

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:11cv23

GERALD ABATEMARCO, BEN ATKINSON, ANTHONY)
BARBIERI, CHRISTIAN BARSANTI, SUSAN BARSANTI,)
THOMAS BERITELLI, SHARON BERITELLI, PEGGY)
BOWLIN, EDGAR BOWLIN, PAUL BOYDELL, TIFFANY)
BOYDELL, BORIS BRAND, MARC BROWNER, ROBERT)
BURT, DIANE CARROLL, GREGORY CARTER, JOANNE)
CARTER, JANAKI CHANDRAMOULI, SRINIVASAN)
CHANDRAMOULI, JEFFREY CHAUS, JO ANN CHAUS,)
FREDERIC CLARK, CHRIS CRUZ, CYNTHIA CRUZ,)
CONSTANCE FONG, DAVID FONG, ANNA GIABOURANI,)
DAVID GRASSE, SHELBY GRASSE, CATHY GRUSSER,)
JOSEPH GRUSSER, EDITH HANSEN, JACK HERZBERG,)
KRISTINE HERZBERG, DONALD HILL, TRICIA HILL,)
DANIEL HINKSON, JULIAN HUTCHINS, LANE HUTCHINS,)
MARK IPPOLITO, MELISSA JADICK, RICHARD JADICK,)
ALISON JURGERNS, DAN JURGENS, JAMES KARP,)
VIVIEN KARP, DENISE KEARY, GREGORY KEARY, ALAN)
KESSLER, SANDA KESSLER, SUSAN KORNFELD,)
KENNETH KOSCO, MICHELE KOSCO, CINDY LAMIR,)
JOSEPH LAMIR, STEVE LANIER, ERIC LAWRENCE,)
LENORA LAWRENCE, COLE MACKELPRANG, TRENT)
MACKIE, EUGENE MARKHAM, JOHANNA MARKHAM,)
DAVE MARKS, TERESA MARKS, CHRIS MATTAROLLO,)
TINA MATTAROLLO, JOSEPH McELROY, ANNE)
MELLENTHIN, MICHAEL MELLENTHIN, BETH MOSES,)
STEVEN MOSES, DONNA PANARELLO, JOHN PARK,)
PENELOPE PARK, SUSAN PAYNE, JENNIFER PINKHAM,)
ROGER PINKHAM, KATHLEEN POWELL, RICHARD)
POWELL, RANDAL PRICE, MEKO L. PRICE, PAMELA)
RATCLIFFE, BOYKIN ROBINSON, JENNIFER P.)
ROBINSON, DAVID SANDERS, KIM SANDERS, JUDY)
SCHUNN, ROBERT SCHUNN, CONNIE JOHNSON-SCOTT,)
ROBERT SCOTT, G. DANIEL SIEGEL, GERRY SMITH,)
JAMIE SMITH, JEFFREY SNYDER, BRIDGET STEEN,)

JOSEPH STEEN, PAUL TAFFE, TONYA TAFFE, LYNN)
 TAMN, MARK TAMN, KATHRYN L. TRACY, KEVIN TRACY,)
 PATRICIA TRACY, AUDREY TROIANO, MICHAEL)
 TROIANO, CHRIS TURNER, PAMELA R. TURNER,)
 JENNIFER ULLMAN, NEAL ULLMAN, EDWARD VARON,)
 BARRON WALL, PETE WASILEWSKI, MICHAEL)
 WHITEHOUSE, SYLVIA WHITEHOUSE, KATHERINE)
 WILLIAMS, DARREN WISHNER, JILL WISHNER,)
 BEVERLY WISHNER, EDWARD WISHNER, RUSSELL)
 WISHNER, CASEY WOOD, JASON WOOD, DAVID)
 WRIGHT, STACEY WISHNER, WILLIAM WRIGHT, and)
 AMANDA ZUMBRUN,)
)
 Plaintiffs,)
)
 vs.)
)
 LEGASUS OF NORTH CAROLINA, LLC, SYNOVUS BANK,)
 MICHAEL WOLF, THEODORE C. MORLOK, STEPHEN R.)
 KLORFEIN, as Personal Representative of the Estate of)
 ROBERT A. CORLISS, JAMES R. PITTS, and MARILYN)
 McCOY WOODS,)
)
 Defendants.)
)

MEMORANDUM OF DECISION AND ORDER

THIS MATTER is before the Court on the Plaintiffs’ Motion to Dismiss Without Prejudice [Doc. 93].

Pursuant to the Court’s Order entered June 1, 2012 [Doc. 89] (the “Severance Order”), the Plaintiffs move to dismiss this action without prejudice. [Doc. 93]. Defendant Synovus Bank (“Bank”) opposes the

Plaintiffs' motion, arguing that the claims of certain Plaintiffs should be dismissed with prejudice. The Bank further contends that the remaining Plaintiffs should be allowed to dismiss their claims without prejudice only subject to certain conditions, such a re-filing deadline; a limitation on further filings by the remaining Karp¹ litigants; a requirement that any re-filed case be filed within 60 days and within this District; and the Bank's ability to seek attorneys' fees and costs upon re-filing. Finally, while the Bank consents to the dismissal of its counterclaim against Plaintiff Kosco with prejudice, the Bank opposes the dismissal of any of its remaining counterclaims. [Doc. 94].

The Plaintiffs object to the imposition of any of the proposed conditions upon the dismissal of the action. The Plaintiffs further argue that the Bank's counterclaims should be dismissed along with their claims. [Doc. 95].

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." After carefully considering the arguments of the parties, the Court will grant the Plaintiffs' motion and allow them to dismiss their claims pursuant to Rule 41(a)(2). The Court offers no advisory opinion

¹Plaintiffs Gerald Abatemarco, Ben Atkinson, Anthony Barbieri, Daniel Hinkson, James Karp, Gregory Keary, G. Daniel Siegal, Kevin Tracy, Patricia Tracy, Barron Wall, and Katherine Williams are also litigants in a group of consolidated cases known as Synovus Bank v. Karp, Civil Case No. 1:10cv172 (W.D.N.C.).

at this time as to whether such dismissal operates to preclude any future refiling of such claims. The Bank's request for the imposition of certain conditions upon the dismissal of these claims is denied.

The Plaintiffs' request for the dismissal of the Bank's remaining counterclaims is granted only with respect to Plaintiff Kenneth Kosco. With respect to the other counterclaims asserted by the Bank against Joseph McElroy, Mark Tamn, Russell Wishner, David Wright, Edward Wishner, and Darren Wishner, the Plaintiffs' request for dismissal is denied. See 9 Wright & Miller, Federal Practice and Procedure § 2365 at 518-19 (3d ed. 2008) ("Ordinarily the defendant's counterclaim can stand on its own and a dismissal can stand on its own and a dismissal can be granted on the plaintiff's claims without affecting the adjudication of the counterclaim."). As these Plaintiffs have filed their Reply to the Bank's Counterclaims [see Doc. 77], issues have now joined. The parties therefore should proceed with their initial attorneys' conference.

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion for Dismiss [Doc. 93] is **GRANTED IN PART** and **DENIED IN PART** as follows:

- (1) The Plaintiffs' Motion is **GRANTED** to the extent that the claims of the Plaintiffs are hereby **DISMISSED**; and

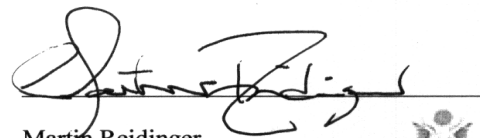
(2) The Plaintiffs' Motion is **GRANTED** with respect to the Bank's counterclaim against Plaintiff Kenneth Kosco, which counterclaim is **DISMISSED**. With respect to the other counterclaims asserted by the Bank, the Plaintiffs' Motion for dismissal is **DENIED**.

IT IS FURTHER ORDERED that with the dismissal of the Plaintiffs' claims against the Defendants, the Defendants' cross-claims for indemnification and/or contribution are **DISMISSED** as moot.

IT IS FURTHER ORDERED that the Bank and the remaining Counter-Defendants should conduct an initial attorneys' conference as soon as possible but no later than fourteen (14) days from the entry of this Order. The parties shall file a certificate of initial attorneys' conference within seven (7) days thereafter.

IT IS SO ORDERED.

Signed: September 26, 2012



Martin Reidinger
United States District Judge

