SO ORDERED.

SIGNED this 1st day of February, 2021.

Dale L. Somers
Dale L. Somers
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re: Pixius Communications LLC, Debtor.	Case No. 19-11749-11
WISPer Ventures Leasing LLC, Plaintiff, v. Pixius Communications LLC, *et al.*, Defendants.	Adv. No. 19-5110

Order Granting in Part and Denying in Part Motion to Amend Complaint and Join Parties

Plaintiff WISPer Ventures Leasing LLC ("WVL") filed its original complaint against Debtor Pixius Communications LLC ("Pixius") and various

additional defendants in state court a year and a half ago. Removal brought the case to this Court shortly thereafter, but various procedural issues slowed advancement of the case for some time. The parties are now in the middle of the discovery process, and the deadline to amend the pleadings has not yet passed. WVL seeks leave to amend its complaint and join parties.[1] Over the objection of one defendant and one previously dismissed defendant, the Court grants the majority of WVL's motion. WVL may amend its complaint as requested, other than asserting a claim for negligent misrepresentation against the Jay S. Maxwell Trust and Jay S. Maxwell individually.

I. Factual and Procedural Background

As alleged by WVL in its original complaint, more than five and half years ago, on June 1, 2015, Pixius and WVL entered into a master lease agreement. As an inducement for WVL to enter that agreement with Pixius, six subordination agreements were executed, one with each of the following: Robert G. Hanson, Jay S. Maxwell Trust, Vosburgh Family Revocable Trust, Carol L. Murray Living Trust, Lies Investments LP, and LV Properties, GP.

WVL alleges that certain individuals and entities then executed a promissory note in favor of CrossFirst Bank, and in breach of the subordination agreements, Pixius made payments on the debt to CrossFirst

[1] Doc. 133.

Bank for the benefit of those individuals/entities. WVL also alleges that loans were made to Pixius, and in breach of the subordination agreements, Pixius made (and the individuals/entities accepted) payments on account of those loans.

WVL filed suit in Arizona state court in August 2019, naming the following defendants in its original complaint: Pixius, Robert G. Hanson, Jay S. Maxwell, individually and as trustee of the Jay S. Maxwell Trust, James R. Vosburgh, individually and as trustee of the Vosburgh Family Revocable Trust, Carol L. Murray, individually and as trustee of the Carol L. Murray Living Trust, Lies Investments, L.P., LV Properties, GP, John Does 1-10, Jane Does 1-10, and ABC Entities 1-10. The complaint stated four counts:

- Count 1: Only as to Pixius, for breach of contract, alleging that Pixius breached the subordination agreements by failing to hold funds in trust for WVL (as it was obligated to do by the subordination agreements) by making payments to the defendants who had signed the subordination agreements.

- Count 2: As to non-Pixius defendants, for breach of contract, based on payments from Pixius in breach of their subordination agreements.

- Count 3: Only as to Pixius, for breach of contract, based on the payments made by Pixius to certain defendants for the payment of the debt to CrossFirst Bank in breach of Pixius's obligations under the subordination agreements.

- Count 4: Only as to the parties involved in the CrossFirst Bank transaction, for breach of contract, based on the payments made on the CrossFirst Bank debt in breach of the subordination agreements.

After the case was removed to this Court, WVL filed a notice of dismissal as to Pixius.[2] The Court entered an order confirming its subject matter jurisdiction and the case proceeded.[3] After a round of briefing and argument, the counts against Jay S. Maxwell in his individual capacity were dismissed.[4]

The initial Federal Rule of Civil Procedure 26(f) report of parties' planning meeting was not filed until late June 2020. The Scheduling Order in this case, which has been extended several times (due to issues in the main bankruptcy case, new counsel, etc.), in its current form requires that amendments to pleadings be filed by March 29, 2021 and discovery be complete by May 15, 2021.[5] A global mediation of all claims in the Pixius bankruptcy case and this adversary proceeding is currently scheduled for February 22, 2021.[6]

WVL filed its motion to amend its complaint and join parties on December 31, 2020. The proposed amended complaint now identifies seven subordination agreements, adding KBS Properties, and identifies a guaranty agreement for the master lease agreement executed by both the Jay S.

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[2] Doc. 8.
[3] Doc. 35.
[4] Doc. 114.
[5] Docs. 137, 138.
[6] *Id.*

Maxwell Trust and new defendant the Penny R. Maxwell Trust. The amended complaint states five counts as follows:

- Count 1: breach of contract (the subordination agreements), against Robert G. Hanson, Jay S. Maxwell Trust, Vosburgh Family Revocable Trust, Carol L. Murray Living Trust, Lies Investments LP, LV Properties, GP, and KBS Properties.

- Count 2: suit on the guaranty executed by the Jay S. Maxwell Trust and the Penny R. Maxwell Trust.

- Count 3: tortious interference with contract, against Jay S. Maxwell, the estate of James R. Vosburgh, Carol L. Murray, and Michael Lies, all in their individual capacity, and Vosburgh Investments, for directing, encouraging, and/or facilitating payments by Pixius to their respective trusts in subversion of the subordination agreements.

- Count 4: unjust enrichment, again against Jay S. Maxwell, the estate of James R. Vosburgh, Carol L. Murray, and Michael Lies, all in their individual capacity, and Vosburgh Investments, for accepting payments from Pixius to avoid the restrictions of the subordination agreements.

- Count 5: negligent misrepresentation, against all defendants (Robert G. Hanson, Jay S. Maxwell, Jay S. Maxwell Trust, Estate of James Vosburgh, Vosburgh Family Revocable Trust, Vosburgh Investments, LP, Carol L. Murray, Carol L. Murray Living Trust, Michael Lies, Lies Investments LP, LV Properties, GP, Penny R. Maxwell Trust, and KBS Properties, Inc.), for providing false information to WVL that the individuals and the entities they control would not accept payments in violation of the subordination agreements.

Generally stated, the relief requested is the amount of the deficiency of Pixius indebtedness under the master lease agreement that should have been retired, and lost profits due to WVL's alleged lost business opportunities.

II. Analysis[7]

A. Governing Rules of Civil Procedure

WVL seeks joinder of additional defendants pursuant to Federal Rule of Civil Procedure 20, which permits joinder of persons if "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."[8] The allegations against the defendants joined via the amended complaint (Jay S. Maxwell, Penny R. Maxwell Trust, and KBS Properties, Inc.) certainly arise out of the same transactions or occurrences and share common questions of law and fact.

In addition, WVL seeks amendment of its complaint to change/add claims pursuant to Federal Rule of Civil Procedure 15(a)(2).[9] Rule 15(a)(2) is

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[7] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Amended Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order 13-1 *printed in* D. Kan. Rules of Practice and Procedure (March 2018). As noted above, the Court has previously concluded that, at minimum, "related-to" jurisdiction gives the Court subject matter jurisdiction over the case. Doc. 35.

[8] Federal Rule of Civil Procedure 20 is applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7020.

[9] Federal Rule of Civil Procedure 15 is applicable to adversary proceedings via Federal Rule of Bankruptcy Proceeding 7015.

applicable to amendments to pleadings other than those permitted as a matter of course. The Rule provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Per the Supreme Court, the mandate that leave should be freely granted "is to be heeded."[10] "The purpose of the Rule is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties."[11] Rule 15(b)(1) even permits amendment of a complaint during and after trial, if "doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits."

As this Court has previously noted, however, this "liberal amendment policy . . . does not mean that leave will be granted in all cases."[12] In the Tenth Circuit, courts may refuse leave to amend "only on a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment."[13]

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[10] *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[11] *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006).

[12] *Redmond v. CJD & Assoc., LLC (In re Brooke Corp.)*, 506 B.R. 560, 564 (Bankr. D. Kan. 2014).

[13] *Duncan v. Manager, Dep't of Safety, City & Cnty of Denver*, 397 F.3d 1300,

Defendant Jay S. Maxwell Trust and dismissed defendant Jay S. Maxwell (hereinafter referred to jointly as the "Maxwell Defendants") filed a joint response opposing several portions of WVL's motion to file an amended complaint. The Maxwell Defendants specifically oppose the amendment of the complaint to add Claim 3 (tortious interferences with contract), Claim 4 (unjust enrichment), and Claim 5 (negligent misrepresentation) based on two grounds: undue delay in prosecuting the case and futility.

B. Undue Delay

The Tenth Circuit has given mixed messages about timeliness. On one hand, the Circuit has stated that "untimeliness alone is an adequate reason to refuse leave to amend,"[14] On the other hand, the Circuit has focused on *undue* delay, and stated "[e]mphasis is on the adjective: [l]ateness does not of itself justify the denial of the amendment."[15] The Circuit has also noted that "[t]he longer the delay, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend."[16]

Regardless, this Court has noted that it does not measure undue delay

1315 (10th Cir. 2005) (internal quotation omitted).

[14] *Id.*

[15] *Minter*, 451 F.3d at 1205 (internal quotation omitted).

[16] *Id.*

by time alone. Rather, "[t]he circumstances of the case must be considered."[17] When previously considering a delay between an original complaint and a proposed amendment, this Court looked at whether the litigation had progressed significantly, whether the course of the litigation would be significantly different if the proposed changes would have been made at the beginning, and whether there is undue prejudice to either party.[18] Likewise, the Tenth Circuit has directed that courts should focus on the reason for the delay.[19]

As noted above, WVL's original state court complaint was entirely based on breach of contract, stemming from the subordination agreements.

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[17] *In re Brooke Corp*, 506 B.R. at 565.

[18] *Id*.

[19] *Minter*, 451 F.3d at 1206. The Tenth Circuit noted that "Courts will properly deny a motion to amend when it appears that the plaintiff is using Rule 15 to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, to present theories seriatim in an effort to avoid dismissal, or to knowingly delay raising an issue until the eve of trial." *Id*. (internal quotations, alterations, and citations omitted). The question of undue delay is highly fact specific, and case law runs from one end of the spectrum, *e.g.*, *Hamilton v. Citimortgage, Inc. (In re Clark)*, No. 09-41319, 2011 WL 2118272, at *2 (Bankr. D. Kan. May 24, 2011) (no undue delay for amendment under Rule 15(a)(2) when motion seeking leave to amend filed only seven days after the defendant filed its answer and discovery had not yet commenced; motion filed "within a reasonable period of time after learning" of new claim), to the other, *e.g.*, *Lashinsky v. Amphone (In re Amphone)*, No. 18-10544, 2019 WL 2724549, at *3 (Bankr. D. Kan. June 27, 2019) (noting that the court had the discretion to deny an amendment sought five and a half months after the deadline to do so, after the close of discovery, at the final pretrial stage order, when the case was ready for trial). Neither of these extremes are present here.

WVL contends that during the course of discovery it has gained additional information and documents that support tort claims, which stem from those subordination agreements. The Maxwell Defendants point out that "[a]s of the date of WVL filing its Motion for Leave, 512 days had passed since WVL filed its Complaint."[20] But, discovery in this case did not begin until late June 2020, about six months before the motion for leave to amend was filed. And discovery was extended multiple times by consent, all for valid reasons. Despite the length of time the case has been on file, the matter has not progressed to the stage where amendment would prejudice the Maxwell Defendants' defense, or cause added costs they would not have needed to incur had the claims been made in the original complaint. It appears WVL is seeking to amend its complaint to add tort claims as soon as it had the facts from discovery to do so. There is no argument WVL is employing unsavory litigation tactics, and the Court has not witnessed any. The circumstances of this case simply do not point to a conclusion that the delay for the amendment here was undue.

C. Futility

The question of futility for a Rule 15(a)2) amendment is "whether the proposed claim or defense is legally insufficient on its face. If a complaint as

[20] Doc. 139 p.4.

amended could not withstand a motion to dismiss or summary judgment, then the amendment should be denied as futile."[21] In other words, "'[a] proposed amendment is futile if the complaint, as amended, would be subject to dismissal.'"[22] Under Federal Rule of Civil Procedure Rule 12(b)(6), the court "must accept as true all well-pleaded factual allegations and view them in the light most favorable to the pleading party" and only when "the proposed claims do not contain enough facts to state a claim for relief that are plausible on their face or the claims otherwise fail as a matter of law" should the court find the amendment futile.[23] The Maxwell Defendants bear the burden of showing the futility of WVL's proposed amended complaint.[24]

1. Tortious Interference with Contract

Regarding WVL's claim based on tortious interferences with contract,

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[21] *In re Brooke Corp*, 506 B.R. at 564; *see also Flex Fin. Holding Co.*, 2017 WL 3970697, at *2 ("The proposed pleading is then analyzed using the same standard as a motion to dismiss under Fed. R. Civ. P. 12(b)(6).").

[22] *Farmers Bank & Tr., N.A. v. Witthuhn*, No. 11-2011-JAR, 2011 WL 5920941, at *2 (D. Kan. Nov. 28, 2011) (quoting *Jefferson Cnty Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999).

[23] *Flex Fin. Holding Co.*, 2017 WL 3970697, at *2 (internal quotations omitted); *see also Weingarden v. Rainstorm, Inc.*, No. 09-2530-JWL, 2012 WL 13026753, at *1 (D. Kan. July 12, 2012) ("[T]he court will only deny an amendment on the basis of futility when, accepting the well-pleaded allegations of the proposed amended complaint as true and construing them in the light most favorable to the plaintiff, the court determines the plaintiff can prove no set of facts in support of her claims that would entitle her to relief.").

[24] *W&W Steel, LLC v. BSC Steel, Inc.*, No. 11-2613-RDR, 2012 WL 1828928, at *1 (D. Kan. May 18, 2012) ("The party opposing the proposed amendment bears the burden of establishing its futility.").

to state such a claim in Arizona, the following must be alleged:

> (1) the existence of a valid contractual relationship;
> (2) knowledge of the relationship on the part of the interferor;
> (3) intentional interference inducing or causing a breach;
> (4) resultant damage to the party whose relationship has been disrupted; and
> (5) that the defendant acted improperly.[25]

The claim requires intentional, improper conduct: "a plaintiff must show that the defendant either intended or should have known that a particular result was likely to be produced by his conduct" and "the defendant's actions must be improper as to motive or means."[26]

On this claim, WVL satisfies the first element (the existence of a valid contract) by the subordination agreement between Pixius and the Jay S. Maxwell Trust, with WVL as the named third-party beneficiary of those contracts. Mr. Maxwell knew of the relationship because, as the trustee of that trust he was the person actually signing the subordination agreement, and because of his involvement with Pixius. Regarding intentional, improper interference, WVL alleges that Mr. Maxwell "directed, encouraged, and/or facilitated payments" by Pixius to the Jay S. Maxwell Trust and also accepted payments from Pixius in his individual capacity "to avoid the restrictions of

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[25] *ABCDW LLC v. Banning*, 388 P.3d 821, 831 (Ariz. Ct. App. 2016) (internal quotations omitted).

[26] *Id.*

the Subordination Agreements."[27] WVL adequately pleads that it suffered damages.

At this point, the Court cannot determine whether Mr. Maxwell actually acted improperly. Certainly, this is the most difficult element to show in a claim based on tortious interference with contract. The Supreme Court of Arizona has said that "a plaintiff must show more than the defendant's knowledge that his or her conduct would induce a breach to establish intentional interference with contractual relations."[28] To determine whether conduct is "improper," a court must analyze:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interest sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.[29]

The Arizona Supreme Court has advised that the first two factors carry the most weight.[30]

Although its claim is not robust with details, the Court concludes that WVL has sufficiently plead a claim for tortious interference with contract.

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[27] Doc. 133 Exh. 1 p.15-16 ¶¶ 79-80.
[28] *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1026 (Ariz. 2005).
[29] *Id.* at 1027 (internal quotations omitted).
[30] *Id.*

WVL alleges that Mr. Maxwell "directed, encouraged, and/or facilitated" payments and that Mr. Maxwell subverted the terms of the subordination agreements, which indicates malicious intent. It is not futile to permit amendment to allow this claim. When accepting as true the facts in WVL's amended complaint and viewing them in the light most favorable to WVL, the proposed claim alleges enough to state a claim for relief.

2. Unjust Enrichment

Regarding WVL's claim based on unjust enrichment, to state a claim, WVL will be required to show five elements:

> (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law.[31]

A claim for unjust enrichment requires a showing that "a party has received a benefit at another's expense and, in good conscience, the benefitted party should compensate the other."[32] The Arizona Supreme Court has noted that the unjust enrichment doctrine is not applicable when there is "a specific contract which governs the relationship of the parties."[33]

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[31] *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 283 P.3d 45, 49 (Ariz. Ct. App. 2012) (internal quotations omitted).

[32] *Id.*; *see also Trustmark Ins. Co. v. Bank One, Ariz., NA*, 48 P.3d 485, 491 (Ariz. Ct. App. 2002) ("Unjust enrichment occurs when one party has and retains money or benefits that in justice and equity belong to another.").

[33] *Brooks v. Valley Nat'l Bank*, 548 P.2d 1166, 1171 (Ariz. 1976).

The Maxwell Defendants argue that WVL has not stated a claim for unjust enrichment because the amended complaint does not allege that WVL conferred a benefit upon the Maxwell Defendants, citing older Arizona case law stating the elements of the claim as "(1) plaintiff conferred a benefit upon the defendant; (2) defendant's benefit is at plaintiff's expense; and (3) it would be unjust to allow defendant to keep the benefit."[34] The Court instead relies on the five-factor elements cited above, as those are the elements repeatedly stated in more recent Arizona case law.

In the proposed amended complaint WVL alleges payments to Mr. Maxwell and the Jay S. Maxwell Trust (an enrichment), that should have instead been paid to WVL (an impoverishment), the payments would have gone to WVL absent the Maxwell Defendants' tortious interference (a connection between the enrichment and impoverishment), subversion (the absence of justification for the enrichment and impoverishment), and no adequate remedy at law against Mr. Maxwell individual (the absence of a remedy provided by law). The Court therefore concludes that it is not futile to permit amendment to allow this claim, because when accepting as true the facts in WVL's amended complaint and viewing them in the light most favorable to WVL, the proposed claim alleges enough to state a claim for

[34] *USLife Title Co. of Ariz. v. Gutkin*, 732 P.2d 579, 584 (Ariz. Ct. App. 1986).

relief.

3. Negligent Misrepresentation

In Arizona, a person or entity may be liable for negligent misrepresentation when "he fails to exercise reasonable care and competence in obtaining or communicating information and thereby, in the course of his business or employment, provides false information for the guidance of others in their business transactions, causing the recipients of the information to incur damages because they justifiably relied on the false information."[35] "To state a claim for relief for negligent misrepresentation, a plaintiff must allege . . . that the defendant owed the plaintiff a duty of care."[36] It is not clear what duty of care was owed here.

Regardless, in addition to the above required elements, the tort of negligent misrepresentation is limited in the types of conduct that is actionable. The Arizona courts have stated that a promise of future conduct

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[35] *PLM Tax Certificate Program 1991-92, L.P. v. Schweikert*, 162 P.3d 1267, 1270 (Ariz. Ct. App. 2007); *see also Kuehn v. Stanley*, 91 P.3d 346, 349 (Ariz. Ct. App. 2004) (stating liability for negligent misrepresentation claim as "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information").

[36] *Belen Loan Inv'rs, LLC v. Bradley*, 296 P.3d 984, 989 (Ariz. Ct. App. 2012).

that is unkept cannot support a claim for negligent misrepresentation.[37] Here, the allegations supporting WVL's negligent misrepresentation claim are that the defendants "provided false information" to WVL that they, and the entities they controlled, "would not accept any payment or benefit from Pixius until Pixius' debt under the Master Lease Agreement was paid in full."[38] This is a promise of future conduct, and it is not actionable as a negligent misrepresentation. WVL's argument to the contrary is based on a mis-reading of a case discussing Arizona tort claims.[39] As a result, it would be

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[37] *See, e.g.*, *McAlister v. Citibank (Ariz.)*, 829 P.2d 1253, 1261 (Ariz. Ct. App. 1992) ("Negligent misrepresentation requires a misrepresentation or omission of a *fact*. A promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation."); *Moshir v. PatchLink Corp.*, No. CV-06-1052-PHX-FJM, 2007 WL 505344, at *7 (D. Ariz. Feb. 12, 2007) (noting that a claim of fraud has as an exception to the exclusion of future conduct to allow claims where there is a "promise made without present intention to perform," but negligent misrepresentation does not).

[38] Doc. 133 Exh. 1 p.19-20 ¶¶ 104-05.

[39] WVL reads *Moshir* as permitting such a claim, but a complete quotation of the portion of the court's opinion referenced by WVL makes clear that the tort of fraud was being discussed:

> A representation is actionable as fraud when it relates to a present or preexisting fact, and cannot be based on unfulfilled promises or statements as to future events. Unkept promises relating to future events are, at most, a breach of contract. However, an established exception to this general rule is a promise made without present intention to perform; there, the misstatement of the present intention is regarded as a misrepresentation of fact.

2007 WL 505344, at *5 (internal quotations omitted). Later discussion in the same opinion notes that negligent misrepresentation does *not* have the same exception as fraud does to the bar on statements as to future events: "As in the context of fraud

futile to allow WVL to amend its complaint to make this claim against the Maxwell Defendants, because the claim would subject to dismissal.[40]

D. Standing

In its reply brief, WVL argues the Jay S. Maxwell Trust has no standing to oppose the amendment of the complaint to state the tort claims, because the tort claims are asserted only against Jay S. Maxwell, individually. First, as a factual matter, it is incorrect that the tort claims are stated only against Jay S. Maxwell, individually. Although the tortious interference with contract claim and the unjust enrichment claim are not proposed against the Jay S. Maxwell Trust, the negligent misrepresentation claim is. WVL also argues that because Jay S. Maxwell has been previously dismissed from this adversary proceeding, he does not have standing at all to oppose the motion for leave to amend the complaint. WVL cites no case law at all in support of its argument.

Based on the Court's own research, it appears there is some support for

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claims, a promise of future conduct that is unkept cannot support a claim for negligent misrepresentation. *However, unlike fraud, negligent misrepresentation, which is predicated upon the failure to exercise reasonable care, does not carve out an exception for a promise made without present intention to perform*." *Id.* at *7 (emphasis added).

[40] Because the Court concludes the allegations made do not support a claim for negligent misrepresentation, it need not address the Maxwell Defendants alternative argument that the claim is barred by the economic loss doctrine.

the argument that a non-party may not oppose a motion for leave to amend, but should instead wait to be served and then file a motion to dismiss.[41] Other cases have considered a non-party's opposition to a motion for leave to amend, however, because that non-party would have been permitted to intervene per Federal Rule of Civil Procedure 24(b).[42] Other courts have allowed named defendants to oppose motions for leave to amend to add non-parties when there is a relationship between the two.[43]

The Court has concluded that it is logical to consider the Maxwell Defendants' opposition to the motion for leave to amend. Consideration of the issues early will help move the entire adversary proceeding to resolution in a more timely manner. Enforcing a procedure without a purpose would not benefit any party, and WVL is not prejudiced by the Court considering the issues at this juncture. The Supreme Court has noted that leave to amend is a discretionary decision.[44] Consideration of the Maxwell Defendants' arguments is appropriate in this case: we are already a year and a half into

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[41] *See, e.g.*, *Smith v. TFI Family Servs., Inc.*, No. 17-02235-JWB-GEB, 2019 WL 1556250, at *3 (D. Kan. Apr. 10, 2019) (citing cases).

[42] *Id.*

[43] *See, e.g.*, *Speedsportz, LLC v. Menzel Motor Sports, Inc.*, No. 07-CV-624-TCK-SAJ, 2008 WL 4632726, at *1 (N.D. Okla. Oct. 17, 2008) (citing cases, and permitting named defendant (a limited liability company) to oppose amendment to add the principal of that named defendant).

[44] *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("grant or denial of an opportunity to amend is within the discretion of the District Court").

the litigation between the parties, and the players have been involved from the start. The situation may be different in future cases.

III. Conclusion

The motion for leave to amend its complaint and join parties filed by WVL[45] is granted, other than adding a claim for negligent misrepresentation against the Maxwell Defendants.

It is so Ordered.

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[45] Doc. 133.