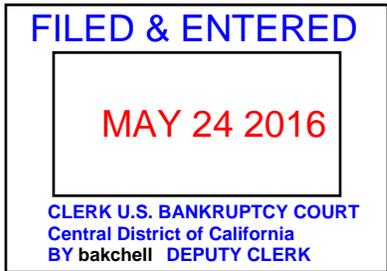


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NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:
BRENNON TY BISHOP and MICHELLE
BISHOP,
Debtors.
ELECTRONIC FUNDS SOLUTIONS, LLC,
as successor-in-interest to RICHARD A.
MARSHACK, Chapter 7 Trustee,
Plaintiff,
v.
FEDCHEX, LLC; FEDCHEX RECOVERY,
LLC; ED ARNOLD; RODNEY DAVIS;
FEDCHEX MERCHANT SERVICES;
FEDCHEX/DS GROUP; YELLOW PAGES
DIRECTORY SERVICES, LLC; YELLOW
PAGES 2000, INC.; BSYB, INC.; NICHE
DIRECTORIES, LLC; CONVERGENTDS,
LLC; DIRECT VISION; DS MARKETING;
YK2000; iEXCHANGE,
Defendants.

Case No. 2:12-bk-16000-RK

Chapter 7

Adv. No. 2:12-ap-01302-RK

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANTS'
MOTION TO SUBSTITUTE PARTY DUE
TO TRANSFER OF INTEREST**

Pending before the court is the motion of the remaining defendants in this
adversary proceeding, FedChex, LLC ("FedChex"), FedChex Recovery, LLC ("FedChex

1 Recovery”), Ed Arnold (“Arnold”), Rodney Davis (“Davis) (collectively, “Defendants”), to
2 substitute party due to transfer of interest (“Motion”). ECF 554. Plaintiff Electronic Funds
3 Solutions (“EFS”) filed an opposition to the Motion, ECF 566, and Defendants filed a reply
4 thereto, ECF 568.

5 On December 1, 2014, at the initial hearing on the Motion, the court determined
6 that the Motion would be treated as a contested matter under Federal Rule of Bankruptcy
7 Procedure 9014. The court then set a status conference on the matter, which was
8 continued from time to time to allow the parties to engage in mediation and settlement
9 discussions, to allow Plaintiff’s then new counsel, Arent Fox LLP, adequate time to
10 familiarize itself with the adversary proceeding and participate in mediation and
11 settlement discussions, and, after the court later entered an order granting Arent Fox
12 LLP’s Motion to Withdraw as Plaintiff’s Counsel, ECF 663, to allow Plaintiff additional
13 time to find new counsel to further oppose the Motion. Since at the time of the status
14 conference in this matter on May 11, 2016, Plaintiff had not retained new counsel, and
15 Defendants opposed any further delay of a ruling on the Motion, the court took the Motion
16 under submission. Having considered the moving and opposing papers, the exhibits and
17 declarations attached therein, the parties’ oral arguments, and the record before the
18 court, the court rules as follows.

19 **DISCUSSION**

20 The Motion alleges that subsequent to the filing of the Fourth Amended Complaint,
21 ECF 112, which is the operative complaint in this adversary proceeding, FexChex
22 transferred all of its assets and liabilities to FedChex Recovery, and based thereupon,
23 now moves to substitute FedChex Recovery for FedChex in this adversary proceeding
24 pursuant to Federal Rule of Civil Procedure 25(c), made applicable to this adversary
25 proceeding by Federal Rule of Bankruptcy Procedure 7025.

26 Federal Rule of Civil Procedure 25(c) provides in pertinent part: “If an interest is
27 transferred, the action may be continued by or against the original party unless the court,
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1 on motion, orders the transferee to be substituted in the action or joined with the original
2 party.” As recognized by one commentary, the Rutter Group Practice Guide on Federal
3 Civil Procedure Before Trial,

4 If a party to a lawsuit assigns or otherwise transfers its interest during the
5 course of the proceedings, a motion *may* be made to substitute the
6 assignee. But this is not required. The action may be continued by or
against the original party (assignor) and the resulting judgment is binding on
the original party’s successor in interest (assignee).

7 The Rule is designed to allow an action to continue unabated when an
8 interest in a lawsuit changes hands, rather than requiring the initiation of an
entirely new lawsuit. But the Rule is procedural only. It does not determine
9 whether the interest is transferable as a matter of law or what actions
survive the transfer.

10 The decision to grant or deny substitution on the basis of a transfer of
11 interest rests in the court’s discretion.

12 1 Wagstaffe, *Rutter Group Practice Guide: Federal Civil Procedure Before Trial*, ¶ 7:366
13 at 7-136 (2016) (citations omitted) (emphasis in original); *see also, Hilbrands v. Far East*
14 *Trading Co., Inc.*, 509 F.2d 1321, 1323 (9th Cir. 1975) (“Rule 25, it is true, is procedural
15 . . .”). As recognized by another commentary, Wright, Miller & Kane on Federal Practice
16 and Procedure, “If the transferor and the transferee are both already parties to the action,
17 the court, again in its discretion, may dismiss the transferor from the suit. Since the
18 matter is discretionary, the court also may refuse substitution if this seems the wisest
19 course.” 7C Wright, Miller & Kane, *Federal Practice and Procedure*, § 1958 at 702-703
20 (2007 and 2015 Supp.). Wright, Miller & Kane further stated:

21 The most significant feature of Rule 25(c) is that it does not require that
22 anything be done after an interest has been transferred. The action may be
23 continued by or against the original party, and the judgment will be binding
24 on the successor in interest even though the successor is not named. An
order of joinder is merely a discretionary determination by the trial court that
the transferee’s presence would facilitate the conduct of the litigation.

25 *Id.* at 696-698, *citing inter alia, Hilbrands v. Far East Trading Co., Inc., supra* (footnotes
26 omitted).

1 Based on the court's examination of the case law regarding Federal Rule of Civil
2 Procedure 25(c), the rule is typically used to substitute transfer parties who were not
3 parties to the proceeding when the suit was commenced into the proceeding. See, e.g.,
4 *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 427 (1991); *ELCA*
5 *Enterprises, Inc. v. Sisco Equipment Rental & Sales, Inc.*, 53 F.3d 186, 188 (8th Cir.
6 1995); *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350 (11th Cir. 1994). That is not
7 the situation in this case, however.

8 Plaintiff's Fourth Amended Complaint, which was filed in this adversary proceeding
9 on August 19, 2005 against the named Defendants, as well as against other defendants
10 which were dismissed with prejudice on August 26, 2009, ECF 406, asserted all of its
11 eight causes of action against all defendants, including both FedChex LLC and FedChex
12 Recovery. ECF 112. Defendants in their Motion contend that, during the pendency of
13 this adversary proceeding, FedChex LLC transferred all of its assets and liabilities to
14 FedChex Recovery. Motion at 2; Declaration of Rod Davis at ¶ 4. Plaintiff in its
15 opposition to the Motion contends that FedChex, LLC was terminated through a
16 Certificate of Cancellation filed with the California Secretary of State during the pendency
17 of this adversary proceeding on September 19, 2013. Opposition at 2; Ex. A.

18 Whether to grant or deny substitution under Federal Rule of Civil Procedure 25(c)
19 rests in the court's discretion. See, e.g., *Dodd v. Pioche Mines Consolidated, Inc.*, 308
20 F.2d 673, 674 (9th Cir. 1962); *Sun-Maid Raisin Growers v. California Packing*
21 *Corporation*, 273 F.2d 282, 284 (9th Cir. 1959). Federal Rule of Civil Procedure 25(c)
22 "focuses on what was really going on in this case, and is designed to cope with that." *In*
23 *re Bernal*, 207 F.3d 595, 598 (9th Cir. 2000).

24 Given that all causes of action in the operative complaint were also pleaded
25 against FedChex Recovery, if the Motion was granted, the only effect would be
26 procedural and would not apparently affect the liability of any successor of interest, i.e.,
27 FedChex Recovery for FedChex LLC. Because the court has not made, nor is the court
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1 aware of, any judicial determination as to the validity of FedChex LLC's alleged
2 dissolution, the court exercises its discretion and determines that it should not grant the
3 motion to substitute FedChex Recovery for FedChex in this adversary proceeding, which
4 would dismiss FedChex LLC from the adversary proceeding. To grant the Motion might
5 prejudice Plaintiff EFS's ability to collect on a future judgment in this adversary
6 proceeding and given that Plaintiff's opposition argues that FedChex's termination was
7 fraudulent and intended to thwart its recovery on any judgment in this adversary
8 proceeding, the court believes that denial of the Motion is the wisest course of action and
9 will not take any action which would alter the procedural status quo in this adversary
10 proceeding. As noted in *Virgo v. Riviera Beach Associates, Ltd.*, "[t]ransferring assets of
11 a corporation that is engaged in litigation and its effect on the lawsuit is governed by state
12 law." 30 F.3d at 1357-1358, *citing, Defense Supplies Corp. v. Lawrence Warehouse Co.*,
13 336 U.S. 631 (1949). However, the issue of the effect of the transfer of assets of
14 FedChex LLC to FedChex Recovery LLC under state law has not been discussed and
15 analyzed by the parties in their briefing on the Motion, and the court hesitates to make a
16 ruling that may potentially affect the result of litigating that issue under state law by
17 granting the Motion to substitute parties. Further, given that FedChex Recovery is
18 already a defendant to all of the Fourth Amended Complaint's causes of action, the court
19 observes that the requested substitution would not really provide procedural benefit in
20 moving forward in the litigation of this adversary proceeding which is nearly at its

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1 conclusion before this court now that the trial is completed. Accordingly, Defendants'
2 Motion is denied.

3 IT IS SO ORDERED.

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Date: May 24, 2016



Robert Kwan
United States Bankruptcy Judge