**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **IN RE:** | § | |
| | § | |
| **DAVID LEON CROSS,** | § | **Case No. 01-37901-BJH-7** |
| | § | |
| **Debtor.** | § | **Chapter 7** |
| | § | |
| | § | |
| **BRENDA FULLER, INTERNETOPS.COM, INC., & WHATANET, INC.,** | § | |
| | § | |
| **Plaintiff,** | § | |
| | § | |
| **vs.** | § | |
| | § | |
| **MULTISOURCE COMMUNICATIONS, INC., formerly known as MULTISOURCE COMMUNICATIONS, LC, TEXAS INTERNET, INC., OUT-OF-AREA MARKETING, INC., ADAM DILLAPLAIN, PAUL VAN METER, WILLIAM "BILL" BOWMAN, C. SAM SMITH, JOHN M. SJOVALL, and HALEY & DAVIS, P.C.,** | § | **Adversary Proceeding No. 01-3711** |
| | § | |
| **Defendants,** | § | |
| | § | |
| **vs.** | § | |
| | § | |
| **DAVID LEON CROSS,** | § | |
| | § | |
| **Third-Party Defendant.** | § | |

U. S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
APR - 3 2002
TAWANA C. MARSHALL, CLERK
By _____
Deputy

## MEMORANDUM OPINION

Before the Court is John M. Sjovall's and Haley & Davis, P.C.'s (the "Movants") Motion and Notice of Motion to Abstain, Motion to Remand and Alternatively, Motion to Sever and Remand Severed Defendants (the "Motion"). For the reasons set forth below, the Court



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concludes that it lacks subject matter jurisdiction over the primary action and that the primary action was not properly removed to this Court. Regarding that portion of the action that is a third-party action against the Debtor, the Court concludes that it has "related to" jurisdiction over those claims but that remand is appropriate on equitable grounds. Alternatively, the Court concludes that the requirements for mandatory and/or permissive abstention have been met with regard to the claims asserted against the Debtor. Thus, the Court will remand the entire action to state court.[1]

## I. Procedural Background

This lawsuit originated when three non-debtor plaintiffs (an individual and two of her corporations) filed an action in state court against nine defendants. Seven of those defendants brought a third-party action against the debtor and, after the debtor's bankruptcy filing, removed the litigation to this Court. The two remaining defendants have brought no claims against the debtor, oppose the removal, and have moved for remand, abstention, or alternatively, their severance and remand.

On September 27, 2001, David Leon Cross (the "Debtor") filed a voluntary Chapter 7 petition in this Court. As noted above, at the time his bankruptcy petition was filed, a state court civil action (the "Civil Action") was pending before the 116th Judicial District Court, Dallas County, Texas (the "State Court").[2] On December 5, 2001, Multisource Communications, Inc., formerly known as Multisource Communications, LC ("Multisource"), Texas Internet, Inc., Out-

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[1] The action is remanded to state court subject to the automatic stay. Relief from stay is required before the action may proceed.

[2] The state court civil action is styled as *Brenda Fuller, Internetops.com, Inc., & Whatanet, Inc., Plaintiffs and Counter-defendants, v. Multisource Communications, Inc. f/k/a Multisource Communications, L.C., Texas Internet, Inc. Out-of-Area Marketing, Inc., Adam Dillaplain, Paul Van Meter, William "Bill" Bowman, C. Sam Smith, John M. Sjovall & Halley & Davis P.C., Defendants, and Multisource Communications, L.C., Texas Internet, Inc., Out-of-Area Marketing, Inc., Adam Dillaplain, Paul Van Meter, William "Bill" Bowman, C. Sam Smith, Counter-Plaintiffs and Third-Party Plaintiffs, v. David Cross, Third-Party Defendant*, Case No. 00-2624-F .

of-Area Marketing, Inc., Adam Dillaplain, Paul Van Meter, William "Bill" Bowman, and C. Sam Smith (collectively, the "Third-Party Plaintiffs") filed a Notice of Removal of State Court Civil Action, thus removing the Civil Action to this Court pursuant to 28 U.S.C. § 1452(a) and commencing this adversary proceeding.[3] Movants, both named as co-defendants in the Civil Action, then filed the Motion which requests that this Court remand on equitable grounds, abstain, or alternatively, sever the claims against Movants and remand that portion of the lawsuit and/or claims to the State Court. The Third-Party Plaintiffs filed a response in opposition to the Motion. However, the Debtor did not file any response to the Motion.

Meanwhile, in the Debtor's main bankruptcy case, the Third-Party Plaintiffs have timely filed a Complaint objecting to the dischargeability of their debt pursuant to 11 U.S.C. § 523 and the discharge of the Debtor pursuant to 11 U.S.C. § 727 (the "Dischargeability Complaint"). Although the Dischargeability Complaint does not specify the nature of the debt owed to the Third-Party Plaintiffs, it does allege many of the same facts as are alleged in the Third-Party Petition. Despite the inartful pleading, the Court surmises that the Third-Party Plaintiffs contend that any debt owed to them by virtue of their success in connection with the Third-Party Petition is non-dischargeable in bankruptcy.

In addition, the Chapter 7 Trustee has filed a Trustee's Report of No Distribution and Chapter 7 § 341 Proceeding Memorandum certifying that the Debtor's estate has been fully administered.[4]

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[3] Removal was timely pursuant to Fed. R. Bankr. Pro. 9027(a)(2).

[4] On the November 6, 2001 Chapter 7 §341 proceeding memorandum, the Trustee noted that there was a "possible fraudulent transfer action." However, a subsequent proceeding memorandum stated that the Trustee had determined such property of the estate "as exists is either exempt by law or of inconsequential value and benefit to the estate." *See* Trustee's Report of No Distribution and Chapter 7 § 341 Proceeding Memorandum filed January 7, 2002.

## II. Underlying Facts

This litigation arises from a tangled web of business, professional, and personal relationships. The Debtor (also the "Third-Party Defendant") was president or principal, director and sole or majority owner of Network Integration and Systems, Inc. ("NIS"). NIS was a member of Multisource Communications, L.C. ("Multisource"), along with Texas Internet, Inc. and Out-of-Area Marketing, Inc. The Debtor also served as Controller or Chief Operating Officer of Multisource. Plaintiff Brenda Fuller ("Fuller") was an employee of NIS who purchased NIS' interest in Multisource and then transferred that interest to her own corporation Whatanet, Inc. Movant John Sjovall is an attorney at the law firm of Movant Haley & Davis, P.C. which served as counsel for Multisource.

The Civil Action consists of two parts – the Original Complaint (and certain counterclaims described below) and the Third-Party Petition. In the Original Complaint, the Plaintiffs are Brenda Fuller, Internetops.com, Inc., and Whatanet, Inc. (collectively the "Plaintiffs"). The Plaintiffs allege claims against the Third-Party Plaintiffs for breach of contract, fraud, tortious interference with contract, conversion, breach of fiduciary duty, and aggravated assault. In addition, the Plaintiffs request that the Court pierce the corporate veil to hold Paul Van Meter and Allan Dillaplain personally liable for the actions of certain defendant corporations. Against the Movants specifically, the Plaintiffs allege claims for fraud, aggravated assault, conversion, malpractice, breach of fiduciary duty, tortious interference with contract, and slander of property. The Plaintiffs seek money damages and "such other and further relief at law and in equity to which Plaintiff shows herself to be justly entitled."[5] The Third-Party Plaintiffs filed counterclaims against the Plaintiffs for breach of fiduciary duty and duty of loyalty, fraud

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[5] *See* Plaintiff's Original Petition, p 32.

and fraudulent inducement, violations of the Texas Theft Liability Act, declaratory judgment, and breach of contract (the "Counterclaims").

As noted previously, the Debtor became involved in the Civil Action upon the filing of the Third-Party Petition. The Third-Party Plaintiffs allege causes of action against the Debtor for breach of fiduciary duty and duty of loyalty, negligence, fraud, Texas Theft Liability Act violation, and declaratory judgment. Regarding their request for a declaratory judgment, the Third-Party Plaintiffs seek a declaration from the Court that neither Whatanet, Inc. nor NIS are members of Multisource. In addition, they request that the Court declare the rights, status and legal relations of the parties under their operating agreement and grant such supplemental relief as is necessary to implement the declaration including, but not limited to, a full and complete audited accounting of NIS.[6]

The Movants request that the Civil Action be remanded in its entirety or, alternatively, that the claims against them be severed and remanded. Movants maintain that remand will have no adverse effect on the efficient administration of the Debtor's bankruptcy case; that remand is appropriate because state law issues predominate in the Civil Action as it is a matter that involves state law but does not involve a federal question; and that the Civil Action is not a core proceeding but one only remotely related to the bankruptcy case. The Movants further allege that the Civil Action can be timely adjudicated in the State Court, where trial was scheduled for February 4, 2002 (its second trial setting).[7] In addition, the Movants contend that they are

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[6] *See* Special Exceptions, Original Answer, Verified Denials, Affirmative Defenses Counterclaims and Third-Party Petition of Defendants Multisource Communications, Inc., Texas Internet, Inc., Out-of-Area Marketing, Inc., Adam Dillaplain, Paul Van Meter, William Bowman, and C. Sam Smith, p. 36-41.

[7] *See* Defendant's, John M. Sjovall and Haley & Davis, P.C.'s Memorandum in Support of Motion to Abstain, Motion to Remand and Alternatively Motion to Sever and Remand Severed Defendants, p. 7.

entitled to a jury trial and have demanded one.[8] Finally, the Movants note that neither the Third-Party Plaintiffs nor the Debtor have filed any claims against the Movants, nor have the Movants brought any claims against the Third-Party Plaintiffs or the Debtor.

The Third-Party Plaintiffs oppose the Motion arguing that the removed litigation directly involves property of the Debtor's bankruptcy estate which is subject to this Court's exclusive jurisdiction pursuant to 28 U.S.C. § 1334(e). The Third-Party Plaintiffs further allege that Ms. Fuller is the Debtor's girlfriend and that all the claims asserted by them arise out of the Debtor's fraudulent conveyance of his property to Ms. Fuller. However, the Court notes that the Third-Party Plaintiffs did not seek to avoid any alleged fraudulent transfer when the Third-Party Petition was filed.[9]

As noted previously, the Debtor has not filed any pleadings or taken a position regarding the removal of the Civil Action or the remand requested in the Motion.

## III. Discussion

### A. Removal and Remand

Removal of a civil action to 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.

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[8] *See id.* at 8.

[9] Upon the Debtor's bankruptcy filing, the Trustee is the only party with standing to bring a fraudulent transfer action. Based on the evidence in the Court's file, the Trustee has chosen not to pursue such an action. *See* 11 U.S.C. §§323 and 548.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.

28 U.S.C. § 1452. 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 Third-Party Plaintiffs, as the removing parties, bear the burden of establishing federal jurisdiction. *See Frank*, 128 F.3d at 921-22. The Third-Party Plaintiffs contend that this Court has jurisdiction because the removed litigation involves property of the Debtor's estate.

Removal was proper here only if this Court "has jurisdiction of such claim or cause of action under section 1334 . . ." 28 U.S.C. § 1452(a).[10] Thus, the first question is whether this Court has jurisdiction over the claims asserted in the Civil Action under section 1334. 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.

28 U.S.C. § 1334. In addition to "cases under title 11," which refers to the original bankruptcy petition and is not at issue here, section 1334 lists three types of proceedings over which the

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[10] Although not all of the named defendants sought removal of the Civil Action to this Court, removal is not precluded under §1452. Section 1452 permits an individual defendant in a multi-defendant case to remove an action from state court without the joinder or consent of the other defendants when the lawsuit contains matters related to a bankruptcy case. *Sommers v. Abshire*, 186 B.R. 407, 409 (E.D. Tex. 1995).

district court has jurisdiction – those "arising under title 11," those "arising in" a case under title 11, and those "related to" a case under title 11. *See Wood v. Wood (In re Wood)*, 825 F.2d 90, 92 (5th Cir. 1987).[11] Claims that "arise under" or "arise in" a bankruptcy case are "core" matters. *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp. 2d 596, 606 (S.D. Tex. 1999). Claims that "relate to" a bankruptcy case, but do not arise under the Bankruptcy Code or arise in a bankruptcy case are "non-core" matters. *Id.*

"Arising under" jurisdiction involves causes of action created or determined by a statutory provision of title 11. *Wood*, 825 F.2d at 96. "Arising in" jurisdiction is not based on a right expressly created by title 11, but is based on claims that have no existence outside bankruptcy. *Id.* at 97. "Related to" jurisdiction exists if "the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *Celotex Corp. v. Edwards,* 514 U.S. 300, 307 n. 6 (1995) (discussing the Third Circuit test and noting its adoption by the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits); *In re Wood*, 825 F.2d at 93 (adopting the Third Circuit's definition). The Fifth Circuit has further stated that "an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and . . . in any way impacts upon the handling and administration of the bankrupt estate. Conversely, the bankruptcy court has no jurisdiction over a matter that does not affect the debtor." *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753 (5th Cir. 1995) (internal citations omitted).

Proceedings "related to" the bankruptcy "include . . . suits between third parties *which*

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[11] The Fifth Circuit has held that "[f]or the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings 'arising under,' 'arising in a case under,' or 'related to a case under,' title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy." *Wood,* 825 F.2d at 93. The distinction is relevant, however, for determining whether a proceeding is core or non-core.

*have an effect on the bankruptcy estate.*" *Celotex*, 514 U.S. at 308 n. 5 (citing 1 *Collier on Bankruptcy* ¶ 3.01[1][c][iv], at 3-28 (Lawrence P. King ed., 15th ed. 1994)) (emphasis added). Regarding third-party actions, the Fifth Circuit noted that the:

> large majority of cases reject the notion that bankruptcy courts have 'related to' jurisdiction of third-party actions. Those cases in which courts have upheld 'related to' jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create 'related to' jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action 'related to' the bankruptcy.

*Zale*, 62 F.3d at 753 (internal citations and footnotes omitted). Judicial economy alone does not justify the Court's finding jurisdiction over any otherwise unrelated suit. *Id.* at 753-54.

Applying the above principles first to the Original Petition, the Court finds that the Plaintiffs do not articulate any claims which "arise under," "arise in," or are "related to" a case under title 11. The Plaintiffs' multiple tort and contracts claims against the Defendants and Movants (all non-debtors) were brought under state law, not the Bankruptcy Code, and all exist outside of bankruptcy. Nor are the claims "related to" the Debtor's bankruptcy. The Plaintiffs' success (or failure) to prevail on their claims will not alter the Debtor's rights, liabilities, options or freedom of action (either positively or negatively) nor will it affect the handling and administration of the bankruptcy estate. In fact, the Plaintiffs assert no claims against the Debtor and do not seek in any way to affect property of his bankruptcy estate. Likewise, the Counterclaims asserted by the Third-Party Plaintiffs are also brought under state law, not the Bankruptcy Code, exist outside of bankruptcy, and are unrelated to the bankruptcy case. The Third-Party Plaintiffs' success or failure to prevail on the Counterclaims will not alter the Debtor's rights, liabilities, options or freedom of action nor will it affect the handling or the

administration of the bankruptcy estate. Thus, the Court concludes that it lacks subject matter jurisdiction over the Original Petition and the Counterclaims.

When applying the same principles to the Third-Party Petition, the Court again finds that the causes of action asserted are state law claims that do not "arise under" or "arise in" a case under title 11. However, the claims asserted are "related to" the Debtor's bankruptcy as the outcome of that litigation could "alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively)" in a way which may impact "upon the handling and administration of the bankrupt estate." *See Zale*, 62 F.3d at 753. If the Third-Party Plaintiffs prevail in their claims against the Debtor, the Debtor's liabilities will increase.[12] Because the Court has "related to" jurisdiction under section 1334(b), removal of the Third-Party Petition was proper.

Despite proper removal, the Court may still remand the Third-Party Petition on any equitable ground. 28 U.S.C. § 1452(b). The Third-Party Plaintiffs' claims against the Debtor could be liquidated in either the State Court or this Court. Thus, the issue is whether the Third-Party Petition is so intertwined with the Original Petition and the Counterclaims that the Court should remand the Civil Action in its entirety to the State Court on equitable grounds.

In deciding this issue, the Court will consider the following factors:

(1) the duplication or uneconomical use of judicial resources;
(2) whether remand will adversely affect the bankruptcy estate's effective administration;
(3) whether the case involves questions of state law better addressed by state courts;
(4) comity;
(5) prejudice to unremoved parties;

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[12] As a practical matter, unless the claims are determined to be nondischargeable in the Dischargeability Complaint, the liquidation of the Third-Party Plaintiffs' claims against the Debtor will not affect the handling and administration of the Debtor's estate in any material way because the Trustee has concluded that this is a "no asset" Chapter 7 case.

(6) whether remand lessens the possibility of inconsistent results; and
(7) whether the court where the action originated has greater expertise.

*See, e.g., Browning v. Navarro*, 743 F.2d 1069, 1077 n. 21 (5th Cir. 1984) (analyzing the predecessor to §1452); *Horton v. Nacogdoches Indep. Sch. Dist.*, 81 F.Supp. 2d 707, 711 (E.D. Tex. 2000); *Gabel v. Engra, Inc. (In re Engra, Inc.)*, 86 B.R. 890, 896 (S.D. Tex. 1988). Additional factors to consider include:

(1) the jurisdictional basis, if any other than 28 U.S.C. § 1334;
(2) the degree of relatedness or remoteness of the proceeding to the main case;
(3) the substance rather than the form of the asserted 'core' proceeding;
(4) the feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in state court with enforcement left to the bankruptcy court;
(5) burden of the bankruptcy court's docket;
(6) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; and
(7) the presence of nondebtor parties.

*See Horton*, 81 F.Supp. 2d at 711.

After considering these factors, the Court concludes that some of these factors mitigate in favor of remand. Remand will not adversely affect the administration of the bankruptcy estate in any material way. The Trustee has certified that the Debtor's bankruptcy estate has been fully administered. The bankruptcy case can be administratively closed pending the outcome of the state court litigation and then reopened if need be. In addition, the Third-Party Petition involves state court causes of action with no issues peculiar to bankruptcy law. The Third-Party Petition was pending in State Court for almost two years before the Debtor filed bankruptcy on the eve of trial[13] and discovery has apparently been completed. It appears that the case could be timely adjudicated by the State Court. The claims against the Debtor could be reduced to judgment in the State Court and, if the Third-Party Plaintiffs are successful, the findings of fact made by the

[13] The Third-Party Petition was filed in state court on June 13, 2000.

State Court (or a jury) used as a basis for a summary adjudication of the Nondischargeability Complaint before this Court.[14]

In contrast, other factors mitigate in favor of retaining the Third-Party Petition. There may be some duplication of judicial resources if the Third-Party Petition is remanded to the State Court because the Third-Party Plaintiffs may have to prove essentially the same facts in connection with the Dischargeability Complaint. If this Court retains the Third-Party Petition, it could hear both the Third-Party Petition and the Dischargeability Complaint together and then close the bankruptcy case. Although state law claims predominate in the Third-Party Petition, they do not appear to require any special expertise and this Court could adjudicate them. While this Court's docket is a heavy one, it could hear the Third-Party Petition and the Dischargeability Complaint within a reasonable time.

On balance, however, the Court concludes that there is no good reason to sever and remand only a portion of the Civil Action. The Original Petition and the Counterclaims were not properly removed to this Court. This Court simply does not have jurisdiction over those parties or claims. The claims asserted against the Debtor in the Third-Party Petition are inextricably intertwined with the other claims asserted in the Civil Action. A single court should hear all of these claims. Since this Court cannot hear the claims asserted in the Original Petition and the Counterclaims, the Court concludes that it should remand the Civil Action in its entirety to the State Court on equitable grounds.

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[14] The Court recognizes that there may be different issues than those put to either the State Court or a jury that may be relevant to the ultimate outcome of the Nondischargeability Complaint before this Court. However, the Court's experience suggests that the Third-Party Plaintiffs are likely to seek such a summary adjudication before this Court by relying on the underlying fact findings from the state court action. It is premature for this Court to speculate on what success, if any, the Third-Party Plaintiffs might have in such a summary proceeding.

### B. Abstention

The Movants also contend that the Court should abstain from hearing the Civil Action under principles of both mandatory abstention under 28 U.S.C. § 1334(c)(2) and permissive abstention under 28 U.S.C. §1334(c)(1). The determination of whether to abstain is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

#### 1. Mandatory Abstention

Regarding mandatory abstention, section 1334(c)(2) provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2). Based on this language, some courts have held that if the following six requirements are met, the court must abstain:

> (1) A party to the proceeding must file a timely motion to abstain;
> (2) The proceeding is based on a state law claim;
> (3) The proceeding is a "related to" proceeding;
> (4) There is no basis for federal court jurisdiction other than section 1334;
> (5) An action is pending in state court; and
> (6) The state court action can be timely adjudicated.

*Engra, Inc.*, 86 B.R. at 894.

There is a split in authority whether mandatory abstention applies to cases removed to federal court on the basis of bankruptcy jurisdiction. Several courts have focused on the requirement that "an action is commenced and can be timely adjudicated, in a State forum of appropriate jurisdiction," and have concluded that a parallel state court proceeding is a prerequisite of mandatory abstention. *See Christo v. Padgett (In re Christo)*, 223 F.3d 1324, 1331 (11th Cir. 2000)(discussing the split in authority). Under this interpretation, once the action

has been removed to federal court, there is no longer an action "commenced . . . in a State forum of appropriate jurisdiction." *See id.* "The majority of courts, however, have concluded to the contrary on the reasoning that the removed action has been 'commenced' and, upon remand, would remain capable of timely adjudication in state court." *Id.* The Fifth Circuit follows the majority rule. *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir. 1999) (rejecting the assertion that mandatory abstention does not apply to cases removed to federal court on the basis of bankruptcy jurisdiction and endorsing the majority rule).

Because the Court has concluded that it does not have even "related to" jurisdiction over the Original Petition and the Counterclaims, an abstention analysis is not required. The Court must remand the Original Petition and the Counterclaims to the State Court because it has no jurisdiction over those claims. Thus, an abstention analysis is only required with regard to the claims asserted in the Third-Party Petition.

Applying the requirements set forth above to the Third-Party Petition, the Court finds that all of the requirements for mandatory abstention have been satisfied. Movants sought mandatory abstention under section1334(c)(2) in a timely fashion.[15] The claims stated in the Third-Party Petition are founded solely in Texas state law and implicate no federal question. All of the parties involved are Texas citizens or Texas corporations, so the Court has no federal diversity jurisdiction. Had the Debtor not filed for bankruptcy, this action could not have been brought in federal court. In short, there is no basis for federal court jurisdiction other than section 1334. The Third-Party Petition was commenced in state court and, upon its remand, could be timely adjudicated there. The Third-Party Petition (along with the other claims asserted in the Civil Action) was set for trial earlier this year (its second trial setting). No trial was held

[15]Defendants removed the Civil Action on December 5, 2001. Movants filed the Motion on January 3, 2002, less than thirty days later.

because the Debtor filed bankruptcy and the entire Civil Action was removed to this Court. Thus, this Court must abstain from hearing the Third-Party Petition.

**2. Permissive Abstention**

Permissive or equitable abstention is governed by section 1334(c)(1) which states:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for state law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334 (c)(1). Under section 1334(c)(1), a court may, in its discretion, abstain from deciding either core or non-core proceedings if the interests of justice, comity, or respect for state law so require. *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1206 (5th Cir.1996).

Courts have stated that the "starting point" in analyzing whether permissive abstention is appropriate is whether abstention "will impede or disrupt the bankruptcy court's 'exclusive and non-delegable control over the administration of the estate within its possession.'" *See Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader's Serv.)*, 81 B.R. 422, 426 (S.D. Tex. 1987) (quoting *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940)). "Where a claim asserted against an estate involves legal issues in which state law predominates, a claim can be litigated in state court to the point of judgment, with enforcement of the judgment stayed until further order of the bankruptcy court. This result follows even though a formal proof of claim, the allowance or disallowance of which constitutes a core proceeding, has been asserted against the state." *Id.* at 426. Other factors to consider are drawn from the elements of mandatory abstention: (1) the existence of two closely related proceedings based upon state law or a state law course of action; (2) absence of any basis for jurisdiction other than section 1334; (3) likelihood of timely adjudication in state court; (4) predominance of state law issues; and (5) degree of relatedness of the proceeding to the bankruptcy case. *Id.* at 427. In addition, a court

may consider the burden of its docket, the likelihood that the commencement of the proceeding in bankruptcy court involves forum-shopping by one of the parties, the existence of the right to a jury trial, and the presence in the proceeding of nondebtor parties. *Id.* at 429.

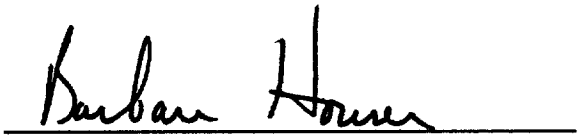
In applying these principles here, the Court finds that abstention will not impede or disrupt the administration of the Debtor's bankruptcy case. State law issues predominate the Third-Party Petition and those issues can be litigated to judgment by the State Court, with enforcement of any judgment against the Debtor stayed until further order from this Court. The Court would have no jurisdiction over these issues absent section 1334. The claims asserted against the Debtor in the Third-Party Petition are inextricably intertwined with the other claims asserted in the Civil Action. A single court should hear all of these claims.

After considering all relevant factors, the Court concludes that it should abstain from hearing the Third-Party Petition and remand the Civil Action in its entirely to the State Court.

## IV. Conclusion

The Court lacks jurisdiction over the claims asserted in the Original Petition and the Counterclaims. Thus, removal of those claims to this Court was not proper and they must be remanded to the State Court. Regarding the claims asserted in the Third-Party Petition, the Court concludes that while it has "related to" jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b), the claims should be remanded to the State Court on equitable grounds. Alternatively, the Court concludes that abstention is appropriate under either 28 U.S.C. § 1334(c)(1) and/or (c)(2). Thus, the Motion is granted and the Court remands the Civil Action to the State Court.

**Signed: April 1, 2002.**



**Barbara J. Houser**
**United States Bankruptcy Judge**