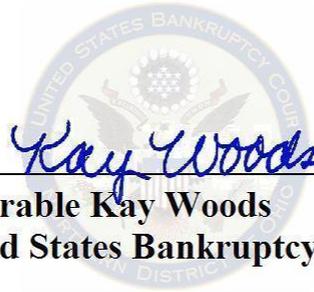


IT IS SO ORDERED.



Dated: September 28, 2009
10:01:09 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PKAM, LLC,	*	
	*	CASE NUMBER 08-40401
Debtor.	*	
	*	

	*	
ANDREW W. SUHAR, TRUSTEE,	*	
	*	ADVERSARY NUMBER 08-04057
Plaintiff,	*	
	*	
vs.	*	CHAPTER 11
	*	
OHIO EDUCATIONAL FACILITIES,	*	
LLC, et al.,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

MEMORANDUM OPINION REGARDING DEFENDANT OHIO EDUCATIONAL
FACILITIES, LLC'S DEMAND FOR JURY TRIAL

This cause is before the Court on Defendant Ohio Educational Facilities, LLC's Counterclaim and Demand for Jury Trial ("Second Counterclaim") (Doc. # 54) filed on August 5, 2009, by Defendant

Ohio Educational Facilities, LLC ("OEF"). The Second Counterclaim requests, *inter alia*, that OEF's counterclaim "be heard by the maximum number of jurors allowed by law." (Second Countercl. at 17.) On August 25, 2009, Plaintiff Andrew W. Suhar, Trustee ("Suhar" or "Plaintiff"), filed Plaintiff's Motion to Strike Ohio Educational Facilities, LLC's Demand for a Jury Trial on its Counterclaim with Memorandum in Support ("Motion to Strike") (Doc. # 55). OEF did not file a response to the Motion to Strike.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. PROCEDURAL AND FACTUAL BACKGROUND

PKAM, LLC ("Debtor") filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code on February 18, 2008. On March 26, 2008, Debtor filed Complaint (Doc. # 1), which commenced the instant adversary proceeding. Debtor prayed for a monetary judgment against Defendants OEF and Mosaica Education, Inc. ("Mosaica") based upon an alleged breach of a lease agreement concerning real property located at 1400 Tod Avenue, N.W., Warren, Ohio. (Compl. at ¶ 9, 13.) On March 26, 2008, the Court issued Adversary Case Management Initial Order ("Case Management Order") (Doc. # 5).

On April 25, 2008, Defendants OEF and Mosaica filed Defendant Ohio Educational Facilities, LLC and Defendant Mosaica Education, Inc.'s Joint Answer and Defenses ("First Joint Answer") (Doc. # 8) and Defendant OEF filed Defendant Ohio Educational Facilities, LLC's Counterclaim Against Plaintiff, PKAM, LLC ("First Counterclaim") (Doc. # 8). In its First Counterclaim, OEF prayed for declaratory and monetary judgments against Debtor for: (i) breach of contract; (ii) constructive eviction; (iii) breach of oral contract; and (iv) promissory estoppel and unjust enrichment. (First Countercl. at 9-14.) Neither the First Joint Answer nor the First Counterclaim contained a demand for a jury trial.

On June 12, 2008, Suhar filed Motion for an Order: (A) Substituting the Trustee as the Plaintiff; and (B) Granting the Trustee an Extension of Time to Respond to Defendant Ohio Educational Facilities LLC's Counterclaim Against the Estate ("Substitution Motion") (Doc. # 10). The Court granted the Substitution Motion on June 17, 2008 (Doc. # 11), substituting Suhar as plaintiff in the instant adversary proceeding.

On July 11, 2008, Plaintiff filed Answer and Affirmative Defenses of the Estate of PKAM, LLC to the Counterclaim of Ohio Educational Facilities, LLC ("Answer to First Counterclaim") (Doc. # 14). On March 2, 2009, OEF filed Proof of Claim No. 25-1 ("Claim 25") for "lease agreement" in the amount of \$4,190,759. Attached to Claim 25 as support was Lease Agreement, dated June 6, 2005, concerning real property located at 1400 Tod Avenue,

N.W., Warren, Ohio ("Lease Agreement").

On July 2, 2009, Plaintiff filed Plaintiff's Motion for Leave to File an Amended Complaint ("Motion for Leave") (Doc. # 43), which sought to: (i) add Warren-Elm Facilities, LLC ("WEF") as a defendant to the instant adversary proceeding; and (ii) assert two additional counts in the Complaint. (Mot. for Leave at ¶ 6.) The Court issued Order Granting Plaintiff's Motion for Leave to File an Amended Complaint (Doc. #44) on July 7, 2009, and Plaintiff subsequently filed Plaintiff's First Amended Complaint ("Amended Complaint") (Doc. # 45) on July 8, 2009. The Amended Complaint prays for a monetary judgment against: (i) OEF for breach of the Lease Agreement; (ii) Mosaica for breach of the guaranty; (iii) OEF and Mosaica, jointly and severally, for breach of the implied covenant of good faith and fair dealing; and (iv) Mosaica and WEF, jointly and severally, for tortious interference with contractual relations. (Am. Compl. at 4-7.)

Defendants OEF, Mosaica, and WEF filed Defendant Ohio Educational Facilities, LLC, Defendant Mosaica Education, Inc., and Defendant Warren-Elm Facilities, LLC's Joint Answer and Defenses ("Second Joint Answer") (Doc. # 54) on August 5, 2009. That same date, Defendant OEF also filed Second Counterclaim. In its Second Counterclaim, OEF prays for declaratory and monetary judgments against Debtor for: (i) breach of contract; (ii) constructive eviction; (iii) breach of oral contract; and (iv) promissory estoppel and unjust enrichment. (Second Countercl. at 13-17.) For

the first time, in its Second Counterclaim, OEF made a jury demand. (Second Countercl. at 17.) OEF does not assert that it is entitled to a jury trial under the Seventh Amendment or otherwise provide support for its jury demand.

OEF's First and Second Counterclaims are substantively identical. The First and Second Counterclaims differ only in that: (i) the Second Counterclaim incorporates the substitution of Suhar as Plaintiff; and (ii) the Second Counterclaim contains a demand for a jury trial. (Second Countercl. at 10, 17.)

On August 25, 2009, Plaintiff filed Motion to Strike, in which Plaintiff asserts "OEF has no right to a jury trial because it has submitted itself to the jurisdiction of the Bankruptcy Court with respect to its counterclaim." (Mot. to Strike at 1.) In addition, Plaintiff proclaims "OEF filed a proof of claim in the main case thereby further submitting itself to the jurisdiction of this Court." (*Id.* at 5.) That same date, Plaintiff also filed Answer and Affirmative Defenses of the Estate of PKAM, LLC to the Counterclaim of Ohio Educational Facilities, LLC ("Answer to Second Counterclaim") (Doc. # 56).

II. ANALYSIS

Section 8 of the Case Management Order, "Jury Demands," states, "In any adversary proceeding where a jury demand is made, the Court will make an initial determination as to whether the case constitutes a core proceeding and whether there is a basis for the Court to conclude that the right to a jury trial does or may

exist." (Case Mgmt. Order at § 8.)

A. Core Proceeding

Plaintiff and Defendants acknowledge that the instant adversary proceeding is a core proceeding, over which this Court has jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), (C), (E), and (O). (Am. Compl. at ¶ 1; Second Joint Answer at ¶ 1.) Because no party disputes this Court's jurisdiction over the instant adversary proceeding, further analysis is unnecessary.

B. Waiver of Jury Trial

Bankruptcy Rule 9015 incorporates Federal Rule of Civil Procedure 38, "Right to a Jury Trial; Demand" ("Rule 38"). Rule 38 states in pertinent part:

(b) **Demand.** On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 10 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

* * *

(d) **Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

FED. R. CIV. P. 38 (West 2009.) Rule 38 mandates that a jury demand be served on the other parties within ten days after service of the last pleading directed to the issue for which a jury trial is sought. A party waives its right to a jury trial if it fails to timely and properly file and serve a jury demand.

The last pleading directed to an issue "is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply." *McCarthy v. Bronson*, 906 F.2d 835, 840 (2d Cir. 1990), *aff'd*, 500 U.S. 136 (1991).

The filing of a later or amended counterclaim "is of no consequence when no new issues or facts are introduced.'" *Columbia Gas Transmission Corp. v. First Congregational Church*, 2008 U.S. Dist. LEXIS 4584, *3 (N.D. Ohio 2008) (quoting *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987)). In *Columbia Gas*, the court concluded that the defendant's jury demand – contained in its amended counterclaim – was untimely "because its amended counterclaim [sic] did not add any new facts, only new theories of liability." *Id.* Thus, an amended pleading that introduces no new issues or facts to an action does not revive the right to demand a jury trial. See *Olund v. Swarthout*, 459 F.2d 999, 1000 (6th Cir. 1972); *Western Geophysical Co. of America v. Bolt Associates, Inc.*, 440 F.2d 765, 769 (2d Cir. 1971) ("The authorities are clear that when a party has waived the right to a [jury] trial with respect to the original complaint and answer by failing to make a timely demand, amendments of the pleadings that do not change the issues do not revive the right."); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2320 (3d ed. 2009) ("[A]mended or supplemental pleading does not revive a right to jury trial previously waived on the issues already framed by the original

pleadings.").

OEF filed the First Counterclaim on April 25, 2008, and Plaintiff filed Answer to First Counterclaim on July 11, 2008. OEF's Second Counterclaim, which is substantively identical to its First Counterclaim, introduced no new issues or facts to the instant action. Therefore, the "last pleading directed to the issue," per Rule 38, is Plaintiff's Answer to First Counterclaim, which was filed July 11, 2008. Accordingly, OEF's jury demand – contained in its August 5, 2009, Second Counterclaim – is not timely. As a result, Defendant OEF waived any right to a jury trial it may have had in the instant adversary proceeding.

C. Right to Jury Trial

In *Granfinanciera, S.A. v. Nordberg*, the Supreme Court recognized that a creditor's Seventh Amendment right to a jury trial "depends upon whether the creditor has submitted a claim against the estate." 492 U.S. 33, 58 (1989). "[B]y filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (quoting *Granfinanciera*, 492 U.S. at 58-59, n.14). The claims-allowance process is "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction" and, therefore, is triable only in equity. *Id.* (citing *Granfinanciera*, 492 U.S. at 57-58). As a result, a party who submits a claim against the bankruptcy estate has no Seventh

Amendment right to a jury trial. *Id.* at 44-45.

Furthermore, "courts have consistently construed counterclaims filed in an adversary proceeding as claims against the bankruptcy estate which divest a defendant in an adversary proceeding of the right to a jury trial." *Treinish v. Glazer (In re Glazer)*, 248 B.R. 528, 533 (Bankr. N.D. Ohio 2000); *see also Murray v. Richmond Steel & Welding Co. (In re Hudson)*, 170 B.R. 868, 874 (E.D.N.C. 1994) ("[C]onvincing authority" led the court to conclude that "the defendant's filing of a counterclaim caused the defendant to lose its Seventh Amendment right to a jury trial."). Likewise, a party who submits a compulsory counterclaim is divested of its right to a jury trial. *Roberds, Inc. v. Palliser Furniture*, 291 B.R. 102, 107 (S.D. Ohio 2003). Whether a counterclaim is permissive or compulsory, it seeks to reduce the debtor's estate and, thus, is subject to the bankruptcy court's equitable power. *Id.* (quoting *O'Neill v. New England Road, Inc.*, 2000 WL 435507, *7 (D. Conn. 2000)). Accordingly, a party who files a counterclaim in an adversary proceeding is not entitled to a jury trial. *Id.* at 106-07.

In the underlying bankruptcy proceeding, Defendant OEF filed Claim 25. In doing so, OEF triggered the claims-allowance process, which falls squarely within this Court's equitable power. Having filed a claim against the Debtor's estate – ultimately seeking to reduce the size of the estate – OEF is subject to the equitable power of this Court and is not entitled to a jury trial.

OEF also filed a counterclaim against the Debtor in the instant adversary proceeding. OEF prays for a monetary judgment against Debtor: (i) in excess of \$25,000 for breach of contract; (ii) in excess of \$25,000 for constructive eviction; (iii) in excess of \$25,000 for breach of oral contract; and (iv) in excess of \$25,000 under the doctrines of promissory estoppel and unjust enrichment. (First Counterclaim; Second Counterclaim.) OEF's counterclaim seeks to reduce the size of the Debtor's estate and, thus, is subject to this Court's equitable power. As a result, OEF is not entitled to have a jury hear its counterclaim.

For the reasons set forth above, Defendant OEF does not have a Seventh Amendment right to a jury trial.

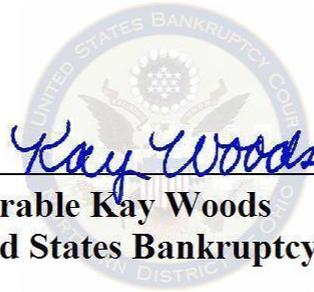
III. CONCLUSION

Defendant OEF waived any right to a jury trial on its counterclaim because its demand for a jury trial was not timely. OEF failed to make the jury demand within ten days after service of the last pleading directed at the issue - Plaintiff's Answer to First Counterclaim - as required by Rule 38. Furthermore, OEF submitted itself to this Court's equitable power by filing: (i) Claim 25 against the Debtor's estate; and (ii) a counterclaim against the Debtor. Accordingly, Defendant OEF's demand for a jury trial is denied.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: September 28, 2009
10:01:09 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PKAM, LLC,	*	
	*	CASE NUMBER 08-40401
Debtor.	*	
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ANDREW W. SUHAR, TRUSTEE,	*	
	*	ADVERSARY NUMBER 08-04057
Plaintiff,	*	
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vs.	*	CHAPTER 11
	*	
OHIO EDUCATIONAL FACILITIES,	*	
LLC, et al.,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

ORDER DENYING DEMAND FOR A JURY TRIAL

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby holds that: (i) Defendant OEF's demand for a jury trial was not timely; (ii) Defendant OEF submitted itself to this Court's equitable power by filing Claim 25

against the Debtor's estate and by filing a counterclaim against the Debtor; and (iii) Defendant OEF's demand for a jury trial is denied.

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