SO ORDERED.

SIGNED this 14 day of June, 2011.

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re: **BROOKE CORPORATION, et. al.,** **DEBTORS.**	**CASE NO. 08-22786** **(jointly administered)** **CHAPTER 7**
ALBERT A. RIEDERER, Chapter 7 Trustee of Brooke Corporation, Brooke Capital Corporation, and Brooke Investments, Inc., **PLAINTIFF,** **v.** **DALLAS NATIONAL INSURANCE CO., et al.,** **DEFENDANTS.**	**ADV. NO. 10-06162**

MEMORANDUM OPINION AND ORDER GRANTING CHAPTER 7 TRUSTEE'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT TO NAME NATIONAL SPECIALTY LINES, INC. AS A DEFENDANT

The matter under advisement is the Chapter 7 Trustee's Motion for Leave to File Second Amended Complaint (hereafter "Motion").[1] The proposed Second Amended Complaint attached to the Motion seeks to amend the names of two defendants: (1) Changing defendant "Republic Companies Group, Inc." to "Republic Companies, Inc."; and (2) changing defendant "NSL Gainsco" to "National Specialty Lines, Inc."

National Specialty Lines, Inc. (hereafter "NSL") objects to the Motion.[2] It characterizes the Motion as seeking to add a new party to the action long after the expiration of the statute of limitations. It argues that the amendment would be futile and therefore should not be allowed.

A. THE LEGAL STANDARD.

The Trustee seeks leave to file a second amended complaint pursuant to Fed. R. Civ. P. 15(a)(2), made applicable to this proceeding by Fed. R. Bankr. P. 7015. Rule 15(a) applies to amendments before trial. Subsection (a)(1) permits a party to amend a complaint as a matter of course within 21 days after service. Subsection (a)(2) addresses other amendments, stating:

> (2) **Other Amendments.** In all other cases, a party may amend its pleading only with the opposing party's written

[1] Dkt. no. 62.

[2] Dkt. no. 73. Defendants Four Corners Insurance Services, Inc., and Republic Companies, Inc., filed a response. Dkt. no. 70. They do not oppose the amendment but assert that neither Republic Companies Group, Inc., nor Republic Companies, Inc., the parent of defendant Four Corners Insurance Services, Inc., are proper parties to this case. They request dismissal of Republic Companies, Inc. That response is not yet under advisement and will be the subject of a future order.

> consent or the court's leave. The court should freely give leave when justice so requires.

Collier on Bankruptcy, a leading treatise, states the following about this subsection:

> If the right to amend as a matter of course is lost by the passage of time, amendment is permissible by leave of court or by obtaining the written consent of the adverse party. Rule 15(a) also provides that leave by the court shall be freely given "when justice so requires." Professor Moore indicates that the more common reasons for denying leave to amend include undue prejudice to the adverse party, undue delay, lack of good faith and sufficient opportunity to state a claim encompassing several failed attempts to do so. Leave should probably be denied where the amendment would be subject to a motion to dismiss or strike. In such an instance the amendment serves no useful purpose. The same result should obtain where the amendment is objected to on the ground that the claim or defense would not relate back under Rule 15(c) and would therefore be barred by the applicable statute of limitations.[3]

NSL asserts that the proposed amendment is futile because the amendment would not relate back to the date of the original Complaint and the time for the Trustee to file avoidance actions has expired. It seeks to benefit from the generally accepted rule that new parties cannot be added to an action after the applicable statute of limitations has run. However, courts have long recognized an identity of interest exception to that rule, which is discussed below, the simplification and uniformity of which was achieved through the 1966 amendment of Rule 15(c), which explicitly authorized "changing parties along with additional requirements designed to assure that any party who is added by amendment

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[3] 10 *Collier on Bankruptcy*, ¶ 7015.04 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2011) (citations omitted).

after the limitations period has expired had adequate notice of the action and of plaintiff's mistake in failing to name the new party at the outset."[4] The rule guards against the possibility that the new party might have a procedural due process claim that its right to invoke the statute of limitations defense was improperly barred.[5] Rule 15(c) was amended in 1991 to link the relation back notice to the federal period for service of process, rather than to the limitations period.[6] Rule 15(c)(1)(C) now provides as follows regarding relation back of an amendment changing a party:

> **(c) Relation Back of Amendments.**
> **(1) When an Amendment Relates Back.** An amendment to a pleading relates back to the date of the original pleading when:
> . . .
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

NSL asserts the proposed amendment should not relate back to the filing of the

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[4] 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure, Civil*, § 1498 at 128 (3d ed. 2010).

[5] *Id.*

[6] *Id.*, § 1498.1 at 132-34.

Complaint because: (1) NSL did not have notice within the 120-day period for service under Fed. R. Civ. P. 4(m); (2) NSL will be prejudiced by the relation back of the Second Amended Complaint; and (3) NSL did not have knowledge that it was the proper party to the action.

B. THE RELEVANT FACTS.

Two of the Debtors filed for relief on October 28, 2008, and the third filed on November 3, 2008. The Court is familiar with the business practices of the Debtors and will not expand this opinion by including such facts. The last date for the timely commencement of avoidance actions in the Brooke Corporation and Brooke Capital Corporation cases was October 28, 2010, the date the parties use in their arguments.

The Complaint, alleging causes of action under 11 U.S.C. §§ 544, 547, 548 and 550, was filed on October 22, 2010. The transfers in issue include the Debtors' use of their own funds to pay insurance premiums which were in fact owed by their agents. The original defendants included "Gainsco Inc. (and NSL Gainsco)." On October 26, 2010, the Trustee filed an Amended Complaint naming Gainsco, Inc., and NSL Gainsco as separate defendants. On December 14, 2010, a summons was issued to Gainsco, Inc., to be served as follows:

> Gainsco, Inc.
> c/o Glenn W. Anderson
> 3333 Lee Parkway, Ste. 1200
> Dallas, TX 75219

An additional summons was issued on December 15, 2010, for service on NSL Gainsco

to be served on the Texas Department of Insurance. On January 3, 2011, the Texas Department of Insurance notified the Trustee that NSL Gainsco was not an insurance company registered in Texas. The Trustee thereafter learned that the proper name for NSL Gainsco was National Specialty Lines, Inc. On February 17, 2011, the Trustee filed the instant Motion, attached to which is the proposed Second Amended Complaint, naming as a defendant National Specialty Lines, Inc.

On February 17, 2011, the Motion and the accompanying exhibit were sent via overnight mail (Federal Express) addressed to NSL at three locations,[7] including the following two:

National Specialty Lines c/o CT Corporation 1200 South Pine Island Road Plantation, FL 33324	National Specialty Lines c/o Glenn W. Anderson, Michael S. Johnston, Richard M. Buxton, or Daniel J. Coots. 3333 Lee Parkway, Suite 1200 Dallas, TX 75219

Both mailings were delivered to the foregoing addressees on February 18, 2011.[8] The mailing to the Texas address was signed for by the receptionist. After CT Corporation received the Motion, it forwarded the pleading to:

> Glenn Anderson
> National Specialty Lines, Inc.
> 3333 Lee Parkway, Suite 1200
> Dallas, TX 75219.[9]

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[7] Dkt. no. 77.

[8] Dkt. nos. 80-1 and 80-2.

[9] Dkt. no.73-2.

A transmittal letter CT Corporation included with the pleading states, "Enclosed are copies of legal process received by the statutory agent of the above company,"[10] which is NSL.

Gainsco is a holding company with its office in Dallas, Texas. NSL is a subsidiary of Gainsco. Gainsco, and certain of its affiliates, provide centralized accounting, financing, administrative, and marketing and branding services to NSL. NSL is an operating company active in the southeast region of the United States. It holds an insurance license in Florida as a managing general agent and enters into agency contracts with agents in Florida. NSL has an office in Miami, Florida, but is not authorized to do business in Texas and holds no insurance license in Texas.

The Complaint was filed on October 22, 2010. One hundred twenty calender days thereafter was Saturday, February 19, 2011. Because that day was the Saturday of President's Day weekend, the 120 days for service under Rule 4(m) did not expire until the following Tuesday, February 22, 2011.[11] On January 15, 2011, the Court granted the Trustee's motion to extend by 90 days the time to effectuate service as to many defendants, including NSL Gainsco.[12] When 90 days are added to the original 120 days for service, the new service date became Friday, May 20, 2011.

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[10] *Id.*

[11] Fed. R. Civ. P. 6(a)(1)(C).

[12] Case no. 08-22786, Dkt. no.1800; *see also* Case no. 08-22786, Dkt. no. 1735-2, p. 8, which includes NSL Gainsco in the list of defendants for whom Dkt. no. 1800 extended the service date by 90 days.

C. IN ACCORD WITH RULE 15(c)(1)(C), NSL RECEIVED NOTICE OF THE ACTION WITHIN THE TIME FOR SERVICE OF THE COMPLAINT UNDER RULE 4(m).

Rule 15(c)(1)(C) requires that the party to be brought in by amendment must have received notice of the action within the period provided by Rule 4(m) for serving the summons. The notice need not be formal and need not come directly from the plaintiff.[13]

The 120-day period established by Rule 4(m) expired on February 22, 2011. NSL contends by affidavit that "National Specialty did not first learn that the Trustee was seeking to add it as a party until sometime after February 22, 2011,"[14] which apparently would be the date of receipt of the Motion forwarded by CT Corporation.

The Court rejects this position as insufficient to show lack of timely notice. First, the assertion is contrary to the fact that NSL received the Motion on February 18, 2011, at the same office to which CT Corporation forwarded the copy it received on the same date. Further, NSL admits that service of the Motion on NSL's statutory agent, CT Corporation, was accomplished within 120 days of the filing of the Complaint. Notice to NSL's statutory agent was notice to NSL.[15]

In addition, Gainsco, Inc., was served with a summons and a copy of the Amended Complaint on December 14, 2010, by mail addressed to it in care of Glenn W. Anderson,

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[13] *Loveall v. Employer Health Services, Inc.*, 196 F.R.D. 399, 403 (D. Kan. 2000).

[14] Dkt. no. 73-1, ¶ 15.

[15] *E.g., Bailey v. Gulf Ins. Co.*, 389 F.2d 889, 891 (10th Cir. 1968) ("The general rule is that knowledge of an agent obtained within the scope of his authority is ordinarily imputed to his principal.").

the same individual at the same address to which CT Corporation forwarded the copy of the Motion served on it as NSL's statutory agent. That Amended Complaint purported to assert claims against defendants Gainsco, Inc., and NSL Gainsco. A single attachment enumerates the transfers in issue against both defendants. Service of the Amended Complaint on Gainsco, Inc., provided informal notice to NSL of the claims the Trustee seeks to add by the Second Amended Complaint.

Finally, as noted above, the Court granted an additional 90 days to effectuate service on NSL Gainsco. The appropriate time limit for notice to NSL is therefore 210 days, not 120 days. The Advisory Committee notes to the 1991 amendment to Rule 15(c) regarding the relation back of amendments to the pleadings states:

> In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule.

NSL admits receiving notice before the expiration of 210 days.

D. NSL RECEIVED SUCH NOTICE OF THE ACTION THAT IT WILL NOT BE PREJUDICED IN DEFENDING ON THE MERITS.

Rule 15(c)(1) allows an amended complaint changing a party or naming a party against whom a claim is asserted to relate back to the original filing date if two conditions are satisfied. First, the notice received must be such that the party "will not be prejudiced in defending the action." As the Court understands this requirement, the question is whether the party to be added received such notice of the action that it will not

be prejudiced by the filing of the amended complaint and summons outside the limitations period.

NSL alleges that it is prejudiced because: (1) the Trustee seeks to add it as a party after hearings on a motion the Trustee filed in the Debtors' main cases, the Omnibus Procedures Motion,[16] that concerned this and many other adversary proceedings; (2) many of the transfers in issue occurred three to four years ago, and its ability to defend itself is diminished each day beyond the limitations period; and (3) the attachment to the proposed Second Amended Complaint enumerating the transfers in issue is the same as the one attached to the Amended Complaint and does not differentiate transfers made to Gainsco from those made to NSL. The Trustee responds that NSL will not be prejudiced in defending the action, even though his motion to file the Second Amended Complaint was filed after the limitations period expired.

The Court agrees with the Trustee and finds that NSL will not be prejudiced by the filing of the action outside the limitations period. Gainsco, the parent of NSL, which provides centralized accounting, financing, administrative, and marketing services to NSL, was served with a summons and the Amended Complaint within the limitations period for recovery of the same transfers which the Trustee seeks to recover from NSL in the Second Amended Complaint. It appears highly likely that the same records would be central to the defense of both the parent and the subsidiary. NSL does not argue that any

[16]Case no. 08-22786, Dkt. no. 1635.

records of NSL were destroyed because it was not named as a party in the Amended Complaint.

NSL's not being included in the hearings on the Trustee's Omnibus Procedural Motion is not prejudicial to NSL's defense. The order finally entered governs procedures in all cases similar to the one against NSL. If unique circumstances of an individual defendant such as NSL render the general procedures prejudicial to that defendant, the Court may enter an order addressing such problems.

Likewise, NSL's argument that the attachment to the proposed Second Amended Complaint fails to give adequate notice of the claims against it does not constitute prejudice for purposes of the relation back doctrine. It is an argument about the sufficiency of the complaint that is not related to the time of the complaint's filing.

E. NSL KNEW OR SHOULD HAVE KNOWN THAT THE ACTION WOULD HAVE BEEN BROUGHT AGAINST IT, BUT FOR A MISTAKE CONCERNING THE PROPER PARTY'S IDENTITY.

Rule 15(c)(1)(C)(ii), as the second condition for relation back when the amendment changes a party or the naming of a party against whom a claim is asserted, requires that the party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." The relevant time is the 120 days (or expanded service time) of Rule 4(m).[17]

When arguing this requirement is not satisfied, NSL states, "National Specialty

[17] *Krupski v. Costa Crociere S.p.A.*, __ U.S. __, __, 130 S. Ct. 2485, 2493 (2010).

submits it did not know, and certainly was not in a position where it should have known, anything about the proposed amendments."[18] Knowledge about the substance of the amendments is not the relevant issue. The rule requires the defendant knew or should have known that it would have been named as a party to the complaint but for the mistake of the plaintiff.

The facts examined above which show the absence of prejudice to NSL from being sued after the expiration of the limitations period also show that NSL knew or should have known that it should have been named as a party. This knowledge arose during the 120 days as a result of service of the Amended Complaint on NSL's parent company and the receipt by NSL's agent, CT Corporation, of a copy of the Motion. A review of the Amended Complaint and the proposed Second Amended Complaint, which include allegations of transfer of the Debtors' own funds for payment of insurance premiums owed by agents, clearly evidence that the Trustee made a mistake and named NSL Gainsco as a defendant in place of NSL, the holder of an insurance license and a managing general insurance agent.

F. RELATION BACK IS ALSO SUPPORTED BY CASE LAW ADDRESSING THE IDENTITY OF INTEREST DOCTRINE.

The specific provisions of Rule 15(c) addressing relation back of amendments changing parties were added in 1966. Before that amendment, some courts prevented the "barring effect of limitations statutes by holding that the general notice requirements of

[18] Dkt. no. 73, p. 8.

Rule 15(c) were satisfied when the named and intended parties were closely related."[19] "Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation against the other."[20] In other words, the close relationship allows the imputation of notice to the party sought to be added or substituted, as a substitute for actual notice.[21] The Tenth Circuit, in cases arising before 1966, recognized an exception, consistent with amended Rule 15(c), "where the new and old parties have such an identity of interest that it can be assumed that relation back will not prejudice the new defendant."[22]

NSL, as an additional and apparently independent argument in support of its objection to the Motion, argues that the identity of interest doctrine is not satisfied in this case. The Court rejects this argument as a basis to deny the Motion.

First, the Court rejects NSL's position that "[w]here there is no identity of interest, the amendment should not relate back."[23] As examined above, the doctrine was developed before enactment of the current rule regarding changing of parties, and the

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[19] 6A Wright, Miller & Kane at § 1499.

[20] *Id.*

[21] *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986); *Unger v. Caloric Corp.(In re Allbrand Appliance & Television Co., Inc.)*, 875 F.2d 1021, 1025 (2nd Cir.1989).

[22] *Graves v. General Ins. Corp.*, 412 F.2d 583, 585 (10th Cir, 1969) (citing *Travelers Indem. Co. v. United States, ex rel. Constr. Specialities Co.*, 382 F.2d 103 (10th Cir. 1967)).

[23] Dkt. no. 73, p. 10.

current rule is consistent with the doctrine. The general language of Rule 15(c)(1)(C), added to Rule 15(c) by the 1966 amendment, preserves the "judicially developed exception to the proposition that amendments changing parties after the limitations period has expired will not relate back."[24] When, as in this case, Rule 15(c)(1)(C) is satisfied based upon actual notice to the party to be added, the imputation of notice under the doctrine is irrelevant. The cases cited by NSL do not convince the Court that identity of interest is a requirement for relation back imposed in addition to the conditions of Rule 15(c)(1)(C).

Second, based upon the limited facts provided by the parties, the Court finds that it is highly likely that there is an identity of interest between NSL and Gainsco, Inc., sufficient for the imputation of notice. Identity of interest has been found between a parent and a wholly-owned subsidiary.[25] In this case, not only is NSL a subsidiary of Gainsco, but Gainsco (which holds no insurance license) provides centralized accounting, financing, administrative, and marketing and branding support services to NSL, which holds an insurance license in Florida as a managing general agent and enters into contracts with agents in Florida. The Trustee provides evidence that Glenn W. Anderson and Richard Buxton are either officers or directors of both Gainsco and NSL, and Daniel J. Coots is an of officer of both companies. Glenn W. Anderson is the individual on

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[24] 6A Wright, Miller & Kane, *Federal Practice & Procedure* § 1499 at 203.

[25] *E.g.*, *Travelers Indem. Co. v. United States, ex rel. Constr. Specialities Co.*, 382 F.2d at 106.

whom service was made on behalf of both Gainsco and NSL. Since the allegations of the complaint concern the payment of insurance premiums on behalf of insurance agents, notice to Gainsco of the litigation should have provided notice to officers and directors of NSL that NSL was a party intended to be sued.

G. CONCLUSION.

For the reasons stated above, the Court rules that the Motion to amend the Amended Complaint to include NSL as a defendant is granted. The filing of the Second Amended Complaint substituting NSL as a defendant in place of NSL Gainsco will not be a futile act. Even though service of the Second Amended Complaint on NSL will be outside the limitations period, the amendment will relate back to the original filing date because the conditions of Rule 15(c)(1)(C) are satisfied.

IT IS SO ORDERED.

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