IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NORTHPOINTE HOLDINGS, LLC, Plaintiff, v. NATIONWIDE EMERGING MANAGERS, LLC, NATIONWIDE CORPORATION, an Ohio Corporation, And NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio Company, Defendants, and NATIONWIDE EMERGING MANAGERS, LLC, Third-Party Plaintiff/ Defendant, v. NORTHPOINTE CAPITAL, LLC, PETER CAHILL, MARY CHAMPAGNE, ROBERT GLISE, MICHAEL HAYDEN, JEFFREY PETHERICK, STEPHEN ROBERTS, and CARL WILK, Third-Party Defendants.	)	**C.A. No. N09C-11-141 JOH**

Date Submitted: February 10, 2012
Date Decided: May 24, 2012

*Upon Consideration of Defendants Nationwide Emerging Managers, LLC, Nationwide Corporation, and Nationwide Mutual Insurance Company's Motion for Summary Judgment – **DENIED***

*Upon Consideration of Plaintiff NorthPointe Holdings, LLC's Motion to Amend its Second Amended Complaint – **GRANTED***

Colm F. Connolly, Esquire, of Morgan, Lewis & Bockius LLP, Wilmington, Delaware, and Jay H. Calvert, Jr., Esquire, and Jason B. Conn, Esquire, of Morgan, Lewis & Bockius LLP, Philadelphia, Pennsylvania, Attorneys for Nationwide Emerging Managers, LLC, Nationwide Corporation, and Nationwide Mutual Insurance Company.

Bartholomew J. Dalton, Esquire, of Dalton & Associates, P.A., Wilmington, Delaware, and Rodger D. Young, Esquire, Steven Susser, Esquire, and Jason Killips, Esquire, of Young & Susser, P.C., Southfield, Michigan, Attorneys for NorthPointe Holdings, LLC.

HERLIHY, Judge

Plaintiff NorthPointe Holdings, LLC ("NorthPointe") purchased for $25 million an investment advisory business, then known as NorthPointe Capital, from defendants Nationwide Emerging Managers, Nationwide Corporation and Nationwide Mutual Insurance Company (collectively "defendants"). Following the purchase, the relationship between the parties quickly soured. NorthPointe alleges defendants committed fraud and breached the contract under which it purchased NorthPointe Capital. Defendants now move for summary judgment claiming NorthPointe lacked and lacks standing to bring these claims.

As part of its financing for the purchase, NorthPointe obtained a $14 million loan from RBS Citizens ("RBS"). As collateral for the loan agreement, NorthPointe assigned to RBS the sole right, unless otherwise agreed to in writing, to enforce all rights under the purchase agreement in the event of a default. A default occurred and thereafter, NorthPointe filed this action. But when it did, it had not obtained RBS' written consent to do so. Subsequently, RBS consented to NorthPointe pursuing this action. When it filed this action without that prior consent, NorthPointe, nevertheless, had a financial interest in the litigation: it was still potentially liable to RBS on the loan whether it recovered or not from defendants.

Since it had the legitimate financial interest at that time it filed suit, the issue is whether the later obtained consent made NorthPointe the real party in interest and whether that consent can be retroactively applied. The Court holds the consent, under the circumstances of this case, made NorthPointe the real party in interest. Further, the defendants have not been and will not be prejudiced by NorthPointe further prosecuting

this action. The defendants' motion for summary judgment based on lack of standing is DENIED.

NorthPointe also seeks leave to file a third amended complaint. It desires to do so to update the allegations based on discovery and to conform to the Court's prior ruling on defendants' motion to dismiss. Defendants oppose. Because defendants have not demonstrated any substantial prejudice that will result from allowing the third amended complaint, NorthPointe's motion to amend is GRANTED.

Factual Background

On July 19, 2007 Nationwide Emerging Managers ("NEM") and NorthPointe entered into a purchase agreement ("Purchase Agreement") whereby NorthPointe agreed to purchase NEM's interest in NorthPointe Capital. NorthPointe Capital is an investment firm that held certain sub-advisory contracts with several Nationwide-sponsored mutual funds and variable trusts. NorthPointe was created as the holding company to purchase NorthPointe Capital from NEM, a wholly-owned subsidiary of Nationwide Mutual Insurance Company ("Nationwide Insurance"). Prior to entering into the Purchase Agreement, NEM owned 65% of NorthPointe Capital and its employee managers owned the remaining 35%.

In order to induce NorthPointe to enter into the Purchase Agreement, NEM included several provisions representing that it would continue to support and not compete with the purchased funds. Specifically, NorthPointe alleges NEM agreed that it would not terminate, dilute, liquidate or merge the sub-advised funds managed by

NorthPointe Capital. In addition, NEM agreed to initiate a marketing campaign for the purchased funds.

The Purchase Agreement closed on September 28, 2007. The purchase price was $25 million. NorthPointe obtained financing for the deal through a $14.4 million note held by RBS and a $9 million seller subordinated note held by NEM. Defendant Nationwide Corporation is the guarantor of the NorthPointe/NEM Purchase Agreement. As part of the closing of the Purchase Agreement, RBS and NorthPointe executed, on the same date, an assignment agreement ("Assignment Agreement") giving RBS "additional collateral" or security for its financing. A term of the Assignment Agreement provided RBS with all NorthPointe's "rights, remedies and interests under the Purchase Agreement[.]" Furthermore, paragraph 2 of the Assignment Agreement states:

> [F]rom and after the occurrence of an Event of Default and provided such Event of Default is continuing, unless [RBS] otherwise agrees in writing, [RBS] shall have the sole right to enforce all rights and remedies under the Purchase Agreement, in [RBS'] name or [NorthPointe's] name, as [RBS] in its sole discretion may elect.[1]

Evidence in the record suggests that NorthPointe believed NEM may have breached the Purchase Agreement immediately following closing. During his deposition NorthPointe's Chief Executive Officer, Michael Hayden, stated:

> Q. When did it come to learn that Nationwide never intended to leave the accounts with NorthPointe Capital?
>
> A. NorthPointe came to learn several facts about the existence, the deposition of these funds probably in the beginning of their behavior in early -- late '07, after the deal was just done. It became -- to me,

[1] NorthPointe's Resp. to Defs.' Summ. J. Mot. (hereinafter "NorthPointe's Resp."), Ex. 1.

became more and more apparent quickly that Nationwide Funds Group was going to dismantle their relationship with NorthPointe.

Q. So when did you come to learn that Nationwide never intended to leave those accounts with NorthPointe Capital?

A. We came to understand by their behavior that the Nationwide Funds Group is going to dismantle the NorthPointe relationship. That behavior began with redemption of the funds. It continued through a complete blackout of information, a lack -- complete lack of willingness to meet with NorthPointe for anything on any matter.

Q. When?

A. Immediately.

Q. After the November letter?

A. No, after July -- after September 30th of '07. The ink on the deal was barely dry. And we launched into what became a very adversarial relationship, so I would say that my instincts told me as a businessman that the relationship had completely deteriorated for whatever reasons.[2]

Hayden further described the rapid deterioration of the relationship immediately following closing on the Purchase Agreement:

Q. Right. So at the time you filed the Complaint your belief was that Nationwide had committed fraud –

A. Yes.

Q. -- with respect to the Purchase Agreement?

A. Correct.

Q. And what was the basis of that belief as of the time you filed the Complaint?

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[2] Deposition of Michael Hayden, No. N09C-11-141 (Sept. 20, 2011) (hereinafter "Hayden Dep.") at 114:4-115:4.

A. Sure. The basis of that belief was the immediate withdrawal of funds which was the beginning of the slow bleed, the lack of initiative or effort at all in a marketing campaign, and actually a conversation I had with Tim Grugeon in early '08 that they may go in a different direction with our funds.
So this all happened within five months of the close of the deal. You don't have that discussion with someone – at Nationwide, I can assure you, decisions on funds are made 18 months in advance. These are not decisions that are made willy-nilly.[3]

NorthPointe claims it defaulted on the RBS note because of NEM's breach of the Purchase Agreement and the resultant decline in its revenue stream. On March 10, 2009, RBS sent NorthPointe a letter containing notice of the default. That letter invoked RBS' contractual right to block any future payments to NEM on the subordinated note until RBS' note was paid in full.

Because of the default, RBS kept in regular communication with NorthPointe regarding how it planned to address the problems which arose under to the Purchase Agreement.[4] After unsuccessfully attempting to resolve the disputes over the Purchase Agreement without court intervention, NorthPointe filed this suit on November 17, 2009.

During the pendency of this suit, RBS and NorthPointe have apparently continued to discuss a strategy to recover under the Purchase Agreement.[5] On August 3, 2010, RBS

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[3] Hayden Dep. at 388:3-20.

[4] *See* Deposition of Terry Gardner, No. N09C-11-141 (Dec. 13, 2011) (hereinafter "Gardner Dep.") at 73:14-24.

[5] In its response to the defendants' motion, NorthPointe stated through Terry Gardner, a NorthPointe executive, that RBS was aware of what NorthPointe was doing, though it did not show them the complaint prior to filing. NorthPointe's Resp., Ex. 2.

At oral argument, the Court asked NorthPointe's counsel about getting something from a RBS authorized representative. That was done several days later in the form of an affidavit.

(continued...)

and NorthPointe entered into a forbearance agreement ("Forbearance Agreement"). Its terms provide for RBS to recover "100% of the net cash proceeds (net of any legal fees and taxes directly related to such lawsuit, cause of action or other claim) received by [NorthPointe] in connection with any lawsuit, cause action or other claim against any holder of any Subordinated Indebtedness, payable promptly after receipt thereof."[6] NorthPointe's Chief Operating Officer, Terry Gardner, testified that the Forbearance Agreement was negotiated to clarify how any proceeds from this pending action would be treated.[7] NorthPointe's potential recovery in this action was used as collateral to induce RBS to agree not to enforce its rights following default on the note.

On October 4, 2010, NEM served on NorthPointe a request for its first production of documents seeking:

> [A]ll documents and communications relating to any assignment of rights between you and RBS Citizens, National Association ("RBS") including, but not limited to, any agreement pursuant to which RBS provided you with permission to enforce your rights under the Purchase Agreement based on the requirements of the Assignment of Rights Under the Purchase Agreement.

Following this request for production, NorthPointe provided a copy of a December 16, 2010 letter which RBS had sent to it and others which includes these provisions:

(...continued)
RBS's representative states she consented to NorthPointe's filing suit prior to its filing. Letter from Bartholomew J. Dalton, Counsel for NorthPointe, Dalton & Associates, P.A., to the Honorable Jerome O. Herlihy, Judge, Superior Court of Delaware (Feb. 6, 2012) (e-filed Transaction ID No. 42316559).

The Court's decision does not rest on this affidavit but on the documents presented in the moving papers and applicable law.

[6] NorthPointe's Resp. Ex. 1, ¶ 2.6.

[7] Gardner Dep. at 68:8-13.

(c) The Lender acknowledges that it has consented to the enforcement by the Debtors of their rights under the NP/Nationwide Lawsuit, and the Debtors acknowledge that the Lender has first priority security interest in all Commercial Tort Claims (as modified hereby) to secure all Obligations and Credit Party Obligations.

(d) The Obligors acknowledge that the Third Party Complaint (the "Nationwide Third Party Complaint") dated October 18, 2010 filed by Nationwide Emerging Managers LLC, Nationwide Corporation and Nationwide Mutual Insurance Company in the NP/Nationwide Lawsuit constitutes an event that causes the Forbearance Period to terminate, and have requested that the Lender temporarily waive such event. Pursuant to such request, the Lender hereby agrees that the filing of the Nationwide Third Party Complaint shall not cause a termination of the Forbearance Period, provided it is acknowledged and agreed that (i) the entry of any adverse judgment with respect to the Nationwide Third Party Complaint, (ii) the entry of any other court order, including any writ or injunction, with respect to the Nationwide Third Party Complaint that results in any monetary obligation of any Obligor (including without limitation the payment [sic] any money, the requirement that any bond, letter of credit or other security or collateral be provided, directly or indirectly, by any Obligor, or any other type of monetary obligation) or results in the attachment, garnishment or seizure of any asset of any Obligor, in any lien or other encumbrance on, or impairment of the use of, any asset of any Obligor or in the appointment of any receiver or similar person for any Obligor or any of their assets, or (iii) any other material adverse development with respect to the enforcement of the Nationwide Third Party Complaint that results in any imminent and material adverse impact on any Obligor's business, assets or financial condition shall, in addition to other events described in Section 1.2 of the Forbearance Agreement, cause a termination of the Forbearance Period. The Obligors acknowledge and agree that the waiver contained herein is a limited, specific and one-time waiver as described above. Such limited waiver, except as expressly stated herein, (x) shall not modify or waive any event that would terminate the Forbearance Period or any other term, covenant or agreement contained in the forbearance Agreement or any of the Loan Documents except as specifically stated herein, and (y) shall not be deemed to have prejudiced any present or future right or rights which the Lender now has or may have under the Forbearance Agreement or any Loan Document.[8]

[8] Letter from RBS Citizens, N.A. to The Obligors party to the Forbearance Agreement (December 16, 2010) (Ex. J to Memorandum of Law in Support of Defendants' Motion for Summary Judgment).

A. Defendants' Motion for Summary Judgment

Parties' Contentions

Defendants move for summary judgment contending NorthPointe lacked standing to bring the present claims as of the time it filed suit. They argue NorthPointe assigned all its rights under the Purchase Agreement to RBS in the event of default. It is undisputed that an event of default occurred and defendants contend RBS held the exclusive right, absent prior written consent to the contrary, to enforce all rights and remedies under the Purchase Agreement, including bringing an action such as this one. Because NorthPointe did not receive written consent before filing its complaint, the defendants claim it lacked standing to sue. They further argue standing cannot be cured post-filing. Since they also argue the relevant statute of limitations has expired, defendants ask the Court to dismiss the second amended complaint and grant judgment in their favor with prejudice. Additionally, defendants seek an award of attorney's fees based on NorthPointe's "frivolous attitude towards litigation."

NorthPointe asserts that the contractual provision requiring RBS' consent does not require *prior* (to the filing of the complaint) written consent. Written consent was given in the August 2010 Forbearance Agreement at the latest and oral consent existed before filing of the complaint, according to NorthPointe. It further contends the August 2010 Forbearance Agreement and December 16, 2010 letter can be retroactively applied to give it standing. In addition, NorthPointe argues defendants are not a party to the Assignment Agreement and are attempting to enforce that agreement's terms as a third-party beneficiary. Assuming arguendo that consent was required prior to filing and it was

not obtained, NorthPointe contends dismissal is inappropriate. It argues it should be entitled to add RBS as the real party in interest to prosecute the case in its name based on Superior Court Civil Rules 17(a) and 15(c). Finally, it opposes defendants' request for sanctions contending an award of attorney's fees is not warranted.

Applicable Standard

In deciding a motion for summary judgment, the Court must determine whether any genuine issues of material fact remain for trial.[9] Summary judgment will only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[10] The Court must view the evidence in the light most favorable to the non-moving party.[11]

Discussion

There are no genuine issues of material fact and neither party has argued that there are. The only issue is a legal one. NorthPointe filed this action seeking an award of damages following the deterioration of its relationship with defendants. They, in turn, claim NorthPointe lacked standing to file suit based on the provision in the Assignment Agreement that transfers to the lender, RBS, the exclusive right to enforce all rights and remedies under the Purchase Agreement in the event of default. The Assignment

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[9] *Wilson v. Joma, Inc.*, 537 A.2d 187 (Del. 1988).

[10] *Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[11] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

Agreement also allows RBS to grant NorthPointe written consent to pursue its rights and remedies under the Purchase Agreement in RBS' name or its own name.

During discovery, defendants became aware of this provision in the Assignment Agreement and the fact that RBS had not provided written consent for NorthPointe to file this action prior to filing suit. It is undisputed that NorthPointe defaulted on its loan with RBS. It is also undisputed that when NorthPointe filed this action in November 2009, RBS had not given written consent to NorthPointe. NorthPointe claims written consent was obtained in the August 2010 Forbearance Agreement. Defendants argued, at the hearing on this motion, that written consent did not exist until the December 16, 2010 letter specifically providing consent for this suit.[12] As a result, defendants filed this motion alleging NorthPointe lacked standing at the time the suit was filed.[13]

Standing refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance.[14] The party invoking the court's jurisdiction has the burden of establishing standing.[15] The issue of standing does not involve the merits of the claims but only concerns the question of who is entitled to bring a legal challenge.[16]

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[12] For reasons that will be discussed on p. 18 *infra*, the Court does not need to address the issue of whether the August 2010 Forbearance Agreement or the December 16, 2010 letter constituted the first written consent for NorthPointe to pursue this action in its own name.

[13] The Court is compelled to note that *much counsel time and expense and significant Court time* has been expended on an issue NorthPointe could have avoided by obtaining written consent prior to filing suit.

[14] *Dover Historical Soc'y v. Dover Planning Comm'n*, 838 A.2d 1104, 1109 (Del. 2003).

[15] *Id.*

[16] *Id.*

To establish standing the plaintiff must demonstrate first, that he or she sustained an "injury in fact" and second, that the interests he or she seeks to be protected are within the zone of interests to be protected.[17] Federal courts require the following elements to establish standing:

> (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[18]

Delaware courts generally recognize the same requirements as federal courts for determining whether a party has standing.[19] However, "[u]nlike federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"[20]

In this case, defendants point to the clause in the Assignment Agreement granting RBS sole enforcement rights under the Purchase Agreement. This, they claim, negates NorthPointe's standing because it did not have written consent at the time this suit was filed. There is no dispute, however, that NorthPointe has properly alleged an injury in

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[17] *Id.*

[18] *Id.* (citing *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)).

[19] *Id.*

[20] *Id.*

fact. Similarly, there is no dispute that NorthPointe has alleged its injuries were caused by the defendants' conduct and that a favorable decision would provide redress for those injuries. The relevant issue requires a determination of which party would be entitled to recover from a favorable decision – NorthPointe or RBS. This issue implicates Superior Court Civil Rule 17, which requires that an action be prosecuted in the name of the real party in interest.[21]

One of the main purposes of Rule 17 is to protect a defendant from duplicative and unnecessary litigation.[22] The real party in interest is one who, by the substantive law, possesses the rights sought to be enforced.[23] By requiring an action to be brought by the real party in interest, the defendant is protected from a subsequent suit based upon the same cause.[24]

On November 17, 2009, NorthPointe filed this suit against defendants. At that time, NorthPointe was not the real party in interest because it had not received written consent from RBS to file suit in its own name. The Assignment Agreement specifically stated that, in the event of default, RBS had the sole right to enforce all rights and remedies under the Purchase Agreement. NorthPointe does not dispute that it did not have written consent when it filed suit. Instead, it argues that *prior* written consent was

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[21] Super. Ct. Civ. R. 17(a); *See Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830 F. Supp. 614, 619 (N.D. Ga. 1993) ("Defendant disputes whether Plaintiff possesses the interest sought to be enforced, which is actually a question of Plaintiff's status as the real party in interest") (internal citation omitted).

[22] *See Cammile v. Sanderson*, 101 A.2d 316, 319 (Del. Super. 1953).

[23] *Id.* at 318.

[24] *Id.* at 319.

not required, and written consent was obtained in the August 2010 Forbearance Agreement. Defendants contend *prior* written consent was required, and written consent was not obtained by NorthPointe until the December 16, 2010 letter specifically granting consent. The Court is distinctly unpersuaded by NorthPointe's argument that *prior* written consent was not needed. That argument is based on an uninformed reading of the Assignment Agreement and makes no sense. Such a reading potentially exposes a defendant to multiple sequential law suits, a long-recognized evil to be avoided.

Delaware courts have not previously addressed the issue of whether a party which was not a real party in interest at the commencement of an action, but later obtains status as the real party in interest, may continue to prosecute a case. Superior Court Civil Rule 17 does not address whether one can maintain an action brought before assignment of the rights sought to be enforced in the suit. Prior courts, in other jurisdictions, which have addressed this issue allowed the plaintiff to continue prosecuting an action even where the claim is not assigned until after the action is instituted.[25]

In *Winn v. Ameritite, Inc.*, the plaintiff filed suit prior to obtaining assignment of the rights for which the suit was based. Defendants claimed the plaintiff lacked standing to sue.[26] The District Court considered four factors important in determining that plaintiff's suit could proceed. Those factors are whether: (1) the assignment transferred

[25] *Infodek*, 830 F.Supp. at 620 ("other circuits have held that even when the claim is not assigned until after the action is instituted, the assignee is the real party in interest and can maintain the action") (citing *Kilbourn v. Western Surety Co.*, 187 F.2d 567 (10th Cir. 1951); *Dubuque Stone Prods. Co. v. Fred L. Gray Co.*, 356 F.2d 718, 724 (8th Cir. 1966); *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 84 (D.S.C. 1979)).

[26] 731 F. Supp. 2d 1093 (D. Idaho 2010).

standing to the plaintiff; (2) plaintiff had an interest in the action at the time the suit was filed; (3) the assignment would cause defendant prejudice; and (4) the assignment complies with the purpose of Federal Rule of Civil Procedure 17 protecting defendant from litigating a case multiple times.[27] The court determined that the "assignment efficiently consolidated [the] action between the two parties of interest without prejudicing [defendant.]"[28] Considering the second factor, the court emphasized the difference between prior cases, where the plaintiff lacked an interest in the action at the time the suit was filed, noting that the plaintiff had a "strong $100,000 monetary interest in the cause of action."[29] The court also stressed the lack of prejudice to defendant because, at the time of its decision, a trial date had not been scheduled and defendant had ample time to prepare any and all defenses on the merits of the action.[30]

Similarly, in *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, the District Court held that even where a claim is not assigned until after an action is instituted, the assignee is the real party in interest and can maintain the action.[31] That court focused on the lack of prejudice to the defendant and the fact that the assignment occurred before trial.[32] In addition, the court noted that the plaintiff was the real party in interest in at least one

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[27] *Id.* at 1099-1100.

[28] *Id.* at 1100.

[29] *Id.* at 1099.

[30] *Id.* at 1099-1100.

[31] 830 F.Supp. at 620.

[32] *Id.*

other claim.[33] On defendant's motion for summary judgment based on plaintiff's alleged lack of standing, the court concluded, "in the interest of judicial economy and because the threat of multiple litigation is effectively removed, the [c]ourt concludes the second assignment should be recognized and [p]laintiff should be permitted to maintain [the action] as a real party in interest."[34]

In addition to allowing a party to obtain status as a real party in interest after commencement of an action, some courts have held, in circumstances similar to those present here, that an assignment as collateral does not divest a party of its status as the real party in interest to sue on the rights previously assigned. For instance, under New York law an assignor retains status as a real party in interest under an instrument if an assignment of rights is made as collateral or as security for the payment of a debt.[35] The assignor for collateral or security purposes retains a real monetary interest in the rights assigned, unlike a situation where an assignor receives consideration for a complete assignment and no longer retains a monetary interest in the rights assigned.

Applying Maine law, The United States District Court for the District of Maine similarly held that an assignment as collateral or security does not defeat an assignor's interest as a real party in interest where the right of the action assigned is in excess of the

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[33] *Id.*

[34] *Id.* at 621.

[35] *Texas San Juan Oil Corp. v. An-Son Offshore Drillling Co.*, 194 F.Supp. 396 (S.D.N.Y. 1961).

debt secured.[36] That court also noted the assignor consented to plaintiff pursuing that suit, prior to its commencement, in its own name, thereby eliminating the potential risk of multiple suits against defendant for the same cause of action.[37]

Although NorthPointe was not the real party in interest at the commencement of this action, RBS' subsequent written consent has conferred upon it status as the real party in interest and it may continue to prosecute this action. Throughout this entire litigation, NorthPointe has held a strong financial interest in the outcome of this case. Regardless of whether it recovers damages from defendants, NorthPointe will still be liable to RBS for the amount of the debt. Any damages recovered from defendants would presumably be used first to satisfy its obligations to RBS. Similar to the facts in *Winn*, NorthPointe held a strong financial interest in the outcome of this case at the time it filed suit.

The record also fails to demonstrate prejudice to defendants which would result from NorthPointe continuing to prosecute this action. RBS has consented to NorthPointe prosecuting this action in its own name and will now be bound by the result of this action. Defendants do not face the possibility of defending multiple actions based on the same transaction or conduct. Along these lines, the most compelling argument defendants make for dismissal of this action is one involving judicial economy. In support of that

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[36] *U.S. for Use and Benefit of Allen Const. Corp. v. Verrier*, 179 F.Supp. 336 (D. Me. 1959).

[37] *Id.* at 341.

argument they quoted *P&G v. Paragon Trade Brands*.[38] The District Court noted that allowing an assignment subsequent to the filing of a suit to cure a standing defect:

> [W]ould unjustifiably expand the number of people who are statutorily authorized to sue. Parties could justify the premature initiation of an action by averring to the court that their standing through assignment is imminent. Permitting non-owners and licensees the right to sue, so long as they eventually obtain the rights they seek to have redressed, would enmesh the judiciary in abstract disputes, risk multiple litigation, and provide incentives for parties to obtain assignments in order to expand their arsenal and the scope of litigation. Inevitably, delay and expense would be the order of the day.[39]

However, that court went on to explain that an initial defect in standing is remediable.[40] It made clear that Federal Rule of Civil Procedure 15 allows amendments to the pleadings and relation back for statute of limitations purposes.[41] This Court also finds the facts of *Paragon Trade Brands* distinguishable from the present facts. In that case, unlike here, the plaintiff did not have a monetary interest in the outcome of the action at the time the suit was commenced. *Paragon* is instructive for another reason. Paragon had brought a counterclaim against Proctor & Gamble which, in turn, moved for summary judgment for lack of standing. Paragon, when it filed its counterclaim, did not have an assignment from the real party in interest but later obtained it. The court granted Proctor & Gamble's motion for summary judgment based on lack of standing but did so

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[38] 917 F. Supp. 305 (D. Del. 1995).

[39] *Id.* at 310.

[40] *See also Smith v. Guest*, 16 A.3d 920, 928 (Del. 2011) ("A litigants standing to sue (or lack thereof) may change over time.")

[41] *Id.*

without prejudice. A clear reading of that opinion indicates the court invited Paragon to amend its complaint to add this assignment to show it had standing.[42]

Here, although NorthPointe did not obtain status as the real party in interest until it obtained the December 16, 2010 letter at the latest, it had a significant monetary interest in the outcome of this case. As previously discussed, prior courts addressing this issue have allowed a party, which becomes the real party in interest after commencement of a suit, to proceed.

In footnote 12, *supra*, the Court noted that it does not need to address whether NorthPointe obtained status as the real party in interest through the August 2010 Forbearance Agreement or the December 16, 2010 consent letter. The key difference between these two dates is that the statute of limitations may have run sometime during the fall of 2010, thereby possibly dating the December 16, 2010 consent letter after the expiration of the statute of limitations.[43] The Court holds this distinction has no effect on the analysis of the present issue. Superior Court Civil Rule 17(a) provides:

> 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.

Because this rule allows for substitution to have the same effect as if the action had been commenced timely in the name of the real party in interest, the possible expiration of the

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[42] *Id.* at 311-12.

[43] *See* 10 *Del. C.* § 8106.

statute of limitations in the fall of 2010 does not change the result if the Court finds the December 16, 2010 letter was the first document which conferred status on NorthPointe as the real party in interest. Therefore, in the Court's view, the issue of whether the August 2010 Forbearance Agreement or the December 16, 2010 letter provided NorthPointe with status as the real party in interest need not be addressed to resolve this matter. NorthPointe is now the real party in interest and RBS is bound by the result of this litigation.

In addition, the Court finds there is no risk of unjustifiably expanding the number of people who are authorized to sue. The assignment to RBS was made for collateral or security for a debt. This is important, as identified in the cases discussed above, because NorthPointe retained a real monetary interest in the outcome of this case despite the fact that RBS held the right to sue on the Purchase Agreement. It is also premature to speculate whether the amount sought in this suit exceeds the value of the rights assigned to RBS as collateral. This holding has no impact on cases where a party files suit, with no monetary interest, and later seeks to obtain the rights sought to be enforced. The result in a case with those facts would probably be different from the result here.

Delaware policy strongly favors decisions on the merits.[44] No trial date has been selected yet and defendants have not demonstrated that any prejudice will result from allowing NorthPointe to prosecute this action. For the reasons listed above, the Court holds NorthPointe has standing and is the real party in interest to prosecute this action.

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[44] *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008).

B. NorthPointe's Motion to Amend the Second Amended Complaint

Parties' Contentions

NorthPointe moves to amend its second amended complaint ("SAC") to conform to the Court's Order on defendants' previous motion to dismiss[45] and to further comply with its theory of the case after conducting discovery. It contends the proposed third amended complaint ("TAC") does not allege any new wrongful conduct or causes of action. Additionally, NorthPointe believes the TAC should be permitted to relate back for calculation of the statute of limitations because the allegations all arose out of the same conduct, transactions and occurrences set forth in the original pleadings. Defendants oppose the TAC because, as discussed more fully above, they believe the SAC should be dismissed for lack of standing. Basing their argument on the presumption that the Court would dismiss the SAC, defendants go on to argue the statute of limitations has expired and no new pleadings should be permitted. Even if the SAC is not dismissed, defendants oppose the TAC because it should not relate back to the filing of the SAC and it would suffer prejudice as a result of the filing of the TAC.

Applicable Standard

A motion to amend a complaint is governed by Superior Court Civil Rule 15. After a responsive pleading is served, a party may only amend its pleading with leave of court or by written consent of the adverse party.[46] Leave to amend shall be freely given

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[45] *NorthPointe Holdings, Inc. v. Nationwide Emerging Managers*, 2010 WL 3707677 (Del. Super. Sept. 14, 2010).

[46] Super. Ct. Civ. R. 15(a).

when justice so requires.[47] Generally, the court shall liberally allow amendments to pleadings unless the opposing party would be seriously prejudiced thereby.[48] Prejudice to the opposing party is to be tested by the terms of the subsection of Rule 15 regarding relation back of amendments.[49] Relation back of amendments is permitted if the claim or defense asserted in the amendment arose out of the same conduct, transaction or occurrence set forth in the prior pleading.[50] The rationale of this rule is to only permit relation back when the defendant should have been on notice from the original pleading that the claim might be asserted against that defendant.[51]

Discussion

NorthPointe seeks to amend SAC for purposes of clarity. Specifically, it claims the proposed TAC will clarify its allegations of how defendants' conduct breached the Purchase Agreement and the implied covenant of good faith and fair dealing; how some of the alleged conduct breached additional provisions of the Purchase Agreement not previously identified; and to address the language of the SAC to comply with the Court's prior decision on defendants' motion to dismiss.

Defendants oppose the motion to amend based on its standing argument, discussed in Section A, *supra*. Both parties recognize the applicable statute of limitations has run

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[47] *Id.*

[48] *Gott v. Newark Motors, Inc.*, 267 A.2d 596 (Del. Super. 1970).

[49] *Annone v. Kawasaki Motor Corp.*, 316 A.2d 209 (Del. 1974).

[50] Super. Ct. Civ. R. 15(c).

[51] *Bissell v. Papastavros' Assocs. Medical Imaging*, 626 A.2d 856 (Del. Super. 1993).

and any new filings would have to relate back for statute of limitations purposes. Because defendants' motion for summary judgment based on lack of standing was denied, the proposed TAC may potentially relate back.

In addition, defendants oppose the filing of the proposed TAC because, they claim, it would cause them prejudice. The prejudice would result because they would be required to conduct new depositions, new discovery, another round of Rule 12(b)(6) motion practice and file another answer. Defendants allege that plaintiffs attempt is "nothing more than an attempt to further harass and drive up [defendants'] costs of litigating this baseless law suit."[52]

The Court has reviewed the parties' contentions and the proposed TAC. The Court is satisfied the purpose behind plaintiff's filing the TAC is to clean up the language based on discovery and conform the complaint to the Court's prior decision on defendants' earlier motion to dismiss. They have not claimed the TAC contains claims of which they were not on notice.

Further, NorthPointe provided defendants with a draft copy of the proposed TAC prior to conducting depositions. Defendants have not identified any amendment in the TAC that would require additional discovery or depositions. More importantly, they have not argued there are new claims in the TAC of which they were not previously on notice. Because the record supports a finding that the TAC contains allegations based upon the same conduct, transaction or occurrence as alleged in the SAC, the TAC relates back under Rule 15(c).

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[52] Defs.' Resp. in Opp'n to Pl.'s Corrected Mot. to Amend its Second Am. Compl. at 4.

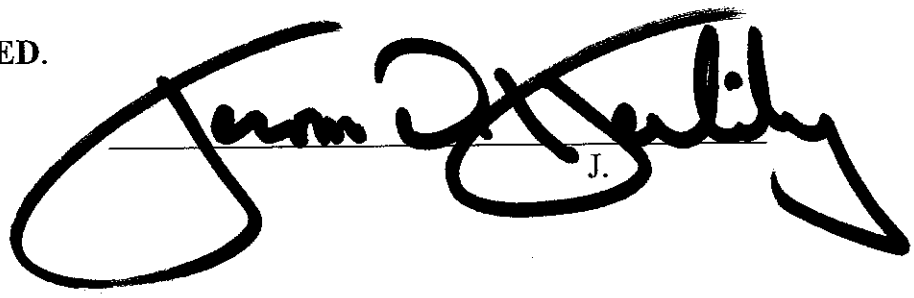
In addition, the Court does not agree with defendants' contention that the TAC is an attempt to further harass and drive up the costs of this "baseless law suit." The Court has carefully considered NorthPointe's allegations and has also had the opportunity to review some of the discovery conducted. Although far from a final decision on the merits, the Court cannot categorize this law suit as "baseless."

Because Rule 15 provides for the Court to freely grant leave to amend pleadings, and because defendants have not shown prejudice required to defeat the Court's policy to freely grant leave to amend pleadings, plaintiff's motion to amend the SAC is granted.

Conclusion

For the above-listed reasons, defendants' motion for summary judgment is DENIED and NorthPointe's motion to amend is GRANTED.

IT IS SO ORDERED.



J.