UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
JUDITH K. ROGAN,	)	CASE NO. 08-23221 JPK
	)	Chapter 13
Debtor.	)	
**********		
JUDITH K. ROGAN,	)	
Plaintiff,	)	
v.	)	ADVERSARY NO. 08-2141
FRIESS ASSOCIATES d/b/a THE	)	
BRANDYWINE FUNDS,	)	
UNITED STATES OF AMERICA,	)	
DEXIA CREDIT LOCAL and PAUL R.	)	
CHAEL, Chapter 13 Trustee,	)	
Defendants.	)	

ORDER ON DEXIA CREDIT LOCAL'S MOTION TO DISMISS
COMPLAINT FOR TURNOVER ("MOTION TO DISMISS")

This adversary proceeding was initiated by a complaint filed on November 25, 2008. The Motion to Dismiss was filed on December 24, 2008, and in response to the court's order of January 8, 2009, Dexia filed a memorandum in support of its motion on January 13, 2009. The plaintiff has not responded to Dexia's motion to dismiss.

The Motion to Dismiss is based solely on Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6), which provides for the assertion of a defense that the complaint fails "to state a claim upon which relief can be granted". Dexia has asserted two separate theories. The first is that the complaint neither mentions Dexia in any way, nor states any facts involving action or inaction by Dexia. The second is that any relief which might be sought to be asserted against Dexia by the complaint has been precluded by orders entered by the United States District Court for the Northern District of Illinois in case number 02 C 8288.

Turning to the first argument, Dexia has cited cases which stand for the proposition that a plaintiff cannot state a claim against a defendant by merely including the defendant in the caption of the case, and yet not stating any facts in the body of the complaint which relate to that

defendant. These cases certainly stand for that proposition, and they are in consonance with the decision of the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), which now provides the definitive standard for allegations which must be provided in a complaint pursuant to Fed.R.Civ.P. 8(a) and the standards by which a complaint is measured under that rule in the face of a Rule 12(b)(6) motion. *Bell Atlantic Corp.* eschewed the long-standing formulation of *Conley v. Gibson*, 78 S.Ct. 99 (1957) – that a complaint does not state a claim only if "no set of facts" could be postulated which would provide a ground for relief. The new standard is stated as follows:

> This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.,* 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the ASSUMPTION THAT ALL THE allegations in the complaint are true (even if doubtful in fact), see, *e.g.*, *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). (footnote omitted)

127 S.Ct. 1995, 1964-1965

The complaint is denominated "Complaint for Turnover", and its prayer for relief is solely that "First Source Bank" be directed to turn over property.[1] There is nothing in the complaint which suggests in any way that Dexia is "in possession, custody, or control" of property of the bankruptcy estate, a necessary predicate for a turnover action pursuant to 11 U.S.C. § 542(a). Under the *Bell Atlantic Corporation* standard, the complaint states no claim against Dexia, and Dexia's motion must be granted on this ground.

With respect to the second ground advanced by Dexia, both the motion to dismiss and the memorandum supporting it include separate exhibits – submitted in ostensible support of Dexia's second ground – which are not part of the record of this adversary proceeding. Fed.R.Civ.P. 12(d) provides that "if matters outside the pleadings are presented to and <u>not excluded by the court</u>" with respect to a Rule 12(b)(6) motion, "the motion must be treated as one for summary judgment under Rule 56" (emphasis supplied). Materials submitted in support of a motion for summary judgment must be admissible in evidence; Fed.R.Civ.P. 56(e)(1). None of Dexia's exhibits is admissible in evidence in the form attached to the motion and to the memorandum. The documents are "hearsay" materials, as defined by Fed.R.Ev. 801, and thus are inadmissible under Fed.R.Ev. 802, unless brought within an exception provided by Fed.R.Ev. 803, in this instance Fed.R.Ev 803(8). The documents have not been authenticated in the manner required by Fed.R.Ev. 902(4)/ Fed.R.Ev. 902(1), and thus do not satisfy the requirements of Fed.R.Ev. 803(8) for admissibility. Because the exhibits submitted by Dexia in support of its second ground are not admissible in evidence, the court determines that the exhibits should be excluded by the court with respect to consideration of Dexia's motion, and

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[1] "First Source Bank" is the defendant against which relief is requested. For the purpose only of this decision, the court will read the prayer for relief as being directed against Freiss Associates d/b/a The Brandywine Funds.

thus the motion to that extent will not be subject to Rule 56. Without the exhibits, there is no basis in the present record of this adversary proceeding upon which Dexia's motion may be granted on the second asserted ground.

The defendant Dexia has filed a motion in this adversary proceeding pursuant to Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6), which the court has granted. The granting of the defendant's motion does not end the case as to the defendant: remaining to be addressed is the issue of the plaintiff's right or ability to file an amended complaint.

Fed.R.Civ.P. 12(b)(6), incorporated into contested matters by operation of Fed.R.Bankr.P. 7012(b), provides that "(e)very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted." Rather than state the Rule 12(b)(6) defense which it has raised in a responsive pleading (i.e., an answer), the defendant has exercised the option provided to it by Rule 12(b) to assert that defense in a separate motion which raises the ground of "failure to state a claim upon which relief can be granted" as a defense to the plaintiff's action. Properly understood, this defense asserts that based upon the allegations/ averments of the plaintiff's complaint, the complaint does not state any cognizable legal basis upon which any relief requested by the complaint can be granted in relation to the defendant. The court has determined previously in this decision that the defendant's motion must be sustained. However, the mere sustaining of the motion does not address whether the plaintiff is entitled to, or may be allowed by the court to, proceed subsequently in this case with respect to an attempt to assert a claim against the defendant. The granting of the Rule 12(b)(6) motion determines only that, based upon the complaint before the court, the plaintiff has failed to establish any claim upon which relief can be granted against the defendant.

The court must next determine the effect of its granting of the defendant's motion in relation to the course of further proceedings in ths case, i.e., does the granting of the motion conclusively end the litigation as to Dexia?

It must first be noted that there is a distinction between dismissal of the complaint in response to the defendant's motion, and dismissal of the action in response to that motion. The dismissal of the complaint does not end the litigation, while dismissal of the action does. As stated in *Paganis v. Blonstein*, 3 F.3d 1067, 1070 (7th Cir. 1993):

> The dismissal of a complaint does not end the litigation. *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 463 (7th Cir.1988); *Bieneman v. City of Chicago,* 838 F.2d 962, 963 (7th Cir.1988); *Benjamin,* 833 F.2d at 671; *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1111 (7th Cir.1984), *cert. denied,* 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985). "In contrast, a dismissal of the entire action ends the litigation and forces the plaintiff to choose between appealing the judgment or moving to reopen the judgment and amend the complaint pursuant to Fed.R.Civ.P. 59 or Rule 60." *Benjamin,* 833 F.2d at 671. *See also Car Carriers,* 745 F.2d at 1111. Therefore, if a judgment entry dismisses only the complaint, it is not a final judgment.

Dismissal of the action is a final appealable judgment, and absent a statement by the court to the contrary in the final judgment of dismissal, dismissal of the action by a final judgment entry is "on the merits", and thus a dismissal "with prejudice"; Fed.R.Bankr.P. 7041/Fed.R.Civ.P. 41(b). Thus, if the court were to dismiss the action without stating that dismissal was "without prejudice" in the final judgment, the action would be dismissed with prejudice and in order to file an amended complaint, the plaintiff would have to file a motion for relief from the judgment pursuant to Fed.R.Bankr.P. 9023/Fed.R.Civ.P. 59(e) or pursuant to Fed.R.Bankr.P. 9024/Fed.R.Civ.P. 60(b); *Foster v. DeLuca*, 545 F.3d 582, 584-85 (7th Cir. 2008); *Furnace v. Board of Trustees of Southern Illinois University*, 218 F.3d 666, 669 (7th Cir. 2000). The Seventh Circuit Court of Appeals is not quite clear on the implication of dismissing a complaint with prejudice, but it suffices to say that such a dismissal would in all probability be construed as a dismissal of the

action as well; *See, Paganis, supra.*

The United States Court of Appeals for the Seventh Circuit has dropped "heavy hints" over the years as to whether or not a complaint or action should be dismissed with prejudice in response to a defendant's initial Rule 12(b)(6) motion to dismiss the original complaint. In *Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 609-610 (7th Cir. 1987); *Rehearing & Rehearing En Banc denied* July 8, 1987; the United States Court of Appeals for the Seventh Circuit stated:

> It is true that plaintiffs' amended complaint failed to allege that Anthony Cairo was the sole beneficiary under the Chicago Title land trusts, although that fact could be reasonably inferred from the insurance contracts attached to the complaint. Nevertheless, this failure was at most a technical defect which in no way warranted a dismissal with prejudice. See *Rainbow Trucking, Inc. v. Ennia Ins. Co.,* 500 F.Supp. 96, 98 (E.D.Pa.1980) (failure to allege insurable interest did not render complaint fatally defective). In *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, the Supreme Court set out the general policy of the federal courts favoring liberal construction of pleadings. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48, 78 S.Ct. at 103. Professors Wright and Miller have similarly commented:
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>> A dismissal under Rule 12(b)(6) generally is not on the merits and the court normally will give plaintiff leave to file an amended complaint. The federal policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that plaintiff be given every opportunity to cure a formal defect in his pleading. * * * Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim.
>> 5 Wright & Miller, Federal Practice & Procedure § 1357, at 611-613. See also *Musikiwamba v. ESSI, Inc.,* 760 F.2d 740, 753 (7th Cir.1985); *Friedlander v. Nims,* 755 F.2d 810, 813 (11th Cir.1985); *Micklus v. Greer,* 705 F.2d 314, 317 n. 3 (8th Cir.1983); *Jureczki v. City of Seabrook,* 668 F.2d 851, 854 (5th Cir.1982) (dismissal with prejudice is a drastic remedy to be used only where a lesser sanction would not better serve the interests of justice). Although we think that requiring plaintiff Redfield at this point to amend the

> complaint to include the above allegation would be of limited usefulness, because of our disposition in Part IV *infra,* Redfield on remand should be given leave to amend the amended complaint to include an allegation setting out Cairo's interest in the Chicago Title & Trust land trusts. (footnote omitted)

As stated in *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008):

> Relief under Rules 59(e) and 60(b) are extraordinary remedies reserved for the exceptional case, *Dickerson v. Board of Education of Ford Heights, Ill.,* 32 F.3d 1114, 1116 (7th Cir.1994), and "the mere desire to expand the allegations of a dismissed complaint does not, by itself, normally merit lifting the judgment." *Camp,* 67 F.3d at 1290. Yet the district court left the plaintiff with little recourse but to file a motion under Rules 59(e) and 60(b) because it simultaneously granted the defendants' motion to dismiss and terminated the case. District courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiff's complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint. *See generally Furnace v. Bd. of Trs.,* 218 F.3d 666, 669 (7th Cir.2000) (noting that "while this court has not accorded talismanic importance to the fact that a complaint ... was dismissed 'without prejudice,' generally, an order dismissing a complaint without prejudice 'is not appealable because the plaintiff may file an amended complaint.' ") (internal citations and quotations omitted); *see also Kaplan v. Shure Bros.,* 153 F.3d 413, 417 (7th Cir.1998) (same); *Farrand v. Lutheran Bhd.,* 993 F.2d 1253, 1254 (7th Cir.1993) (same). (emphasis supplied)

See, Health Control Costs v. Skinner, 44 F.3d 535 (7th Cir. 1995).

From the foregoing, it is clear to the court that the United States Court of Appeals for the Seventh Circuit has assumed that trial judges granting a motion to dismiss pursuant to Rule 12(b)(6) will in most instances accord a plaintiff the opportunity to amend a complaint which fails to state a claim upon which relief can be granted, before entering a final judgment of dismissal with prejudice of the action sought to be asserted by the plaintiff against the defendant by that complaint.

The circumstances under which a federal trial court is required to provide the plaintiff with an opportunity to amend a complaint dismissed pursuant to Rule 12(b)(6) has never been

addressed by the United States Court of Appeals for the Seventh Circuit. This issue has had only scant direct determination by other courts. Based upon the court's research, the most active court in the context of this narrow issue is the United States Court of Appeals for the Eleventh Circuit, which has an interesting history with respect to the issue. In *Bank v. Pitt*, 928 F.2d 1108, 1111-1112 (11th Cir. 1991), the following was stated:

> A complaint should not be dismissed under Fed.R.Civ.P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). "[A] district court's discretion to dismiss a complaint without leave to amend is 'severely restrict[ed]' by Fed.R.Civ.P. 15(a), which directs that leave to amend 'shall be freely given when justice so requires.' " *Thomas v. Town of Davie,* 847 F.2d 771, 773 (11th Cir.1988) (quoting *Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 597 (Former 5th Cir.1981)). Where it appears a more carefully drafted complaint might state a claim upon which relief can be granted, we have held that a district court should give a plaintiff an opportunity to amend his complaint instead of dismissing it. *See Friedlander v. Nims,* 755 F.2d 810, 813 (11th Cir.1985); *Dussouy,* 660 F.2d at 597-99[FN4] This is still true where the plaintiff does not seek leave until after the district court renders final judgment, *see Thomas,* 847 F.2d at 773 (after district court dismissed plaintiff's complaint with prejudice, plaintiff filed motion for reconsideration that was denied; this court reversed and remanded, directing that plaintiff be permitted to amend his complaint), and even where the plaintiff never seeks leave to amend in the district court, but instead appeals the district court's dismissal, *see Sarter v. Mays,* 491 F.2d 675, 676 (5th Cir.1974) (complaint dismissed with prejudice and plaintiff appealed; court of appeals stated that "if the complaint does not adequately apprise the defendant of the nature of the plaintiff's claim, the court should allow the plaintiff to amend the pleadings to more plainly delineate the cause of action rather than dismiss the complaint.").[FN5]
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> FN4. *Dussouy* is a Former Fifth Circuit case decided in November 1981. The Eleventh Circuit has never decided whether Former Fifth Circuit cases decided after September 30, 1981, are binding precedent. In dicta, however, we have indicated that such cases are binding precedent. *See Tallahassee Branch of NAACP v. Leon County,* 827 F.2d 1436, 1440 n. 1, *cert. denied,* 488 U.S. 960, 109 S.Ct. 402, 102 L.Ed.2d 391 (1988); *Stein v. Reynolds Sec., Inc.,* 667 F.2d 33, 34 (11th Cir.1982). One

> commentator has reached the same conclusion. *See* Baker, *A Primer on Precedent in the Eleventh Circuit,* 33 Mercer L.Rev. 1175 (1983). We treat *Dussouy* as binding, but note that our decision would be unaffected even if the case is not binding.
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> FN5. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

> If our precedent leaves any doubt regarding the rule to be applied in this circuit, we now dispel that doubt by restating the rule. Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.[FN6]
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> FN6. We note that the rule that a plaintiff be given at least one chance to amend his complaint before the district court dismisses it with prejudice is consistent with the Federal Rules' fundamental goal that disputes be resolved on the merits, rather than on the pleadings. Under the Federal Rules, "the purpose of pleading is to facilitate a proper decision on the merits." *Conley,* 355 U.S. at 48, 78 S.Ct. at 103. Dismissing an action without granting even one chance to amend is contrary to this goal.
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> We note two important caveats to this rule. First, where the plaintiff has indicated that he does not wish to amend his complaint, the district court need not dismiss with leave to amend. In *Friedlander v. Nims,* 755 F.2d 810 (11th Cir.1985), during a hearing the district judge indicated several times to plaintiff's counsel that the complaint was deficient with regard to one defendant and recommended appropriate changes. Although counsel agreed with the judge that the complaint was deficient, and expressed an intent to amend it, he nevertheless failed to do so. In this situation, where the district court has a clear indication that the plaintiff does not want to amend his complaint, the court may properly dismiss without leave to amend. The second caveat to the rule is that if a more carefully drafted complaint could not state a claim under the standard of *Conley,* 355 U.S. at 45-46, 78 S.Ct. at 102, dismissal with prejudice is proper.

In *Bank*, the United States Court of Appeals for the Eleventh Circuit adopted a relatively bright line standard for trial courts with respect to when dismissal pursuant to Rule 12(b)(6) should be automatically accompanied by an opportunity for the plaintiff to file an amended

complaint. However, this standard was overruled by the United States Court of Appeals for the Eleventh Circuit in *Wagner v. Daewoo Heavy Industries America Corp*., 314 F.3d 541, 542 (11th Cir. 2002):

> In this en banc opinion, we address whether this case should be remanded to the district court with instructions to permit the plaintiff to amend his complaint. Under *Bank,* we would answer that question in the affirmative. 928 F.2d at 1112 ("Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice."). We, however, have determined that the *Bank* rule should no longer be followed. As a result, we overrule *Bank* and substitute the following rule: A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.

In announcing its new rule, the Court stated that the new rule was in consonance with other Circuit Courts of Appeal which had addressed the issue, including the United States Court of Appeals for the Seventh Circuit in *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 662 (7th Cir. 1978). Apart from the fact that pronouncements of the Eleventh Circuit Court of Appeals have no compelling effect on this court, the court does not read the cited Seventh Circuit case as having anything to do with the issue addressed in *Wagner*, and thus the statement of the United States Court of Appeals for the Eleventh Circuit as to the law of the United States Court of Appeals for the Seventh Circuit, as expressed in that case, carries no weight whatsoever with this court. This court thus does not deem the law of the United States Court of Appeals for the Seventh Circuit to be in consonance with the decision announced in *Wagner, supra*.

Thus, an unanswered question in the Seventh Circuit is the extent to which a federal trial court <u>must accord</u> a plaintiff an opportunity to file an amended complaint when the court determines that a Rule 12(b)(6) motion to dismiss the plaintiff's original complaint should be granted. The court deems the law of the Seventh Circuit to clearly state that in most instances,

federal trial courts should grant the plaintiff an opportunity to file an amended complaint before either the complaint or the action is dismissed with prejudice in response to a Rule 12(b)(6) motion. Absent any controlling precedent to the contrary in the Seventh Circuit, the court is free to adopt a rule on its own which the court deems to be in consonance with pronouncements of the United States Court of Appeals for the Seventh Circuit. As stated, the court does not deem the United States Court of Appeals for the Seventh Circuit to be in parallel with the rule announced by the United States Court of Appeals for the Eleventh Circuit in *Wagner v. Daeoo Heavy Industries America Corp., supra*. Rather, this court views the United States Court of Appeals for the Seventh Circuit to be more in consonance with the rule announced by the United States Court of Appeals for the Eleventh Circuit in *Bank v. Pitt, supra*., and it is that rule which the court adopts. Thus, when the court has determined that a Rule 12(b)(6) motion should be granted with respect to a complaint, the court will provide the plaintiff with one chance to file an amended complaint before the case or complaint is dismissed with prejudice, if "a more carefully drafted complaint might state a claim". This rule is subject to two exceptions. First, in a circumstance in which the plaintiff has stated conclusively on the record that he/she/it does not desire in any context to file an amended complaint, no leave to amend will be granted. Secondly, if a more carefully drafted complaint in the court's view could not state a claim for relief under the standards for review of a Rule 12(b)(6) motion stated in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the court may dismiss the action with prejudice without providing leave to file an amended complaint. The review in this context is limited to the record in which the complaint was filed, and does not encompass any extraneous matters otherwise known by the court.

In the instant case, the court determines that the complaint should be dismissed with prejudice as to Dexia. The complaint is directed solely to an account held by an “investment

advisor" , and states that the account is in fact held by that investment advisor. There is nothing in the complaint which suggests that it can be amended to state a claim for "turnover" against Dexia.

Pursuant to the foregoing, the court determines that Dexia's motion to dismiss should be granted pursuant to Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6). The court further determines that the plaintiff should not be accorded an opportunity to file an amended complaint with respect to Dexia, and thus that the complaint should be dismissed with prejudice as to that defendant.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss filed by Dexia Credit Local on December 24, 2008 is granted, and that the complaint is dismissed as to Dexia Credit Local with prejudice as to any assertions of an action for "turnover" against that creditor with respect to the account which is the subject of this adversary proceeding.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that there is no just reason for delay, and that this determination shall be a final judgment as to the claims of the plaintiff against Dexia Credit Local pursuant to Fed.R.Bankr.P. 7054(a)/ Fed.R.Civ.P. 54(b).

Dated at Hammond, Indiana on September 30, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of Record