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Order on Motion for Leave to Assert Defendant
McDiapers, Inc.'s Omitted Counterclaim (United
Community Bank_McDiapers)

John J. Goger
Fulton County Superior Court

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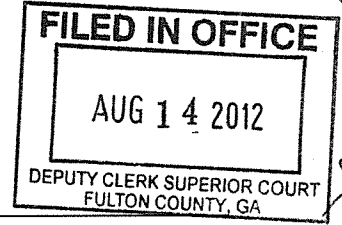
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

UNITED COMMUNITY BANK,)
)
Plaintiff,)
)
v.)
)
MCDIAPERS, INC., RICHARD J. WIELER,)
GAEL COAKLEY, JR., and COLLIN)
BROWN, III,)
)
Defendants.)

Civil Action File No.
2011CV207946



**ORDER ON MOTION FOR LEAVE TO ASSERT DEFENDANT MCDIAPERS, INC'S
OMITTED COUNTERCLAIM**

This matter is before the Court on Defendant McDiapers, Inc.'s Motion for Leave to Assert Omitted Counterclaim. Upon consideration of the motion, the briefs submitted therewith and the record of the case, the Court finds as follows.

Defendant McDiapers, Inc. ("McDiapers") seeks leave of Court to assert counterclaims against Plaintiff United Community Bank ("UCB") for 1) Breach of Trust; 2) Negligent Trust Administration; 3) Negligent Maintenance of Collateral (the Ex-Im Insurance Policy); 4) Negligent Administration of Collateral (the Lockbox Account); 5) Breach of Contract; 6) Conversion; 7) Equitable Accounting; and 8) Treble Damages/Attorneys' Fees under RICO.

McDiapers, a diaper manufacturer, had an ongoing financing arrangement with UCB to fund McDiapers' production of diapers for certain foreign customers. UCB held a security interest in McDiaper's customer accounts, as well as proceeds under an export credit insurance policy with Export-Import Bank ("Ex-Im Bank"), which covered the risk of a foreign buyer's failure to pay for goods. UCB would advance funds under the line of credit which were then

repaid when customers paid certain invoices. According to McDiapers, UCB requested that McDiapers open up an account (the “Lockbox Account”), to which only UCB would have access, where customer payments would be deposited and applied to McDiaper’s line of credit.

In 2007, McDiapers sold its assets to Softee Supreme, LLC (“Softee Supreme”), a diaper company owned by Defendant Collin Brown. According to McDiapers, the asset sale required McDiapers to continue to make sales while Softee Supreme took control of production.

UCB contends that McDiapers, its owners, Richard Wieler and Gael Coakley, Jr., and Collin Brown, concealed the asset sale and scammed UCB by falsely inducing it to make advances under McDiapers’ secured line of credit, when in fact the loan proceeds were used by Softee Supreme, or by the Defendants, personally. UCB alleges that Defendants submitted 202 false advance requests that wrongfully identified McDiapers as the entity taking and filling the customer’s purchase order, when in fact it was Softee Supreme. Now, according to UCB, McDiapers has defaulted on the loan and owes more than \$340,000, exclusive of attorneys’ fees and costs.

UCB also claims that Collin Brown wrongfully withdrew funds from the Lockbox Account. UCB alleges that McDiaper’s principal, Defendant Wieler wrongfully transferred control and use of the account to Defendant Brown by disclosing the user identification and password associated with the bank account. On the other hand, McDiapers contends that UCB, the only one with access to the account, mismanaged the account and allowed Defendant Brown to loot it. McDiapers seeks leave to assert counterclaims associated with these contentions.

“When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.” O.C.G.A. § 9-11-13(f). “When justice requires” the trial court should exercise its

discretion to permit the late counterclaim by freely giving leave to amend to assert such claim. The courts should be very liberal in allowing amendments to assert compulsory counterclaims where no prejudice would result. See Kitchens v. Lowe, 139 Ga. App. 526 (1976); Blount v. Kicklighter, 125 Ga. App. 159 (1971).

Both parties concede that the counterclaims in question are compulsory. Accordingly, the Court will apply the standard set forth above, which authorizes the delayed assertion of compulsory counterclaims, even if the defendant is unable to show excusable neglect, so long as it is within the interests of justice and the plaintiff is not prejudiced.

The Court finds that it is in the interests of justice to allow McDiapers to assert the counterclaims at issue, which, if true, set forth wrongs committed by UCB for which McDiapers may deserve recourse.

However, UCB contends that it will suffer prejudice by virtue of defending against counterclaims, which it argues are futile based on a waiver provision in a loan document. In the promissory note dated June 28, 2010, McDiapers bound itself to the following provision: “All such parties...agree that Lender may ...impair, fail to realize upon or perfect Lender’s security interest in the collateral.” UCB argues that this language prohibits the counterclaims here, which it contends all turn on McDiapers’ allegations that UCB impaired its collateral.

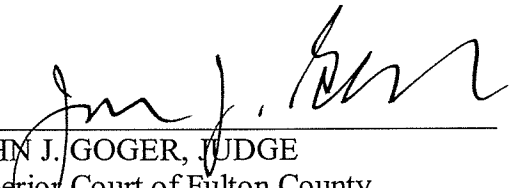
Should the Court accept the futility argument, which the Court notes is not a clear proposition in Georgia law,¹ the cited language appears to waive only McDiapers’ right to assert claims based on UCB’s impairment of its “*security interest* in the collateral.” UCB implicitly urges the Court to construe this language to mean “impairment of collateral,” not just a security

¹ The case law cited by UCB (two out of three cases are dated prior to the adoption of the Civil Practice Act) does not clearly support the imposition of a “futility” test in the analysis undertaken by courts when considering a request for leave to file omitted counterclaims.

interest in collateral. Because the Court has not had the benefit of briefing from both parties on this distinction, the parties are hereby **ORDERED** to submit supplemental briefs within 15 days of the date of this order on the scope of the waiver provision in the promissory note.

As for UCB's other arguments that the counterclaims are futile, the Court is not persuaded that tort claims are inappropriate here due to the parties' contractual relationship. A tort claim will exist if UCB had an independent legal duty to McDiapers, in addition to a contractual duty. A bank owes certain duties to its customers depending on the circumstances. Tucker Fed. Savings & Loan Ass'n v. Rawlins, 209 Ga. App. 649 (1993). It is premature at the pleading stage to determine whether an independent duty was owed to McDiapers.

SO ORDERED this 13 day of August, 2012.



 JOHN J. GOGER, JUDGE
 Superior Court of Fulton County
 Atlanta Judicial Circuit

Copies to:

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