U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
ORIS OTIS BAKKE,	§	CASE NO. 03-41072-DML-7
Debtor.	§	
	§	
JIMMY H. ALLEN, ROBERT PALMER, LEADING EDGE GROUP, INC., THOMAS D. GOOD, STRATHMORE TRADING LTD., CHINA/CANADA CONCRETE TECHNOLOGIES CO., LTD, LEN SLATER, NORTHLINE PROPERITES, P/L, PAUL A. ORPWOOD, SOUTHERN AIRLINES LIMITED a/k/a AUSTRIALIAN CITYJET HOLDINGS LTD.,	§	
Plaintiffs	§	
	§	
vs.	§	ADV. NO. 03-4249
	§	
PETER J. SPECKMAN, DIANE SPECKMAN, HARVEY BAGG JR., WALTER, CONSTON, ALEXANDER & GREEN, P.C., SIGMA FINANCE CORP., & ORIS OTIS BAKKE,	§	
	§	
Defendants	§	

IN RE:	§	
	§	
PETER J. SPECKMAN,	§	
Debtor.	§	CASE NO. 04-42172-BTR-13
JIMMY H. ALLEN, ROBERT PALMER, LEADING EDGE GROUP, INC., STRATHMORE TRADING, LTD., CHINA/CANADA CONCRETE TECHNOLOGIES CO., LTD, LEN SLATER,	§	

NORTHLINE PROPERITES,	§	
PAUL A. ORPWOOD, SOUTHERN	§	
AIRLINES LIMITED a/k/a	§	
AUSTRIALIAN CITYJET HOLDINGS	§	
LTD.,	§	
Plaintiffs	§	
	§	
vs.	§	ADV. NO. 04-4068
	§	
PETER J. SPECKMAN, DIANE	§	
SPECKMAN, HARVEY BAGG JR.,	§	
WALTER, CONSTON, ALEXANDER &	§	
GREEN, P.C., IAN SMALLEY,	§	
SIGMA FINANCE CORP., &	§	
ORIS OTIS BAKKE,	§	
Defendants.	§	

MEMORANDUM ORDER

Before the court is Plaintiffs' Motion for Abstention and Remand (the "Motion") filed in each of the captioned, identical adversary proceedings (the "Adversary"). In the Adversary Plaintiffs claim that they were defrauded of hundreds of thousands of dollars by Defendant Speckman ("Speckman") with the assistance of Defendant Bakke ("Bakke") and Harvey Bagg Jr., Alan Kanzer, and WALTER, CONSTON, ALEXANDER & GREEN, P.C. (the "Lawyers"). Plaintiffs initially commenced suit in the 352nd District Court, Tarrant County, Texas. The Lawyers and Harvey Bagg Jr. removed the litigation to federal court after Speckman's commencement of a chapter 13 case and Bakke's filing for chapter 7 relief in this court.[1] The Adversary then found its way through various forums, eventually to light here, back in this court.

In the Motion the Plaintiffs ask that this court (1) abstain from hearing the Adversary; and

1 Speckman's current bankruptcy case is pending in the Eastern District of Texas, Plano Division. Prior to his current case, Speckman filed a chapter 13 petition in this court, which was transferred to the Dallas Division, then to the Plano court, and subsequently dismissed.

(2) remand the adversary to the state court in which it was pending. *See* 28 U.S.C. § 1334(a), (b) and (c). The Adversary is clearly subject to this court's jurisdiction only because it is "related to" Speckman's chapter 13 case and Bakke's chapter 7 case.[2]

As a "related to" matter the Adversary is subject to either mandatory abstention (28 U.S.C. § 1334(c)(2)) or discretionary abstention (28 U.S.C. § 1334(c)(1)). Mandatory abstention is only appropriate if there is a pending suit of the same substance in another court. *Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton County Elec. Coop.)*, 281 B.R. 876, 880 (Bankr. N.D. Tex. 2002); *Security Farms v. International Bhd. of Teamsters*, 124 F.3d 999, 1009 (9th Cir. 1997) ("Abstention can exist only where there is a parallel proceeding in state court. That is, inherent in the concept of abstention is the presence of a pendent state action in favor of which the federal court must, or may, abstain.") (citing *In re S.G. Phillips Constrs., Inc.*, 45 F.3d 702, 708 (2nd Cir. 1995) (including as a requirement for mandatory abstention the presence of a previously commenced state action) and *In re Tucson Estates*, 912 F.2d 1162, 1167 (9th Cir. 1990) (recognizing as a factor for permissive abstention the presence of a related proceeding commenced in state court or other nonbankruptcy court)). There is no such suit presently pending.

The only relation of the Adversary to Bakke's (or Speckman's) bankruptcy case is in

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2 Within the Fifth Circuit the test for determining whether a proceeding invokes the bankruptcy court's "related to" jurisdiction is easy to meet: "whether 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy' " and "likelihood of such an effect is not a requirement." Arnold v. Garlock, Inc., 278 F.3d 426, 434 (5th Cir. 2001) (citing Pacor, Inc. v. Higgins (*In re* Pacor, Inc.), 743 F.2d 984, 994 (3d Cir. 1984)). See also Randall & Blake, Inc. v. Evans (*In re* Canion), 196 F.3d 579, 585 (5th Cir. 1999); Wood v. Wood (*In re* Wood), 825 F.2d 90, 93 (5th Cir. 1987).

The United States Supreme Court has applied the test as articulated in *Pacor*. See, e.g., Celotex Corp. v. Edwards, 514 U.S. 300, 308 (U.S. 1995) ("The First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the *Pacor* test with little or no variation.")

terms of quantifying claims against his estate and, far more signfically, impairing the debtor's discharge. The Lawyers seem to be the party most anxious to retain these cases in federal court, though Bakke, at least, is concerned about the potential affect of the Adversary on his discharge.

Courts, including this one, have looked to a non-exclusive list of 12 factors in deciding whether to abstain under 18 U.S.C. § 1334(c)(1).[3] The court considers that, on balance, the factors cited favor abstention in the Adversary.[4] The only legitimate reason the court can see for not abstaining and permitting the Adversary to proceed in state court is that could put Bakke and Speckman in the position of defending the Adversary or risking determination of facts fatal to

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3 The 12 factors are:

(1) The effect or lack thereof on the efficient administration of the estate if a court recommends abstention;
(2) The extent to which state law issues predominate over bankruptcy issues;
(3) The difficulty or unsettled nature of the applicable state law;
(4) The presence of a related proceeding commenced in state court or other nonbankruptcy court;
(5) The jurisdictional basis, if any, other than 28 U.S.C. § 1334;
(6) The degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
(7) The substance rather than form of an asserted "core" proceeding;
(8) The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
(9) The burden on the bankruptcy courts docket;
(10) The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
(11) The existence of a right to a jury trial; and
(12) The presence in the proceeding of nondebtor parties.

See Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (*In re* Denton County Elec. Coop.), 281 B.R. 876, 881 (Bankr. N.D. Tex. 2002). *See also* Hester v. Coho Energy, Inc. (*In re* Coho Energy, Inc.), 2002 U.S. Dist. LEXIS 5862, at **19-20 (N.D. Tex. 2002); *In re* Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993); Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990); Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc. (*In re* Republic Reader's Serv., Inc.), 81 B.R. 422, 429 (Bankr. S.D. Tex. 1986).

4 Allowing the Adversary to proceed in state court will not affect administration; the Adversary does not involve bankruptcy law; there is no jurisdictional basis for hearing the Adversary other than 28 U.S.C. §1334(b); removal to this court was forum-shopping; Plaintiffs are entitled to a jury; and many of the parties to the Adversary are not before this court. The remaining factors are mostly neutral, not necessarily favoring exercise by this court of jurisdiction.

their discharge. This, the court believes, is contrary to the intent of the automatic stay of 11 U.S.C. § 362(a).

It would be potentially costly and time consuming for Bakke and Speckman to defend in litigation as complex as the Adversary. On the other hand, the Adversary simply does not belong in this court. The court concludes, therefore, that the proper resolution of the Motion is to permit the Adversary to proceed in state court while protecting Bakke and Speckman from any consequences in their pending bankruptcy cases should they not actively defend the Adversary.[5] Accordingly, it is

ORDERED that this court shall abstain from further consideration of the Adversary pursuant to 28 U.S.C. § 1334(c)(1) and said Adversary shall be remanded pursuant to 28 U.S.C. § 1452(b) to the 352nd District Court, Tarrant County, Texas; and it is further

ORDERED that the automatic stay of 11 U.S.C. § 362(a) shall be modified in Bakke's chapter 7 and in Speckman's chapter 13 case[6] to permit continuation of the Adversary, provided, however, no person presently a party to the Adversary (or any such person's successor in interest) may assert in or in connection with Bakke's pending bankruptcy case (including after any conversion of such case) or Speckman's pending bankruptcy case (including after any conversion of such case) any finding or determination made in the Adversary which finding or determination was not (1) actively contested by Bakke or Speckman, as the case may be; (2)

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5 Because the Adversary was originally removed from state court to this court, remand by this court directly to the state court is proper.

6 Though Speckman's chapter 13 case is not pending before this court, the Bankruptcy Court for the Eastern District of Texas, Hon. Brenda Rhodes, has approved modification of the stay in Speckman's case by this court.

agreed to or stipulated by Bakke or Speckman, as the case may be; or (3) could be asserted in an action against a person who is not a party to the Adversary; provided, further, that nothing herein shall limit the ability of any person to assert any finding or determination made in the Adversary to the extent such finding or determination may be asserted under applicable law and rules of procedure and evidence in any subsequent bankruptcy case filed by Bakke or Speckman if he does not receive a discharge in his pending case; and it is further

ORDERED that the clerk of the court shall promptly take steps to carry out the terms of this order.

SIGNED this the 19 day of July 2004.

HON. DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE