

worked in the Debtor's distribution group during the same time period; and BBC Distribution, L.L.C. ("BBC"), which is the corporation formed by Hardin and Leadbetter (National Gypsum, Hardin, Leadbetter, and BBC are collectively referred to as the "Defendants").

I. Background

On January 16, 2002, the Plaintiffs filed suit against the Defendants in the 193rd Judicial District Court in Dallas County, Texas (the "State Court Action"). In the petition filed in the State Court Action (the "Petition"), Plaintiffs allege that while employed by Kevco, Hardin and Leadbetter began discussions with National Gypsum to plan the formation of a company to compete with Kevco. Plaintiffs further allege that (i) the Defendants planned to move the key officers, supplier and customers into a competing company which would become the depository for everything of value at Kevco, leaving the debt owed to Plaintiffs behind; (ii) on January 19, 2001, Leadbetter left the Debtor's employ; Hardin left a week later; and National Gypsum and other suppliers and customers followed Leadbetter and Hardin to their new corporation, BBC; (iii) less than two weeks later, on February 5, 2001, Kevco filed its voluntary petition for relief under the Bankruptcy Code, thereby commencing this Chapter 11 case (the "Case"); and (iv) Defendants knew or should have known that their actions would leave Kevco unable to pay its debts to Plaintiffs. Plaintiffs plead claims for tortious interference with contract and conspiracy to commit tortious interference, and allege damages of in excess of \$40 million. In short, the theory underlying the Petition is that Defendants tortiously interfered with Plaintiffs' debt contracts with Kevco.

On February 15, 2002, Defendants Hardin, Leadbetter and BBC filed a Notice of Removal

(the “Notice”) of the State Court Action to this Court,¹ alleging that this Court has jurisdiction under 28 U.S.C. § 1334 because “Plaintiffs . . . purport to assert a claim that belongs to the Debtor.” *See* Notice, ¶ 4. The Notice also alleges that upon removal, the cause of action is a core proceeding and that “[t]his court has exclusive jurisdiction to determine what constitutes the property of the estate.” *See* Notice, ¶ 5. NGC, Inc. (alleging that it was incorrectly sued as National Gypsum) joined in the removal.

Plaintiffs now ask the Court to either remand the State Court Action or to abstain from hearing it for several reasons. First, Plaintiffs contend that the Notice is fatally defective. Second, Plaintiffs contend that the State Court Action is not removable, as this Court lacks subject matter jurisdiction over the claims asserted in the Petition. In the alternative, Plaintiffs contend that even if this Court has jurisdiction, the Court must abstain from hearing the claims asserted in the State Court Action pursuant to 28 U.S.C. § 1334(c)(2) or, if not, that the Court should exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c)(1). Lastly, Plaintiffs contend that remand on equitable grounds is proper pursuant to 28 U.S.C. § 1452(b).

The Defendants oppose remand or abstention, as does the Official Committee of Unsecured Creditors appointed in the Case (the “Committee”).

II. Discussion

A. Procedural Challenges

Removal is governed by Federal Rule of Bankruptcy Procedure 9027. Subsection (a)(1) of

¹Removal was timely pursuant to Fed. R. Bankr. P. 9027(a)(3). If a case under the Bankruptcy Code is pending when a claim is asserted in another court, Rule 9027(a)(3) permits removal within 30 days after receipt of a copy of the initial pleading setting forth the claim sought to be removed. The Case was pending when Plaintiffs filed the State Court Action on January 16, 2002. Defendants contend, and Plaintiffs do not challenge, that the first-served defendant was served with process on January 23, 2002. *See* Notice of Removal, ¶ 3. Accordingly, the Notice of Removal filed on February 15, 2002 was timely.

that rule provides that a notice of removal “shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending.” Fed. R. Bankr. P. 9027(a)(1). Plaintiffs contend that the Notice is defective because the State Court Action was pending in Dallas County, but the Notice was filed in the Fort Worth division of this Court. While Plaintiffs concede that this defect is curable, they assert that it is now too late to cure, as the 30-day period during which a notice of removal could properly be filed has now expired. *See* Fed. R. Bankr. P. 9027.

Defendants and the Committee point out that under the Local Rules for the Northern District of Texas and the clerk’s office procedures designed to effect those Local Rules, an action, upon removal, must be assigned an adversary proceeding number under the main bankruptcy case and assigned to the bankruptcy judge presiding over that case. Therefore, even if the Notice had been filed in the Dallas division, the clerk would have assigned it a Fort Worth case number (since the Case is assigned to the Fort Worth division) and would have forwarded the adversary proceeding to Fort Worth. As a result, Defendants contend that the filing of the Notice in Fort Worth did not effect a result any different from that contemplated by the Local Rules, procedures, and practice in this Court.

The Court agrees. To conclude that the filing of the Notice in the Fort Worth division is a fatal jurisdictional defect is to elevate form over substance. While there may have been a technical defect in the filing,² Plaintiffs have failed to show that they have suffered any harm as a result of that defect or that the sanctity of any bankruptcy or state law policy has been marred. The Court is

²The Court notes that Defendants assert that they attempted to file the Notice in the Dallas division, but that the clerk refused to accept the filing and sent them to the Fort Worth division as the main bankruptcy case was pending there.

not persuaded by Plaintiffs' cases, *see, e.g., Careertrack Seminars, Inc. v. Lomasney*, 150 B.R. 257 (D. Colo. 1992) (holding that failure to attach copies of pleadings to notice of removal is a fatal defect), but rather believes that the better view is that a mere procedural defect in the filing of a notice of removal, standing alone, should not serve as the sole basis for remand. *See H.J. Rowe, Inc. v. Sea Prod., Inc. (In re Talon Holdings, Inc.)*, 221 B.R. 214 (Bankr. N.D. Ill. 1998); *see also Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634 (5th Cir. 1994) (construing the general district court removal statutes and stating that removal to the wrong division is procedural, not jurisdictional).³ Plaintiffs also contend that the Notice is defective under Rule 9027(a) because (i) it fails to contain "a short and plain statement of the facts which entitle the party filing the notice to remove . . . ," *see* Fed. R. Bankr. P. 9027(a)(1); and (ii) it does not specifically identify any claim asserted by Plaintiffs which is alleged to be "property of the estate" and therefore subject to the exclusive jurisdiction of this Court.⁴

The Court disagrees. The Notice clearly states that Plaintiffs are asserting a claim which belongs to Kevco's bankruptcy estate and that this Court has exclusive jurisdiction under section

³The *Kreimerman* court cured the defect by directing that the lawsuit be transferred to the division in which the notice of removal should have been filed. In the present case, that would mean transferring the adversary proceeding to Dallas, where the Notice should have been filed. But effecting such a transfer makes little sense here where, pursuant to our Local Rules and procedures, it would simply be transferred back. The Case is pending in the Fort Worth division, and our Local Rules and procedures would require that the adversary proceeding be assigned to the undersigned with a Fort Worth case number. In addition, this Court will preside over this adversary proceeding whether it is assigned to the Fort Worth division or to the Dallas division. Moreover, as this Court has discretion to hold hearings in either forum, the divisional distinction is one without a difference.

⁴Plaintiffs also contend that under the well-pleaded complaint rule, facts in support of jurisdiction must appear on the face of the Notice. Plaintiffs further contend that Defendants' argument that the claims asserted in the Petition are property of the estate is, in effect, a standing argument, and that standing is an affirmative defense. Citing *Foxmeyer Health Corp. v. McKesson Corp. (In re FoxMeyer Corp.)*, 230 B.R. 791 (Bankr. N.D. Tex. 1998), Plaintiffs argue that an affirmative defense does not give rise to federal jurisdiction sufficient to support removal. For the reasons explained further below, however, the argument that a particular claim is property of the estate, while certainly implicating standing, is much broader and more substantive. Moreover, *FoxMeyer* is distinguishable as the court expressly declined to decide whether the claims raised in the complaint at issue there were property of the estate. *FoxMeyer*, at 796 ("The Delaware court will decide whether the claims asserted by Avatex are property of the FoxMeyer estates. This court has accordingly deferred that issue to the Delaware court").

1334 to determine what claims constitute property of the estate. Although the Notice does not refer to any particular subsection of section 1334, Rule 9027 contains no such requirement. *See Wormley v. Southern Pac. Transp. Co.*, 863 F. Supp. 382, 384 (E.D. Tex. 1994) (“the ‘short and plain’ standard is not a burdensome one . . . [it] is treated the same way as the Fed. R. Civ. P. 8(a) requirement that a complaint . . . must contain a short and plain statement of the grounds upon which the court’s jurisdiction depends . . .” (quoting *Grynberg Prod. Corp. v. British Gas P.L.C.*, 817 F. Supp. 1338, 1354 (E.D. Tex. 1993))). As noted previously, Plaintiffs assert only two related claims in the Petition – tortious interference and conspiracy to commit tortious interference. Defendants’ failure to specifically identify in the Notice which of these claims they believe is property of the estate hardly leaves Plaintiffs in the dark. The allegations in the Notice are sufficient to put the Plaintiffs on notice of Defendants’ claims and to invoke this Court’s jurisdiction. *See, e.g., Ross v. Thousand Island Adventures of Iowa, Inc.*, 163 F. Supp.2d 1044 (S.D. Iowa 2001) (construing 28 U.S.C. § 1446(a), which also requires a short and plain statement of grounds for removal, and concluding that a notice of removal which merely refers to jurisdiction under 28 U.S.C. §157 is sufficient to preserve the removing party’s right to amend its notice of removal outside the 30 day window during which an action may be removed).

B. Subject Matter Jurisdiction

1. In General

Removal of a civil action to the bankruptcy court is governed by 28 U.S.C. § 1452 which provides:

- (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental units’ police or regulatory power, to the district court for the district where such civil action is pending,

if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). Therefore, the first question is whether this Court has jurisdiction over the claims asserted in the State Court Action under section 1334. Generally, removal statutes must be strictly construed because removal jurisdiction “implicates important federalism concerns.” *Watts v. Tex. Workforce Comm’n*, 1999 WL 812795 (N.D. Tex. 1999) (citing *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997)). Furthermore, “any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court.” *Id.* (quoting *Cross v. Bankers Multiple Line Ins. Co.*, 810 F.Supp. 748, 750 (N.D. Tex. 1992)). The Defendants, as the removing parties, bear the burden of establishing federal jurisdiction under section 1334. *See Frank*, 128 F.3d at 921-22; *Faulk v. Owens-Corning Fiberglass Corp.*, 48 F.Supp.2d 653 (E.D.Tex. 1999).

Section 1334 provides in relevant part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to a case under title 11.

* * *

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1334.

2. Are the Claims Property of the Estate?

As relevant here, the Court must decide whether the claims asserted by Plaintiffs in the Petition are property of the estate. The parties agree that any causes of action belonging to the Debtor when the Case was filed are property of the estate, *see Louisiana World Exposition v. Federal Ins.*

Co., 858 F.2d 233 (5th Cir. 1988), and that this Court has exclusive jurisdiction over those claims. 28 U.S.C. § 1334(e). The parties also agree that in order to determine whether a cause of action is property of the estate, the Court must look to state law. *See In re Educators Group Health Trust*, 25 F.3d 1281 (5th Cir. 1994). The parties disagree, however, with respect to the proper characterization of the claims asserted in the Petition.

Plaintiffs contend that under the Texas Supreme Court's decision in *Holloway v. Skinner*, 898 S.W. 2d 793 (Tex. 1995), a party contracting with a corporate entity has a claim against corporate officers who tortiously interfere with that contract independent of any claims that the corporation may have against those same officers for breach of fiduciary duty arising from their conduct. In *Holloway*, a creditor sued a corporation for breach of its obligations under a note, and obtained a money judgment. That judgment went unsatisfied, and the corporation filed for bankruptcy relief. The creditor then sued the president, director and largest shareholder of the corporation, claiming that he tortiously interfered with the creditor's note by inducing the corporation to default. The question presented was whether a corporate officer could be held liable for interfering with a contract between his corporation and the creditor.

The Texas Supreme Court began its analysis by noting that Texas law provides that a party to a contract has a cause of action for tortious interference against any third party stranger to the contract who wrongly induces another contracting party to breach the contract. The Texas Supreme Court recognized, however, that the person who induces the breach cannot be a contracting party because if the rule were otherwise, every breach of contract claim would become a tort claim. Because a corporation cannot act without agents, as a general rule, the actions of an agent on behalf of the corporation are deemed the corporation's acts, and the agent will not be considered a third

party stranger to the contract. Thus, the *Holloway* court noted the general rule that an officer of a corporation may not ordinarily be held liable in tort for damages for inducing the corporation to violate a contract. However, the *Holloway* court went on to hold that a corporate officer could be treated as third party stranger to the contract, and thus could be liable in tort, where the creditor could prove that the officer “acted in a fashion so contrary to the corporation’s best interests that his actions could only have been motivated by personal interests.” *Holloway*, at 796. The *Holloway* court noted in a footnote that under Texas law, a corporate agent is answerable “to the corporation for breach of fiduciary duties, and to third parties for the tort of wrongfully inducing the breach of a corporate contract.” *Holloway*, at 797 n. 4 (emphasis in original; internal citations omitted).

Here, Plaintiffs seize on this language and contend that since Texas state law clearly recognizes a completely separate claim by the injured contracting party, independent of any claim by the corporation for breach of fiduciary duty, the claims asserted by Plaintiffs in the Petition are not property of the estate. The *Holloway* court did not, however, analyze the impact of bankruptcy principles upon the claims or determine whether the claim for tortious interference was property of the estate.

While Defendants and the Committee concede that *Holloway* supports a creditor’s claim for tortious interference independent of a corporation’s claim for breach of fiduciary duty in certain circumstances, they contend that the Plaintiffs’ failure to plead a direct injury to themselves based on any act or omission of Defendants is of significance here. Defendants and the Committee further contend that under relevant Fifth Circuit case law, the analysis of whether a claim is property of the estate focuses on the nature of the claim under state law and the nature of the injury alleged. They argue that state law claims against officers of corporate debtors for breach of fiduciary duties,

mismanagement, and misappropriation of assets, regardless of how they are labeled or by whom they are brought, are property of the estate. *See, e.g., Joinder of New NGC, Inc. in Opp'n to Pls.' Mot. to Remand*, p. 2-3. In making this argument, Defendants and the Committee rely principally on three Fifth Circuit cases discussed more fully below.

In *American Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit considered whether an action by a bank against the controlling officer of an insolvent corporation against whom it had a judgment was barred by the automatic stay. In essence, the bank alleged that the officer stripped the corporation of its assets in fraud of creditors and for his own benefit by making three transfers of funds either to himself, other entities which he controlled, or to other creditors in payment of loans that he had personally guaranteed. The bank relied upon the state law corporate trust fund doctrine for its claims.⁵ The Fifth Circuit held that the stay applied to bar the claims since under state law an action under that theory, while *assertable* by creditors, is brought in the right of the corporation. The Fifth Circuit based its conclusion, in part, upon the fact that while both creditors and shareholders have standing to bring such an action under applicable state law, “any money collected in the action is distributed pro rata to all creditors and shareholders.” *In re MortgageAmerica Corp.*, 714 F.2d at 1271. Thus, although most often asserted by creditors, under state law a suit under the corporate trust fund theory is brought in the right of the corporation.

In making a distinction between owning a claim and being able to assert one, the Circuit drew

⁵Although not relevant here, the bank also relied upon the Texas Fraudulent Transfer Act. As to that claim, the Fifth Circuit held that the automatic stay barred its prosecution, not because the fraudulent transfer claim itself was property of the estate, but because under state law, the transferor of property fraudulently transferred retains a legal or equitable interest in the property, and the bank’s action was therefore one to “obtain possession of property of the estate or of property from the estate.” 11 U.S.C. § 362(a)(3).

an analogy to the typical shareholders' derivative action, in which a shareholder can sue a corporation's officers and directors on behalf of the corporation where the corporation itself refuses to act. Thus, the Circuit recognized that a creditor's ability to assert a claim does not necessarily prevent that claim from belonging to the corporation, or to the estate if the corporation has filed for bankruptcy.

In *S.I. Acquisition, Inc. v. Eastway Delivery Serv. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142 (5th Cir. 1987), a creditor of the corporate debtor brought an action against a related corporation, the debtor's corporate parent, and two of its principals, seeking to hold them liable for the debtor's debts on an alter ego theory. The Fifth Circuit held that the claim properly belonged to the corporate debtor, was thus property of the estate, and the automatic stay barred its prosecution. The Fifth Circuit stated that "of most importance" to its decision was "whether a corporation could assert an action against itself based upon alter ego." *S.I. Acquisition*, at 1152. Although the Fifth Circuit was unable to find a Texas case addressing whether a corporation could itself bring an alter ego claim, it noted that since a corporation has a separate legal existence, "theoretically nothing in Texas law prohibits a corporation from asserting on its own an action based on alter ego" *S.I. Acquisition*, at 1153. The Fifth Circuit looked at the policy underlying alter ego claims – to hold those who misuse the corporate form accountable for the corporation's debts – and concluded that an alter ego claim was sufficiently like the corporate trust fund claim determined to belong to the estate in *MortgageAmerica* that the same result should follow.

The Fifth Circuit also noted that its conclusion that the action should be stayed would further the general policies of the Bankruptcy Code. First, the alter ego allegations, if proven, would benefit all creditors, in that more assets would be available to satisfy the corporation's debts. Second, if the

creditor's action was not stayed, it would potentially collect its claim from a pool of assets that should be available to all creditors. Third, if the claim was allowed to proceed, then any creditor could bring such an action, and the result would be "the multi-jurisdictional rush to judgment that we stated in *In re MortgageAmerica* cuts against the fundamental policies of the Bankruptcy Code." *S.I. Acquisition*, at 1154. Finally, the Circuit noted that if creditors were able to bring such actions, there would be a potential for conflict in judgments and collateral estoppel disputes.

In *Educators Group Health Trust*, 25 F.3d 1281 (5th Cir. 1994), the Fifth Circuit noted that whether a particular claim is property of the estate depends upon (i) whether under state law the debtor itself could have raised the claim when the case was filed and (ii) the nature of the harm allegedly suffered by the party who wishes to assert the claim. Specifically, the Fifth Circuit stated:

If a cause of action alleges only indirect harm to a creditor (*ie.*, an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under applicable law, then the cause of action belongs to the estate. Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

Educators Group Health Trust, at 1284. Although the plaintiff's complaint asserted several causes of action, only some of which were held to be property of the estate, the Fifth Circuit held that a claim for negligent mismanagement of the debtor which caused it to become insolvent and unable to pay plaintiff's claim alleged a direct injury to the debtor – but only an indirect injury to the plaintiff – and thus, was property of the estate.

As the Fifth Circuit has clearly held, whether a creditor has a right under state law to bring a claim is not the sole inquiry in determining whether that claim is property of the estate. Thus, the fact that *Holloway* allows Plaintiffs' tortious interference claims, in addition to the claims by Kevco for breach of fiduciary duty, is not dispositive. As the Fifth Circuit held in *In re MortgageAmerica*,

a creditor's ability to assert a claim does not necessarily prevent that claim from belonging to the bankruptcy estate. As it held in *S.I. Acquisition*, where the corporation itself could also bring the claim, the claim may be property of the estate and a court must analyze the policies underlying both state law and the Bankruptcy Code to determine the nature of the claim. *See also In re Schimmelpenninck*, 183 F.3d 347, 359 (5th Cir. 1999) ("when considering whether a creditor's cause of action 'belongs to' the debtor or seeks 'recovery or control' of property of the debtor, the Code's general policies of securing and preserving the debtor's property and ensuring equal distribution of that property to similarly situated creditors should remain a paramount concern"). Finally, as it held in *Educators Group Health Trust*, a court must examine the nature of the injury for which relief is sought and determine whether it is direct or indirect in order to determine whether the claim is property of the estate.

Applying these principles here, Plaintiffs allege in the Petition that:

31. While employed by Kevco, Hardin and Leadbetter began to violate their fiduciary duties and take actions outside the scope of their employment with Kevco. Hardin, Leadbetter and National Gypsum began having discussions and planning the formation of BBC while Hardin was still an officer of Kevco. Specifically, Defendants planned to move the key distribution officers, the key distribution supplier, and eventually, key distribution customers, into a competing company, which would be known as BBC. In effect, BBC became the depository for everything of value at Kevco that had been the basis for Plaintiffs' financing agreements with Kevco. Defendants knew, or should have know, that this tortious interference with the lending arrangements would guarantee that the lenders would not receive the benefit of their contract . . .
32. On or about January 26, 2001, Hardin and Leadbetter left Kevco. On February 16, 2001, just days after they left Kevco, Hardin, Leadbetter, National Gypsum, and Banks Corporation filed the necessary papers in Delaware to formally create BBC. Given these circumstances, the formation of BBC must have been in the works long before Hardin and Leadbetter left Kevco. Ultimately, BBC wrongfully took key distribution assets that would have been used to repay the money owed to Plaintiffs.

* * *

34. Defendants' tortious actions caused Kevco to lose its lead distribution officers, its key supplier, a number of its biggest customers, and its ability to repay its lenders.
35. The loss of Kevco's customers, key distribution officers, and primary supplier devastated Kevco. It was no longer possible for Kevco to follow through with any of its plans for reorganization.
36. Less than two weeks after Hardin, Leadbetter and National Gypsum left Kevco, Kevco filed for bankruptcy, and the company was forced to liquidate its assets.
37. As a result of Defendants' actions, Plaintiffs did not receive the benefit of their contract with Kevco. Plaintiffs' bank debt was only paid off in part and Plaintiffs' bond debt is effectively worth nothing. The damage to Plaintiffs was a known and foreseeable effect of Defendants' actions. Defendants knowingly engage in actions that caused Plaintiffs to lose in excess of \$40 million . . .

* * *

39. The Defendants had knowledge of, and familiarity with, the bank and bond debt agreements between Kevco and Plaintiffs.
40. Defendants tortiously interfered with Plaintiffs' rights under the financing agreements by stripping Kevco of its most valuable assets and commodities.

* * *

47. Defendants conspired with each other to tortiously interfere by, *inter alia*,: (a) entering into business arrangement to the detriment of Kevco while certain Defendants were still officers and/or employees of Kevco; (b) negotiating to steal Kevco's largest customers and suppliers while certain Defendants were still officers and/or employees of Kevco; and (c) intentionally acting in such a way that foreseeably prevented Plaintiffs from receiving the benefit of their financing contracts.

For the reasons explained below, a review of these allegations compels the conclusion that the claims asserted in the Petition are property of the estate. First, as noted previously, the fact that a claim for tortious interference is assertable by Plaintiffs under *Holloway* is not dispositive. *American Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266 (5th Cir. 1983).

Second, as was the case in *S.I. Acquisition*, although the Court is unable to locate a Texas case on point, the Court sees no reason why Kevco could not bring the tortious interference claims alleged in the Petition. As noted in *Holloway*, the elements of a tortious interference claim are (i) the existence of a contract subject to interference, (ii) the occurrence of an act of interference that was willful and intentional, (iii) the act was a proximate cause of the plaintiff's damage, and (iv) actual damage or loss occurred. *Holloway*, 898 S.W.2d at 795-96. Kevco, as one of the parties to Plaintiffs' contracts, could presumably bring such an action provided it could meet the *Holloway* burden of showing that Defendants acted in a fashion so contrary to Kevco's best interests that their actions could only have been motivated by personal interests. As Plaintiffs admitted at the hearing on the motion, Plaintiffs would also have to meet this *Holloway* burden in order to pursue their tortious interference claims in the State Court Action.

Third, while the Petition alleges substantial direct harm to Kevco from Defendants' conduct, the Petition alleges only derivative harm to Plaintiffs. Specifically, the Petition alleges that Kevco lost its officers, supplier and customers; Kevco could not pay its debts; Kevco could not follow through with its reorganization plans; Kevco was devastated; Kevco was forced to file bankruptcy and liquidate. As a result of this direct harm to Kevco, the Petition recites that Kevco was unable to pay Plaintiffs. But the injury to Plaintiffs flows as a consequence of Kevco's injuries. Thus, as alleged by Plaintiffs in the Petition, their damages are derivative and indirect. Although Plaintiffs allege in a post-hearing letter⁶ that they "will seek lost opportunity costs, consequential damages, and punitive damages resulting from Defendants' conduct in addition to the face value of the notes," that is not what the Petition seeks and even if pled, that injury is also an indirect one. Similarly, although

⁶See Letter of Paul B. Lackey dated April 30, 2002. The letter was served upon all counsel.

Plaintiffs' counsel stated at the hearing that Defendants made particular representations to the Plaintiffs which were peculiar to and directly injured them, no such representations are pled in the Petition. Whether removal was proper is determined "on the basis of claims in the state court complaint as it exists at the time of removal" See *Cavallini v. State Farm Mut. Auto Ins.*, 44 F.3d 256, 264 (5th Cir.1995); *Faulk v. Owens-Corning Fiberglass Corp.*, 48 F.Supp.2d 653 (E.D.Tex. 1999).

Finally, the Committee⁷ is the proper party to pursue these claims against the Defendants. In *In re Schimmelpenninck*, 183 F.3d 347, 359 (5th Cir. 1999), the Fifth Circuit held that "even if a claim 'belongs to' the creditor, the trustee is the proper party to assert the claim for the benefit of all creditors, provided the claim advances a generalized grievance." Here, as noted previously, the injury which Plaintiffs allege is injury to Kevco that rendered Kevco unable to pay its debts to Plaintiffs. If Plaintiffs' allegations in the Petition are true, Kevco was rendered unable to pay its debts to Plaintiffs and to numerous other creditors, all of whom should benefit from any recovery from the Defendants.

Other policies underlying the Bankruptcy Code also support this conclusion. As noted by the Fifth Circuit in *S.I. Acquisition*, if Plaintiffs were permitted to pursue the State Court Action, there would be a potential for inconsistent decisions. To prevail on their tortious interference claims in the State Court Action, Plaintiffs must prove that Defendants "acted in a fashion so contrary to [Kevco's] best interests that their actions could only have been motivated by personal interests." *Holloway*, at 797. Thus, to prove their claims, Plaintiffs must prove, in essence, that the Defendants breached their fiduciary duty to Kevco – a claim which the Committee can, and has stated its intention to, assert

⁷On May 28, 2002, the Court entered an Agreed Order Granting Motion For Authority to Pursue Adversary Actions on Behalf of the Estates in favor of the Committee.

before this Court. Since both the Plaintiffs and the Committee will seek to recover from the Defendants for Kevco's inability to pay its debts, the damage claims to be asserted are duplicative, as the Plaintiffs admitted at the hearing on the motion. Although the Plaintiffs' claims and the Committee's claims may not have identical elements, they are "so similar in object and purpose" that the estate should pursue them, not individual creditors. *See National Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999). Were the Court to allow each creditor that was a party to a contract with Kevco to pursue a tortious interference claim independently from the Committee's claims, the result would be a "multijurisdictional rush to judgment." *S.I. Acquisition*, at 1154. Thus, by holding that the Plaintiffs' claims are property of the estate and allowing all such claims (and damages) to be asserted by the Committee on behalf of all creditors, judicial economy is promoted as are the policy goals of the Bankruptcy Code.

Finally, Plaintiffs cite *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275 (5th Cir. 1988) for the proposition that the Fifth Circuit has allowed a creditor's tortious interference claim to proceed outside of bankruptcy. However, that case is easily distinguished. In *LDBrinkman*, the defendants argued that the plaintiff lacked standing to bring certain claims (among them, alter ego and tortious interference) because the corporation (of which they were principals and alleged alter egos) was in bankruptcy. The Fifth Circuit noted that ordinarily, its holding in *S.I. Acquisition* would indeed bar the claims. However, the Circuit noted that the plaintiff in *LDBrinkman*, unlike the plaintiffs in *S.I. Acquisition*, had sought and obtained relief from stay to prosecute the complaint. The Circuit further noted that although there had been an appeal from the relief from stay order, the appeal had been voluntarily dismissed and thus, the propriety of granting relief from stay was not before it. The *LDBrinkman* court did not analyze whether the plaintiff's claims were property of the estate, because

the stay had been lifted to permit their prosecution by the plaintiff. *LDBrinkman* is not controlling here.

III. Conclusion

For all of these reasons, the Court concludes that the claims asserted by Plaintiffs in the State Court Action are property of the Kevco bankruptcy estate. Accordingly, this Court exercises exclusive jurisdiction over those claims, *see* 28 U.S.C. § 1334(e), and neither remand nor abstention is appropriate. The motion is denied.

An Order consistent with this Memorandum Opinion will be entered separately.

SIGNED: June 25, 2002.

Barbara J. Houser
United States Bankruptcy Judge