IT IS ORDERED as set forth below:

Date: May 09, 2008

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NOS. 04-78434 through 04-78436
Rhodes, Inc., et al.,	CHAPTER 11
Debtors.	JUDGE MASSEY
Joel H. Dugan, as Liquidating Agent,	
Plaintiff,	
v.	ADVERSARY NO. 06-6500
Leather Bella, LLC dba Soft Line Group,	
Defendant.	

ORDER DENYING PLAINTIFF'S MOTION TO AMEND, GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING AS MOOT SOFT LINE S.p.A.'s MOTION TO DISMISS

Ten months after filing this adversary proceeding, Joel H. Dugan, as Liquidating Agent for Rhodes, Inc., moved to amend the complaint to substitute Soft Line S.p.A. for the existing Defendant, Leather Bella, LLC. The statute of limitations on the claims made by Mr. Dugan,

with one exception, expired three days after the complaint was filed. Under Fed. R. Civ. P. 15(c), made applicable by Fed. R. Bankr. P. 7015, the proposed amendment would relate back to the filing of the complaint, thereby finessing the statute of limitations, provided that within 120 days after this proceeding was filed, Soft Line had notice of it sufficient for it to mount a defense and knew or should have known that but for an error in naming the proper party, it would have been named.

Plaintiff mailed the initial complaint and an amended complaint to an address that Soft Line, Defendant Leather Bella and their common officer had shared but had vacated nine months earlier. The officer avers that he did not learn of the proceeding until five months after it was filed. The primary issue presented is whether there is a presumption of receipt of the mail containing process directed to the officer at the stale address in the absence of any evidence that their mail was forwarded. A related issue is whether Soft Line and Leather Bella shared an "identity of interest" such that service of the amended complaint on the registered agent of Leather Bella provided the requisite notice to Soft Line for purposes of Rule 15(c). The Court answers these questions in the negative and denies the motion to amend.

I.

The Court heard argument on the motion to amend on December 20, 2007 and held a subsequent hearing by telephone on April 14, 2008. The parties confirmed that there is no dispute that the complaints were served by mail or that nine months prior to service of the initial complaint, Soft Line, its officer and Defendant Leather Bella had moved from and ceased to occupy the address to which Plaintiff mailed the complaints. At both hearings, the Court inquired whether either party wanted an evidentiary hearing, and neither party requested one,

asking instead that the Court decide the motion to amend based on the affidavits each party had filed, there being no material fact in dispute.

Rhodes, Inc. filed this Chapter 11 case on November 4, 2004. On May 23, 2006, the Court confirmed Debtors' Third Amended Plan pursuant to which certain causes of action, including the claims made here, were vested in Rhodes, Inc., to be prosecuted under the direction and control of Joel H. Dugan as liquidating agent.

On October 31, 2006, Mr. Dugan commenced this and dozens of other adversary proceedings to recover alleged voidable preferences. *See* 11 U.S.C. §§ 547. The original complaint named "Soft Line Group" as the defendant. It also sought to recover the transfers listed in an exhibit to the complaint as fraudulent transfers pursuant to 11 U.S.C.§ 548 or as unauthorized postpetition transfers to the extent any were made after the petition date pursuant to 11 U.S.C. § 549. None of the transfers shown on the exhibit to the complaint reflects a postpetition transaction.

Fed. R. Bankr. P. 7004(b) permits nationwide service of process by mail. On November 9, 2006, through his counsel, Plaintiff served the original complaint naming Soft Line Group as the defendant by placing a copy enclosed in a sealed envelope, postage prepaid, in the United States mail addressed to Guy Ray, Vice President, Soft Line Group, at 1931 Freeman Mill Road, South Greensboro, N.C. 27406 (the "Greensboro Address"). The initial defendant did not timely respond to the complaint. Plaintiff decided to investigate further and discovered in the records of Rhodes, Inc. a series of e-mails to and from a Delores Ashby, whose e-mail address was dashby@leatherbella.com.

On December 14, 2006, Plaintiff filed an amended complaint to substitute Leather Bella, LLC dba Soft Line Group as the defendant. In doing so, Plaintiff apparently overlooked the fact

that two e-mails from Delores Ashby were signed "Delores, Soft Line SPA." Exhibit 1, pp.4-5, to Brief in Support of Plaintiff's Motion For Leave to Amend (Document 16, part 5). He served the amended complaint by mail on James C. Diana, registered agent for Leather Bella, LLC, at 100 N. Tryon Center, Bank of America Corporation Center, Charlotte, North Carolina 28202 and on Guy Ray, Owner, Leather Bella, LLC dba Soft Line Group at the Greensboro Address.

Plaintiff used the Greensboro address because it appeared on checks issued by Rhodes to Soft Line Group during the preference period in 2004. He also consulted the website of the North Carolina Secretary of State to determine a proper service address, although he has not provided any evidence showing his search of that website revealed any information about "Soft Line Group." The Secretary of State's website, which Plaintiff cited in his brief and thereby invited the Court to review, does provide information about Leather Bella and does show even now Leather Bella's address to be the Greensboro Address. But a little further digging on that site shows that the last annual report of Leather Bella was for 2003 and was posted on the Secretary of State's website in April 2004, more than two years before this proceeding was filed.

Plaintiff's attorneys never received from the U.S. Postal Service either the envelope containing the original complaint or the envelopes containing the amended complaint mailed to the Greensboro Address or to the registered agent marked "undeliverable" or "unable to forward." Defendant Leather Bella did not file an answer to the amended complaint. Plaintiff took no further action to prosecute the case until confronted with motions to dismiss in August 2007.

Mr. Guy Ray is a managing member and one-third owner of Leather Bella, LLC, a North Carolina limited liability company. Leather Bella has never done business as "Soft Line Group." As of the relevant dates, Mr. Ray was a vice-president and an agent in North America for Soft

Line S.p.A. ("Soft Line"), an Italian company that did business with Rhodes, Inc. in the name of "Soft Line Group," and he was authorized to accept service of process on behalf of Soft Line. Mr. Ray never had an ownership interest in Soft Line.

Until January 2006, Mr. Ray's business office and the offices of Leather Bella and Soft Line were located at the Greensboro Address. In January 2006, approximately ten months before this proceeding was filed, Mr. Ray, Leather Bella and Soft Line moved their offices to 4525 Tigers Den Road, Randleman, North Carolina 27317. After that move, Mr. Ray, Leather Bella and Soft Line conducted no further business of any kind at the Greensboro Address.

Mr. Ray became aware of this adversary proceeding in May 2007, when an Atlanta attorney informed him of its existence. The original complaint and the amended complaint were never forwarded to him, and he never received the amended complaint from James C. Diana, Leather Bella's registered agent.

There is no evidence to show that Soft Line learned of this adversary proceeding prior to May 2007 unless the service of process by mail on Soft Line Group and Leather Bella provided such notice. There is no evidence that Mr. Ray, Leather Bella, or Soft Line asked the U.S. Postal Service to forward mail directed to the Greensboro Address. There is no evidence that the U.S. Postal Service forwarded any mail addressed to Mr. Ray, Leather Bella, or Soft Line at the Greensboro Address.

On August 3, 2007, Leather Bella filed a motion to dismiss the complaint on the ground that it failed to state a claim for relief. The more accurate ground for the motion to dismiss stated in the brief supporting the motion is that in 2004 Leather Bella had no dealings with Debtor Rhodes, Inc. At the same time, Soft Line filed a motion to dismiss for insufficiency of service of process.

On August 31, 2007, Plaintiff filed the present motion for leave to further amend the complaint to delete Leather Bella as the defendant and to name Soft Line S.p.A. as the defendant. Plaintiff did not respond to Leather Bella's motion to dismiss but filed a response opposing Soft Line's motion to dismiss on the ground that it is not a party to this adversary proceeding and therefore lacks standing.

II.

Fed. R. Civ. P. 15 governs amendments to pleadings. In this case, responsive pleadings have been filed. Plaintiff has already amended his complaint once and may not amend a second time without leave of Court. Under Rule 15(a), leave to amend shall be freely given "when justice so requires." Rule 15(c), dealing with the relation back of an amendment to the original pleading, applies where the applicable statute of limitations ran prior to the date the amendment was filed. Rule 15(c) provides in relevant part:

> (c) Relation Back of Amendments. An amendment to a pleading relates back to the date of the original pleading when:
>
> > (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> > (3) the amendment changes the party or the naming of the party against whom a claim is asserted, if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that it will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[1]

The period provided in Rule 4(m) is 120 days after the date on which the complaint was filed.

[1] This is the applicable text of Rule 15(c) on October 31, 2006. The amendment to Rule 15(c) that became effective on December 1, 2008 made no substantive changes.

The importance to Plaintiff of having his proposed amendment relate back to the filing of the initial complaint is that the statute of limitations has run on the counts seeking to avoid alleged preferences and fraudulent transfers. The last day for timely filing a complaint under sections 547 and 548 of the Bankruptcy Code to recover a voidable preference or fraudulent transfer in this Chapter 11 case was November 3, 2006. 11 U.S.C. § 546(a)(1).

The last day for timely filing a complaint under section 549 of the Bankruptcy Code to recover an unauthorized postpetition transaction is two years after the date of the transfer. 11 U.S.C. § 549(d)(1). The amended complaint and the proposed new amendment attached to the motion to amend do not identify any unauthorized postpetition transfer. The exhibit to all versions of the complaint listing the transfers in question shows no postpetition transfer.

Rule 15(c)(1) is inapplicable because the applicable statutes of limitations, 11 U.S.C. §§ 546(a)(1) and 549(d)(1), contain no provision permitting an amended pleading to relate back to the date of the original pleading. Rule 15(c)(2) is intended to prevent unrelated and time-barred claims from being added by amendment. Here, the literal working of that subparagraph is satisfied in the sense that the proposed amended complaint mirrors the first amended complaint except for the identity of the defendant. But because the adding of a party is the subject of Rule 15(c)(3), Plaintiff must satisfy its conditions.

Rule 15(c)(3) requires Plaintiff to show that prior to March 1, 2007, the 121st day after this adversary proceeding was commenced, Soft Line received such notice of this adversary proceeding that it will not be prejudiced in defending it on the merits and knew or should have known that, but for the mistake in identifying it as the proper party, Plaintiff would have named it as the defendant. On this issue, Plaintiff has the burden of proof. *In re Greater Southeast*

Community Hosp. Corp. I, 341 B.R. 91, 98 (Bankr. D.Dist.Col. 2006); *In re Enron Corp*., 298 B.R. 513, 522 (Bankr. S.D.N.Y. 2003).

Plaintiff contends that Soft Line had timely notice of this proceeding for purposes of Rule 15(c) based on the service of the original complaint and the amended complaint and on the assertion that the U.S. Postal Service forwards mail. He maintains that "[t]he Bankruptcy Rules do not require Plaintiff to seek out a defendant to ensure proper notice when there is no reason to believe notice was not received by Mr. Ray at the time of service." Response to Supplemental Affidavit of Guy Ray, Document 26, p. 5. He further contends that an "identity of interest" existed between Soft Line and Leather Bella such that service on Leather Bella provided the requisite notice to Soft Line. Based on his argument that Soft Line received the requisite notice, Plaintiff asserts that Soft Line has not shown that it would be prejudiced by permitting the amendment.

Soft Line contends that the undisputed fact that Mr. Ray, Leather Bella, and Soft Line had vacated premises located at the Greensboro Address in January 2006 rebuts any presumption of receipt of the mail containing the complaints, which shifted back to Plaintiff the burden of proving that Soft Line received timely notice of this proceeding. Because Plaintiff has not provided further evidence that it received timely notice, Soft Line contends that Plaintiff failed to carry its burden of proof and therefore the motion should be denied. It further contends that Plaintiff's failure to name the correct defendant was due to lack of knowledge of the defendant, rather than a mistake, and therefore that Rule 15(c) is inapplicable, citing *Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999) and *Powers v. Graff*, 148 F.3d 1223, 1226-1227 (11th Cir. 1998).

As to the latter argument, Plaintiff asserts that its failure to name the proper defendant was not based on lack of knowledge of the identity of the defendant but rather was due to a mistake as to the defendant's proper name.

III.

The facts and contentions of the parties present four related issues under Rule 15(c): (A) whether Plaintiff's proposed amendment seeks to identify a new defendant previously unknown to Plaintiff or instead seeks to correct an error in the identity of the defendant; (B) whether the circumstances of the mailings of process by Plaintiff's counsel give rise to a presumption of receipt of the complaints by the addressees; (C) whether the service of process on Leather Bella's registered agent provided the requisite notice to Soft Line; and (D) whether there was an "identity of interest" between Soft Line and Leather Bella such that service on Leather Bella was service on Soft Line.

A.

In *Powers v. Graff*, 148 F.3d 1223, the Eleventh Circuit addressed the limits to the applicability of Rule 15(c), stating:

> The purpose of Rule 15(c) is to permit amended complaints to relate back to original filings for statute of limitations purposes when the amended complaint is correcting a mistake about the identity of the defendant. See *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir.1993) (Relation back applies where the amendment is made "to correct a misnomer of a defendant where the proper defendant is already before the court and the effect is merely to correct the name under which he is sued."). . . . "[The Rule] permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where ... there is a lack of knowledge of the proper party." *Worthington*, 8 F.3d at 1256 (emphasis added).

Powers v. Graff, 148 F.3d at 1226-1227. As explained below, Plaintiff's proposed amendment seeks to correct an error in the identity of the defendant, and therefore Soft Line's argument that Rule 15(c) is inapplicable is without merit.

The Court takes judicial notice of the confirmed plan in the main bankruptcy case of Rhodes, Inc. Under that plan, all Causes of Action [a defined term that included avoidance actions under sections 547, 548 and 549 of the Bankruptcy Code] were among estate assets that revested in Debtor Rhodes, Inc. See Case No. 04-78434, Document No. 2059, p. 19 (p.24 of 44), ¶6.2. That paragraph goes on to state that those Causes of Action "shall be prosecuted and enforced under the direction and control of the Liquidating Agent," who is Mr. Dugan. Thus, the real party in interest here is Rhodes, Inc., and it is charged with knowledge of the identity of Soft Line, S.p.A., as reflected in invoice exhibits that Soft Line attached to its supplemental brief filed on October 29, 2007. Nonetheless, Rhodes, Inc's agent, Mr. Dugan, states that he first learned of the correct name of the intended defendant when Soft Line moved to dismiss this adversary proceeding. Brief in Support of Plaintiff's Motion For Leave to Amend, p. 12 (Document 16, part 2).

The circumstances here are unlike the facts in the *Worthington* case cited by the *Powers* court, in which the plaintiff named "three unknown named police officers" as defendants and later sought to amend the complaint to name specific individuals. *Worthington v. Wilson*, 8 F.3d 1253, 1254. Nor are the facts here like those in *Powers*, where the plaintiffs knew from the beginning the names of the individuals they wanted to add as defendants, knew that those individuals controlled a corporate defendant but chose not to name them as defendants.

Plaintiff meant to sue the party to which Rhodes, Inc. made sizeable payments during the 90-day period preceding the petition date and knew that his target's name included the words "Soft Line." His mistake was failing to nail down the corporate name. He then compounded that mistake by assuming that Soft Line Group and Leather Bella were one and the same because at one time they shared the same address, overlooking in the process that e-mail correspondence

cited as the basis for assuming Leather Bella was the correct defendant had been signed "Delores, Soft Line SPA." Thus, the failure to name Soft Line was a case of incomplete and mistaken identity and not a case of ignorance about who to sue or doubt about Soft Line's potential liability.

B.

Serving the complaint on Mr. Ray was not the exclusive method by which Soft Line could have learned of this case. *In re Teligent Services, Inc*., 2005 WL 3789325, 2 (Bankr. .S.D.N.Y. 2005) ("Rule 15(c)(2) does not require service of the complaint upon the defendant."). But Plaintiff does not contend that Soft Line received notice through any means other than service of a summons and complaint by mail. He argues that Mr. Ray should be presumed to have received the mail containing complaints because the Greensboro Address seemed correct to Plaintiff and his counsel and apparently because he believes that the Postal Service always forwards mail. Plaintiff cited no case to support his position. Soft Line also did not cite a case on the question of when a presumption of receipt of mail arises; it did not concede, however, that there is such a presumption in this case. Instead, Soft Line argues that if a presumption of receipt exists, it has rebutted that presumption and that Plaintiff failed to introduce further evidence to show that it received the requisite notice.

The starting point in analyzing these contentions is whether a presumption of receipt exists based on the fact of mailing of the complaints. "The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *Konst v. Florida E. Coast Ry. Co.*, 71 F.3d 850 (11th Cir. 1996) ("The 'presumption of receipt' arises upon proof

that the item was properly addressed, had sufficient postage, and was deposited in the mail. The presumption is, of course, rebuttable.")(footnote omitted). The presumption of receipt is strengthened if correctly addressed mail is not returned by the Postal Service. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Broadhead*, 155 B.R. 856, 858 (S.D.N.Y. 1993). This presumption, sometimes referred to as the mailbox rule, has been applied under various factual settings involving many different statutes, including bankruptcy cases. *E.g.*, *Konst v. Florida E. Coast Ry.*, 71 F.3d at 854 (cataloguing cases); *In re Ms. Interpret*, 222 B.R. 409, 413 (Bankr. S.D.N.Y. 1998) (applying the mailbox rule in a bankruptcy case).

To be properly addressed, mail does not have to be accurate in all respects. *See, e.g., In re Longardner & Assocs., Inc*., 855 F.2d 455, 460 (7th Cir.1988) (holding the presumption applied but was weakened when no zip code was used), cert den. 489 U.S. 1015, 109 S.Ct. 1130, 103 L.Ed.2d 191 (1989); *In re Walker*, 125 B.R. 177 (Bankr. E.D.Mich. 1990) (presumption of receipt of notice found despite listing of creditor's address incorrectly as "153 N. Washington, Oxford, MI" instead of "153 S. Washington, Oxford, MI").

"[T]he presumption of receipt [of properly addressed mail] is 'not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business . . . ." *Barnett v. Okeechobee Hosp*., 283 F.3d 1232, 1240 (11th Cir. 2002) (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193-94, 4 S.Ct. 382, 386 (1884)). It follows that there is a limit to the acceptable degree of inaccuracy because the more inaccurate the address on a piece of mail is, the lower the probability of its delivery in the course of business of the Postal Service.

In *In re La Rouche Industries, Inc*., 307 B.R. 774, 777 (D.Del. 2004), a creditor appealed an order of the bankruptcy court refusing to vacate an order disallowing his claim. The creditor

argued that he had not received the objection, which the trustee had mailed to "Drive Hicks Boulevard" at the correct city, state and zip code, instead of to "Doctor Hicks Boulevard." The district court reversed, stating:

> As the Supreme Court has recognized, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections...." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Under the Bankruptcy Rules, a claimant must receive a copy of the objection to his claim and notice of a hearing, at least 30 days prior to the hearing, before his claim can be expunged. Fed. R. Bankr.P. 3007. The burden is on the Debtors to show that they satisfied the notice requirements. *See Dependable Ins. Co. v. Horton (In re Horton),* 149 B.R. 49, 57 (Bankr.S.D.N.Y.1992). However, a presumption of receipt of notice arises when mail is properly (1) addressed, (2) stamped, and (3) deposited in the mail system. *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932).
>
> After reviewing the decision of the Bankruptcy Court in light of the applicable law, the Court concludes that the Bankruptcy Court erred in applying the presumption of receipt of notice in this case. As the Bankruptcy Court recognized, the address on the notice to Appellant was partially incorrect. Where, as here, the notice was not properly addressed, the presumption of receipt of notice does not attach. *In re Randbre Corp*., 66 B.R. 482, 485 (Bankr.S.D.N.Y.1986); *see also In re Taylor*, 207 B.R. 995, 999 (Bankr.W.D.Pa.1997).

Id. at 778-779. Similarly, mail directed to the wrong city is not presumed to have been received by the addressee. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 457 (6th Cir. 1982).

At the times that Plaintiff's counsel mailed process to the Greensboro Address, the evidence shows that Leather Bella, Soft Line and Mr. Ray were no longer at that address and had moved their offices to a different city. For that reason, the mail was not properly directed to Leather Bella, Soft Line or Mr. Ray so as to give rise to a presumption of receipt. The use of an address that has not been the current address of the intended recipient for nearly a year cannot be said to be reasonably calculated to reach the intended recipient, particularly where the effort to determine the correct address was plainly inadequate, as discussed below.

Plaintiff contends that the Court should presume that the mail directed to the former address of Mr. Ray was forwarded by the U.S. Postal Service because on the website of the Postal Service, there is a page that states mail is forwarded for one year. In his affidavit filed on February 15, 2008, Mr. Underdahl states that "[w]hen a company moves and a change of address is submitted to the United States Postal Service, first class mail is forwarded to the company's new address for twelve (12) months." But this statement does not prove what the Postal Service did with mail directed to a stale address in 2006. Plaintiff has cited no case, and the Court has not found a case, holding that where mail is directed to a stale address, it is presumed that such mail is always forwarded to and received by the intended recipient. Plaintiff has produced no evidence to show that Mr. Ray, Leather Bella or Soft Line provided the Postal Service with a change of address form or otherwise requested that mail directed to the Greensboro Address be forwarded to a different address.

In the absence of evidence that an addressee provided the post office with a forwarding address, "the presumption of receipt arising from the posting of the notices and letters is destroyed." *Henderson v. Carbondale Coal & Coke Company*, 140 U.S. 25, 40, 11 S.Ct. 691, 35 L.Ed. 332; *General Accident Fire & Life Assurance Corporation v. Pacific Coast Casualty Company*, 2 Cir., 247 F. 416." *Kansas City Life Ins. Co. v. Cox,* 104 F.2d 321, 325 (6th Cir. 1939). In the *Henderson* case cited by the Sixth Circuit, the Supreme Court opined that "no such presumption [of receipt of mail] arises unless it appears that the person addressed resided in the city or town to which the letter was addressed." *Henderson v. Carbondale Coal & Coke Company*, 140 U.S. at 37. In the *General Accident* case on which the Sixth Circuit also relied, Judge Learned Hand, writing for the Second Circuit, stated:

Thus in the colloquy between the court and Mr. McDonnell the court said:

> ‘You have not here any proof that instructions were given to the post office authorities to forward mail.‘
>
> He answered:
>
> ‘No; but I have proof here that I mailed a letter to your last-known address.‘
>
> We think that the defendant failed to show that the plaintiff ever received the summonses, and that the direction of a verdict for the plaintiff was right. None of the exceptions to the exclusion of evidence seem to us to affect the result. Without the necessary keystone to the defense, nothing could support it.

General Acc. Fire & Life Assur. Corp. v. Pacific Coast Casualty Co., 247 F. at 419. Based on these authorities and the lack of proof that the Postal Service was asked to forward mail directed to the Greensboro Address, there is no presumption that Mr. Ray or Soft Line received either complaint mailed to the Greensboro Address.

C.

Plaintiff has shown that he properly served the first amended complaint on the registered agent of Leather Bella, James Diana. Mr. Diana is not the registered agent of Mr. Ray or Soft Line. Plaintiff has not argued that service on Mr. Diana provided the requisite notice to Soft Line, although he has asserted that those companies had an “identity of interest,” which is discussed below. But Soft Line has argued that service on the registered agent of Leather Bella did not provide notice to Soft Line of the pendency of this adversary proceeding. The Court agrees with Soft Line.

First, there is no evidence that Mr. Diana actually received the envelope containing the amended complaint, opened it and read the contents. While the facts concerning the service of process on him are sufficient to establish a prima facie case that this Court has in personam jurisdiction over Leather Bella, those facts do not establish that Mr. Diana had actual notice of the contents of the envelope. Hence, even if knowledge of Mr. Diana were imputed to Leather Bella

and Leather Bella's knowledge were imputed to Mr. Ray and therefore to Soft Line, which is a doubtful proposition, the absence of proof that Mr. Diana had knowledge that this matter involved Soft Line would be fatal to a contention, which Plaintiff has not made, that Soft Line learned of this proceeding based on what Mr. Diana knew.

The second reason that service on Mr. Diana did not provide notice to Soft Line is that as a matter of law, service on one company's agent for service of process does not constitute service on any other entity. *Martz v. Miller Bros. Co.*, 244 F. Supp. 246 (D.C. Del. 1965).

> [I]n *Martz v. Miller Brothers Company*, plaintiff had the misfortune of serving someone who was an agent of the corporation that was named but not of the one intended to be sued. The court held that although the names of the companies were similar, their officers and shareholders were common, and the business activities were the same, service on one who was not an agent for the party that plaintiff was trying to sue would not be effective to institute an action against it *or to give notice to the intended party*.

6A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1499 (emphasis added).

D.

The remaining contention of Plaintiff is that Soft Line and Leather Bella have an "identity of interest" and that notice to Leather Bella was notice to Soft Line. The flaw in this argument is that Plaintiff has not proved that Soft Line, Mr. Ray or Leather Bella actually knew of the pendency of this proceeding prior to May 2007. Insofar as Soft Line and Mr. Ray are concerned, the service of process on Leather Bella's registered agent could have supplied the requisite knowledge for the reasons explained above.

The contention that Leather Bella and Soft Line shared an "identity of interest" lacks merit on its own terms for the following reasons.

> Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other. As is true of other aspects of Rule 15(c), the objective is to avoid the application of the statute of limitations when no prejudice would result to the party sought to be added by the amendment.
> . . .

> Although the relationship needed to satisfy the identity of interest test varies somewhat depending on the underlying facts, some general observations may be made. An identity of interest has been found between a parent and a wholly owned subsidiary, as well as between related corporations whose officers, directors, or shareholders are substantially identical and who may have similar names or conduct their business from the same offices. Identity of interest also has been found between past and present forms of the same enterprise.

6A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1499 (footnotes omitted). The conclusion that a parent-subsidiary link is sufficient alone to establish an identity of interest has been questioned.

> Courts accepting that rationale have required substantial structural and corporate identity, such as shared organizers, officers, directors, and offices, *see, e.g., Travelers Indem. Co. v. United States*, 382 F.2d at 106. . . . Further, the parent-subsidiary relationship standing alone is simply not enough-as Professors Wright and Miller perhaps too optimistically state, see 6 C. Wright & A. Miller, Federal Practice and Procedure § 1499, at p. 518 (1971)-to establish the identity of interest exception to the relation back rule. Greater identity of interest must be shown than this record reveals. The two businesses must have organized or conducted their activities in a manner that strongly suggests a close linkage.

In re Allbrand Appliance & Television Co., Inc., 875 F.2d 1021, 1025-1026 (2nd Cir. 1989).

Here, Plaintiff argues that Soft Line and Leather Bella have an identity of interest because Mr. Ray is a vice president of Soft Line and a principal of Leather Bella and because the companies shared the same street address. In support of this contention, Plaintiff relies on *E.I. duPont de Nemours & Co. v. Phillips Petroleum Co.*, 621 F. Supp. 310 (D.C. Del. 1985). In that case, duPont sued Phillips Petroleum Company for patent infringement and later added as a defendant Phillips Chemical Company, a wholly-owned subsidiary of Phillips Petroleum. The defendants answered the complaint, and the parties conducted extensive discovery. Four years into the case, duPont moved pursuant to Rule 15(c) to add Phillips Driscopipe, Inc., also a wholly-owned subsidiary of Phillips Petroleum, as an additional defendant. Phillips Petroleum and Driscopipe opposed the motion on the grounds of laches and estoppel and of prejudice. The

district court ruled those two defenses need not be addressed because the amendment, if permitted, would relate back to the filing of the original complaint pursuant to Rule 15(c). *Id.* at 313. The court found that Driscopipe had notice of the litigation during the relevant period so that it would not be prejudiced in mounting a defense and hence that requirement of Rule 15(c) was "clearly met." *Id*. at 314.

As to Rule 15(c)'s requirement that Driscopipe knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against it, the court opined that this requirement was satisfied if Phillips Petroleum and Driscopipe had an "identity of interest." The court found an identity of interest between them, stating that "[s]ince Driscopipe is a wholly-owned subsidiary of Phillips Petroleum Company, their close intercorporate relationship is at the core of an 'identity of interest.' Accordingly, *because the parent corporation had actual notice*, adding its wholly-owned subsidiary as a party defendant does not prejudice the subsidiary." *Id.* (emphasis added).

Neither the Supreme Court nor the Eleventh Circuit has held that Rule 15(c)'s requirements may be satisfied by finding an "identity of interest" between an existing defendant and an entity proposed to be added as a defendant. *See Schiavone v. Fortune,* 477 U.S. 21, 28-29, 106 S.Ct. 2379, 2384 (1986); *cf. Cliff v. Payco General American Credits, Inc*., 363 F.3d 1113, 1132 (11th Cir. 2004) (declining to reach the issue with respect to adding a new plaintiff). If it is assumed that finding an "identity of interest" would satisfy requirements of Rule 15(c), Plaintiff has not established an identity of interest between Soft Line and Leather Bella.

Plaintiff has provided no evidence to show that during the relevant period of time, these companies were parent and subsidiary or brother-sister companies or that they shared officers and directors other than Mr. Ray. Nor is there any evidence that one was a successor company to the

other. There is no evidence that a judgment against Soft Line would adversely affect Leather Bella or Mr. Ray. Indeed, Plaintiff has offered no evidence whatsoever to show any relationship between these companies during the relevant 120-day period from the commencement of this adversary proceeding other than Mr. Ray was an officer of Soft Line and a managing member of Leather Bella and they shared the same street address prior to January 2006.

The underlying rationale of the "identity of interest" doctrine is the high likelihood that companies that are very closely related will share information about a lawsuit of common concern. In the *duPont* case, the interest of Phillips Petroleum and Driscopipe were co-extensive because the latter was a wholly-owned subsidiary that sold pipe alleged to be infringing on the patent. The subject matter of the lawsuit was of equal concern to both companies because the profits of the subsidiary, which manufactured pipe alleged to have infringed the plaintiff's patent, inured to the benefit of the parent and because the parent corporation had actual notice of the lawsuit and was actively engaged in defending it. In the present proceeding, Plaintiff has not shown that Soft Line and Leather Bella were so closely related that Leather Bella would be concerned about a preference action against Soft Line so as to pass on that information in the latter part of 2006 and early 2007. Indeed, Plaintiff has not proved that Leather Bella had actual knowledge of the pendency of this proceeding prior to May 2007. For these reasons, Plaintiff has not proved that Soft Line and Leather Bella had so close a relationship that for purposes of Rule 15 (c) they had an "identity of interest" such that the bare service of process by mail on a registered agent of Leather Bella provided notice to Soft Line of the pendency of this adversary proceeding.

IV.

At the heart of this matter is a misunderstanding of the depth of responsibility for providing proper notice in bankruptcy cases where service is made by mail. Plaintiff argues that "[t]he Bankruptcy Rules do not require Plaintiff to seek out a defendant to ensure proper notice when there is no reason to believe notice was not received by Mr. Ray at the time of service." He is correct in that Bankruptcy Rule 7004 does not require a plaintiff to confirm with a defendant that the defendant received process under any circumstances. To the extent he believes that the lack of a duty to contact a defendant about service relieves a plaintiff of attending to proper service, he is mistaken.

A plaintiff should always want to confirm receipt if there is any reason to doubt that the court might not have personal jurisdiction over the defendant, because an in personam judgment entered by a court lacking jurisdiction over the person of the defendant is void. *Sloss Industries Corp. v. Eurisol*, 488 F.3d 922, 924 (11th Cir. 2007). Plaintiff argues incorrectly that he had no reason to believe that there was any problem with service. He is wrong because he made no reasonable effort to ensure the address he used was correct, as explained below. Even if he had no basis to think service was defective, Plaintiff's belief about the sufficiency of service is irrelevant to whether or not he served the complaints properly.

In assuming that service was proper, Plaintiff apparently overlooked Bankruptcy Rule 7004(f) which provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

To be effective under the Constitution, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Notice here could not have been reasonably calculated to apprise Mr. Ray of the pendency of the action because the mailing address used was not the address of Mr. Ray or Soft Line at the times of service. Plaintiff lacked a reasonable basis for assuming that the Greensboro Address was correct because he knew he had not verified it as Mr. Ray's address from then current, reliable sources. He found that address on checks issued by Rhodes to Soft Line Group two years prior to service of the initial complaint and on a website that provided no assurance whatsoever that the address shown for Leather Bella was accurate in late 2006. Plaintiff could have taken one or more of several simple steps to verify the correct address, ranging from using certified mail, return receipt requested, in addition to regular mail, to contacting the registered agent of Leather Bella, to making inquiries in the industry, to using telephone directories and the Internet to obtain a current telephone number and calling it, to hiring someone in Greensboro to verify that the address remained current, to serving process personally. The necessity of making these kinds of efforts would seem obvious in a case in which the demand was $1,641,060.86.

To find that a presumption of receipt arose under the circumstances described in this Order would encourage attorneys to be careless in attending to service of notices and process by mail, which is an essential aspect of operating the bankruptcy system economically. The use of mail to serve notices and process is a privilege not to be treated lightly.

V.

Plaintiff's failure to respond to Leather Bella's motion to dismiss and his motion to amend to delete Leather Bella as a defendant show that he has no opposition to its motion to dismiss. See

Bankruptcy Local Rule 7007-1. Plaintiff contends that Soft Line is not a party to this adversary proceeding, and because the Court is denying Plaintiff's motion to amend, Soft Line's motion to dismiss is moot.

For these reasons, Plaintiff's motion for leave to amend the first amended complaint is DENIED, Defendant's motion to dismiss it as a defendant is GRANTED, and Soft Line's motion to dismiss is DENIED as moot.

END OF ORDER