IT IS ORDERED as set forth below:

Date: October 27, 2007

C. Ray Mullins

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U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
ALLIED HOLDINGS, INC. and RELATED DEBTORS,	:	05-12515-CRM through 05-12537-CRM
Debtors.	:	
_____	:	
ALLIED HOLDINGS, INC.,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 06-1013
v.	:	
VOLVO PARTS NORTH AMERICA, INC., dba Contact Center Solutions,	:	IN PROCEEDINGS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE
Defendant.	:	

ORDER

On July 31, 2005, Allied Holdings Inc. and its affiliates (hereinafter the "Debtors")

filed voluntary petitions under Chapter 11 of the Bankruptcy Code. Prior to that time, the Debtors and Volvo Parts North America, Inc. (hereinafter "Volvo") were operating under a contract through which Volvo rendered mechanical "break-down" assistance to the Debtors' drivers on an as-needed basis. Shortly before the petition date, the Debtors owed Volvo approximately $980,536 in unpaid charges for this service, and Volvo began charging the Debtors in advance. To meet this requirement, the Debtors paid Volvo a set amount through a process referred to as a Comchek for each service call, regardless of the cost of the service. After the petition date, the Debtors and Volvo continued under this arrangement, and throughout the post-petition period, Volvo received more from the Debtors than it invoiced for the post-petition services. On September 12, 2005, the Debtors terminated the contract and requested that Volvo pay the Debtors $538,743 for overpayments made during the post-petition period. Volvo refused to pay the Debtors and asserted that it had a right to retain the overpayments as a recoupment against its pre-petition claim.

On February 8, 2006, the Debtors filed a complaint against Volvo for turnover of estate property and for contempt for violating the automatic stay. In the complaint, the Debtors alleged that Volvo retained $538,743 in funds paid during the post-petition period and applied these funds to its pre-petition debt. The Debtors contended that the unearned funds are property of the Debtors' bankruptcy estate and must be turned over pursuant to section 542. Additionally, the Debtors alleged that Volvo violated the automatic stay by

engaging in an act to obtain or exercise control over property of the estate (section 362(a)(3)), by attempting to collect a pre-petition debt (section 362(a)(6)), and by effectuating a setoff without obtaining relief from the automatic stay (section 362(a)(7)).

On March 7, 2006, Volvo filed its answer to the Debtors' complaint. In the answer, Volvo denied that it had violated the automatic stay on the basis that its actions constituted a recoupment under state law, which is not subject to the automatic stay. All of Volvo's enumerated responses to the Debtors' allegations of fact and legal conclusions are consistent with this defense with the exception of Volvo's answer to Paragraph 21 of the complaint. In Paragraph 21, the Debtors alleged that Volvo "is in contempt pursuant to section 105 for violating the automatic stay imposed by section 362(a)(3)." In its answer, Volvo stated that it "admits the allegations of Paragraph 21."

By joint motion of the parties, the discovery period was extended through October 4, 2006, and the time for filing dispositive motions was also extended until November 3, 2006. Volvo filed a motion for summary judgment, in which it asserted that it was entitled to summary judgment because it had not violated any provision of the automatic stay and because the Debtors were not entitled to a return of the overpayments due to the existence of Volvo's right of recoupment. On November 3, 2006, the Debtors filed a motion for partial summary judgment. In support of the motion, the Debtors submitted that the undisputed facts support the conclusion that the post-petition funds paid to Volvo in excess of the post-petition services rendered are property of the bankruptcy estate subject to

turnover and that Volvo's actions in refusing to return the overpayments constituted an exercise of control over property of the estate, an action to collect a pre-petition debt, and a setoff, all completed with knowledge of the bankruptcy filing. At this time, the Debtors did not refer to or rely upon Volvo's admission of Paragraph 21 of the complaint. Instead, the Debtors addressed the merits of Volvo's argument that it is entitled to recoup the post-petition overpayments against its pre-petition claim.

On December 8, 2006, the Debtors filed a reply to Volvo's response to the Debtors' motion for partial summary judgment. In Section A of this reply, the Debtors asserted that Volvo had admitted in its answer that it is in contempt for violating the automatic stay and, consequently, Volvo is now estopped from arguing that the automatic stay is not applicable. On December 4, 2006, Volvo filed a motion for leave to supplement its response to the Debtors' motion for partial summary judgment and, on December 5, 2006, Volvo filed a motion to replace its response to the Debtors' Statement of Material Facts as to Which No Genuine Issue Exists to be Tried.[1] Additionally, Volvo filed a motion for leave to amend its answer and affirmative defenses, followed shortly by a motion to strike Section A of the Debtors' reply. In the Motion to Strike, Volvo argues that the Court should strike the

[1] The Debtors do not oppose these motions. The Debtors do oppose the Court's consideration of Volvo's Response to the Debtors' Statement of Material Facts as To Which No Genuine Issue Exists to be Tried (Docket Number 49) to the extent that this response conflicts with Volvo's previously filed Statement of Undisputed Facts (Docket Number 34) and the affidavit of Lyn Thomason. The Court leaves that issue for future resolution along with the pending cross motions for summary judgment.

Debtors' argument in the reply brief on the basis that the Debtors did not make this argument in their memorandum of law in support of their motion for partial summary judgment and are, therefore, barred from making the argument in their reply to Volvo's response. Volvo acknowledges that its motion to strike will be moot if the Court permits it to amend its answer to deny the allegation of Paragraph 21 of the Debtors' complaint.

As to the motion to amend the answer, Volvo argues that its admission of Paragraph 21 was clearly a mistake by its attorney. Volvo submits that, under Rule 15 of the Federal Rules of Civil Procedure, the requested amendment is well within the discretion of the Court and should be permitted. In response, the Debtors contend that Volvo has unduly delayed this proceeding by waiting to seek leave to amend its answer and, accordingly, the request for leave to amend should be denied. The Debtors point to the fact that the complaint had been on file for over ten months, the answer had been on file for over nine months, and discovery had been closed for over four months before Volvo moved for leave to amend its answer.[2]

Rule 15 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedures, governs amended pleadings. *See* FED. R. CIV. P. 7015. In pertinent part, Rule 15 provides:

> (a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise, a party may amend

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[2] In actuality, discovery had been closed for only two months at the time Volvo moved to amend its answer.

> the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be given freely when justice so requires.

FED. R. CIV. P. 7015(a). Accordingly, Volvo cannot amend its complaint without leave of the Court or the written consent of the Debtors, which the Debtors have not given.

A trial court has considerable discretion when determining whether to grant leave to amend a pleading. *Jameson v. The Arrow Co.*, 75 F.3d 1528, 1534-35 (11th Cir. 1996). "'Although [l]eave to amend shall be freely given when justice so requires,' a motion to amend may be denied on 'numerous grounds' such as 'undue delay, undue prejudice to the defendants, and futility of the amendment.'" *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000). That being said, the purpose of Rule 15(a) is to "assist the disposition of litigation on the merits of the case rather than have pleadings become ends in themselves." *Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1284 (5th Cir. 1981) (citations omitted); *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (noting that the spirit of the procedural rules is merit-based decisions). In *Foman v. Davis*, the United States Supreme Court instructed that, "[i]n the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis,* 371 U.S. at 181-82 (internal citations omitted).

In this case, the Court finds that there is no "apparent or declared reason" to deny this amendment. There is no evidence that Volvo has engaged in any bad faith conduct or has been dilatory in failing to seek leave to amend. Volvo filed its answer in March 2006. It does not appear that the Debtors themselves realized that Volvo had inadvertently admitted the allegation of Paragraph 21 until approximately December 2006 when they filed their reply to Volvo's response to their motion for partial summary judgment. It does appear that, as soon as Volvo realized its error, it moved for permission to amend its answer. Even if the Debtors did become aware of the admission prior to that time, as Volvo points out, it is highly unlikely that the Debtors ever relied on the admission to their detriment, as it was clear from the remainder of the answer and from Volvo's course of conduct throughout the case that Volvo vehemently disagreed with the Debtors that Volvo's actions violated any provision of the automatic stay. Accordingly, the Court cannot find that the Debtors would be unduly prejudiced if the Court permits the amendment.

The Court is certainly cognizant that the Rules of Civil Procedure exist to assist the Court and the parties to resolve litigation in an orderly and swift manner. In this case, however, justice would not be served by holding Volvo to an admission that is so clearly an inadvertent error of counsel. Additionally, in the absence of any of the factors discussed in *Foman*, the Court believes that disposing of this litigation on the merits of the case rather than on a technicality would better serve the purpose of Rule 15.

For the reasons stated above, Volvo's Motion to Amend Answer (Docket Number 56)

is hereby **GRANTED.** No objection having been filed, Volvo's Motion to Supplement Response (Docket Number 52) and Motion for Leave of Court to Replace Defendant's Response to Plaintiffs' Statement of Material Facts as to Which No Genuine Issue Exists to be Tried (Docket Number 53) are hereby **GRANTED**. Volvo's Motion to Strike Section A of the Debtors' Reply (Docket Number 57) is hereby **DENIED** as moot.

The status conference scheduled on these motions for December 12, 2007 will not be held. Oral argument on the Cross-Motions for Summary Judgment pending in this case will be held on **December 12, 2007** at 2:00 p.m. as originally scheduled.

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