

Organization LLC (“Heritage” or the “Debtor”) and several other defendants in the United States District Court for the Northern District of Texas (“District Court”) on May 9, 2003, alleging various claims, some arising under state law and others arising under federal anti-corruption statutes. Fairly extensive proceedings took place in the District Court, during which many of the claims (including all of the claims arising under federal law) were dismissed. On May 17, 2004, Heritage filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. An order approving the appointment of a Chapter 11 Trustee was entered on August 13, 2004, and Dennis S. Faulkner (the “Trustee”) was appointed on August 16, 2004. The Trustee filed a “Suggestion of Bankruptcy” in the District Court on September 9, 2004. Ultimately the District Court entered, on May 27, 2005, an Order of Referral so that the lawsuit could be considered in conjunction with Heritage’s bankruptcy case. The lawsuit came to this Court and was assigned Adv. Pro. No. 05-3699 (the “Adversary Proceeding”).

The relationship between the Plaintiffs and Heritage and the underlying facts giving rise to the Adversary Proceeding are the subject of this Court’s Memorandum Opinion and Order dated August 31, 2007 (the “Prior Memorandum Opinion and Order”). For ease, the Court adopts that background discussion here. *See* Prior Memorandum Opinion and Order, Docket No. 1266 in Case No. 04-35574-BJH-11, pp. 9-14; 59-67; 80-85 (*reported at* 375 B.R. 230 (Bankr. N.D. Tex. 2007)). In issuing the Prior Memorandum Opinion and Order, this Court approved a settlement between the Trustee and the Plaintiffs (among others) regarding the claims between them which constitute the subject matter of this Adversary Proceeding (and other claims, as well). This Court also confirmed a Chapter 11 plan of liquidation jointly proposed by the Trustee and several creditors – the Plaintiffs

in this Adversary Proceeding among them, which incorporated the terms of the settlement.¹ Subsequent to the entry of the Prior Memorandum Opinion and Order, the Plaintiffs settled their claims against two other defendants in this Adversary Proceeding, Edward Ahrens and Ahrens & DeAngeli, p.l.l.c., a Boise, Idaho law firm. As a result of these and other settlements, the only claims remaining in the Adversary Proceeding are the Plaintiffs' claims against defendants Kornman and GMK (collectively, the "Defendants").²

Although the Adversary Proceeding now involves only non-debtors and asserts solely state law claims,³ up until recently, its disposition could affect the bankruptcy estate of Heritage and, now that the plan has been confirmed, the size of the pool of claims held by creditors (whose claims have been transformed into claims against the *res* of a trust created by the plan). This was so because the Defendants timely filed proofs of claim in the Heritage bankruptcy case alleging rights to indemnity, contribution and reimbursement against Heritage for any and all claims and all costs and expenses related to claims made against them, including those the Plaintiffs assert in this Adversary Proceeding. As a result of these proofs of claim being filed, this Court exercised "related to" jurisdiction over the claims asserted in this Adversary Proceeding during the bankruptcy case, and post-confirmation jurisdiction over the claims under the retention-of-jurisdiction provisions of the confirmed plan and the Fifth Circuit's interpretation of post-confirmation jurisdiction under 28

¹ The Court approved the settlement and confirmed the plan over the vigorous objection of Gary M. Kornman ("Kornman") and GMK Family Holdings, LLC ("GMK"), two of the other defendants in this Adversary Proceeding. Kornman was the President of the Debtor and allegedly in direct or indirect control of a group of entities affiliated with the Debtor. GMK was the managing member of, and an equity owner in, the Debtor.

² On January 29, 2008, Kornman and GMK moved to dismiss with prejudice all third-party claims they had asserted against W. Ralph Canada, Jr. An order granting that relief was entered on February 5, 2008.

³ Plaintiffs' Third Amended Complaint, which was filed on December 14, 2007 after leave to do so was granted upon all parties' consent, asserts claims against the Defendants for fraud and breach of fiduciary duty.

U.S.C. § 1334 as set forth in *Newby v. Enron Corp. (In re Enron Corp.)*, No. 07-20051, 2008 WL 2689248 (5th Cir. July 10, 2008), *U.S. Brass Corp. v. Travelers Ins. Group (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002) and *Bank of Louisiana v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388 (5th Cir. 2001).

On May 22, 2008, less than two weeks before the scheduled trial docket call in this Adversary Proceeding,⁴ the Defendants jointly filed a “Notice of Withdrawal of Certain Claims Against the Debtor by Defendants Gary M. Kornman and GMK Family Holdings, L.L.C.” See Docket No. 141 (the “Notice of Withdrawal of Claims”).⁵ In the Notice of Withdrawal of Claims, Kornman and GMK withdrew

any and all claims, asserted or unasserted, against the Debtor arising out of the subject matter of this adversary proceeding, whether such claims be for indemnity, contribution, reimbursement or otherwise, including but not limited to those claims asserted by [Kornman and GMK] in the Amended [Kornman and GMK] Claim[s] that relate solely to this adversary proceeding

On that same date, the Defendants filed a “Motion to Abstain and Brief in Support Thereof or in the Alternative Motion for Continuance of Trial Date” (“Motion to Abstain”). In the Motion to Abstain, the Defendants argued that at a status conference held on September 19, 2005, the Defendants

made a conditional waiver of their right to trial by jury . . . on the condition that the Honorable Barbara J. Houser would be the Bankruptcy Judge to conduct such a bench trial. The Court accepted what it characterized as a conditional jury trial

⁴ Given the large number of bankruptcy cases over which it presides, this Court’s practice is to set aside a “trial week” each month, during which adversary proceedings will be tried. The Court schedules a monthly “trial docket call” the week before its scheduled trial week, to determine which adversary proceedings are ready to be tried the following week. Thus, adversary proceedings scheduled for trial docket call during the first week in June would be expected to proceed to trial during the second week of June.

⁵ The next day, Kornman and GMK filed an amended notice which corrected a typographical error in the Notice of Withdrawal of Claims.

waiver and agreed to conduct a non-jury trial in the Adversary Proceeding in accordance with the parties' preference as it was announced at the Status Conference.

Motion to Abstain, ¶ 4.⁶ The Defendants argued that their prior waiver was “based on the circumstances and complexion of the Adversary Proceeding at the time of the Status Conference.” *Id.* The Defendants pointed out that back in 2005, the Debtor (or more accurately, the Trustee, standing in the shoes of the Debtor) was still a party to the Adversary Proceeding, and the Defendants “intended to pursue claims against the Debtor for indemnity, contribution and reimbursement in connection with the Adversary Proceeding.” Motion to Abstain, ¶ 5. The Defendants further noted that (1) the Debtor is no longer a party to the Adversary Proceeding, (2) the only claims remaining are state law claims against them, and (3) they have expressly withdrawn any and all claims for indemnity, contribution, reimbursement or otherwise against the Debtor related to this Adversary Proceeding. Motion to Abstain, ¶ 6. As a result, the Defendants argued that in its current posture, the Adversary Proceeding “is no longer related to the Debtor’s bankruptcy case in any meaningful way. The outcome of the Adversary Proceeding will no longer have any impact, however attenuated, on the administration of the Debtor’s bankruptcy case.” Motion to Abstain, ¶ 7. Accordingly, the Defendants requested that this Court, pursuant to 28 U.S.C. § 1334(c)(1), “abstain from hearing any further proceedings in the Adversary Proceeding. Whether or not Defendants’ conditional jury waiver remains effective based on the changed circumstances, this

⁶ At the September 19, 2005 hearing, the Court asked whether the parties were in agreement that the case would be tried in the bankruptcy court “either with or without a jury.” Counsel for one of the defendants responded that “My clients are willing to agree to a non-jury trial before Your Honor. There is a concern that, for example, another bankruptcy judge is appointed, someone we don’t know, we wouldn’t want that consent to extend to someone – some fact finder we don’t know who they are. So our consent would be limited, but we are comfortable with the non-jury trial to Your Honor and we would be willing to do that.” Kornman’s then-counsel then added: “the same for – for clients I represent, Your Honor.” See Transcript, hearing held 9/19/05 (Docket No. 13), p. 12, lines 10-21.

Court is no longer the appropriate forum to adjudicate the Plaintiffs' claims against the Defendants.”⁷ Motion to Abstain, ¶ 8.⁸ The Defendants cited 28 U.S.C. § 1334(c)(1) as the statutory authority upon which they relied, but their prayer for relief requested not only that this Court abstain, but also that this Court “recommend to the District Court that the Adversary Proceeding be returned to the District Court for purposes of all further proceedings and trial.” Motion to Abstain, p. 12. The Motion to Abstain was set for hearing on June 17, 2008.

On May 29, 2008, six days before the scheduled trial docket call, the Defendants filed “Defendants’ Motion for Trial by Jury” (“Motion for Jury Trial”). See Docket No. 150. The Defendants argued that their prior waiver of their right to trial by jury should not be enforced against them because it was made in the context of a lawsuit “that bears little resemblance to the Adversary Proceeding before the Court today.” Motion for Jury Trial, ¶ 11. The Defendants have not, to date, requested a hearing on the Motion for Jury Trial.⁹

The Plaintiffs did not oppose the Motion to Abstain. At the June 17, 2008 hearing, both the parties and the Court agreed that in light of the District Court’s Order of Referral to this Court, abstention was an inappropriate procedural vehicle with which to get some court other than this one

⁷ The Defendants conceded that their jury trial waiver was made with actual knowledge of the existence of the right to jury trial and with the actual intent to relinquish that right. However, they argued that they should not be held to their waiver because it was “based on the posture of the case at that time,” and in the “context of a lawsuit that bears little resemblance to the Adversary Proceeding before the Court today.” Motion to Abstain, ¶ 21. Therefore, they argued (without citation to authority) that it would be inequitable to enforce their jury trial waiver against them, because that waiver was made in the context of litigation that has little in common with the Adversary Proceeding as it exists today. Motion to Abstain, ¶ 23.

⁸ The Defendants conceded that the existence of subject matter jurisdiction is determined at the time the case is referred to the bankruptcy court. *Randall & Blake, Inc. v. Evans (In re Canon)*, 196 F.3d 579 (5th Cir. 1999). The Defendants did not dispute the existence of subject matter jurisdiction, but instead argued that “based on changed circumstances, this Court is no longer the proper forum.” Motion to Abstain, p. 5, n. 4.

⁹ The Motion for Jury Trial was filed under Rule 39(b) of the Federal Rules of Civil Procedure, made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 9015.

to hear the issues raised by this Adversary Proceeding. The Defendants announced that they were withdrawing the Motion to Abstain and would be seeking to have the reference withdrawn, and the Court directed that the Defendants, if they chose to file a motion to withdraw the reference, do so within five days.¹⁰ Five days later, on June 23, 2008, the Defendants *and the Plaintiffs* filed a joint motion for withdrawal of the reference with this Court (the “Motion”).¹¹ As the Plaintiffs had announced at the hearing on the Motion to Abstain that they did not oppose either withdrawal of the reference or a jury trial, by agreement of the parties, the Court treated the June 17, 2008 hearing as the status conference on the to-be-filed motion to withdraw the reference.¹²

Governing Law

Rule 5011.1 of the Local Rules provides that at the status conference on a motion to withdraw the reference, the court shall consider and determine the following:

- (a) whether any response to the motion to withdraw the reference was filed, and whether the motion was denied;
- (b) whether a motion to stay the proceeding pending the district court's decision on the motion to withdraw the reference has been filed, in which court the motion was filed, and the status (pending, granted or denied) of the motion;
- (c) whether the proceeding is core or non-core, or both and with regard to the non-core and mixed issues, whether the parties consent to entry of a final order by the bankruptcy court;
- (d) whether a jury trial has been timely requested, and if so, whether the parties consent to the bankruptcy judge conducting a jury trial, and whether the district court

¹⁰ The Court entered an Order to that effect on June 26, 2008.

¹¹ The motion seeking withdrawal of the reference was transmitted to District Court on June 25, 2008. The Court believes that Judge Boyle, who originally referred the Adversary Proceeding to this Court, will remain the assigned judge, under Docket No. 3:03-CV-0991-B.

¹² Rule 5011.1 of the Local Rules of the Bankruptcy Court for the Northern District of Texas (the “Local Rules”) provides in part that a “motion to withdraw the reference of a case or a proceeding in a case shall be directed to the district court, but shall be filed with the clerk of the bankruptcy court. A status conference on the motion shall be held by the bankruptcy court with notice to all parties involved in a contested matter or adversary proceeding of which the reference is proposed to be withdrawn.”

- is requested to designate the bankruptcy court to conduct a jury trial;
- (e) if a jury trial has not been timely requested or if the proceeding does not involve a right to jury trial;
 - (f) whether the bankruptcy court has entered a scheduling order in the proceeding;
 - (g) whether the parties are ready for trial;
 - (h) whether the bankruptcy court recommends that
 - (1) the motion be granted;
 - (2) the motion be granted upon certification by the bankruptcy court that the parties are ready for trial,
 - (3) the motion be granted but that pre-trial matters be referred to the bankruptcy court, or
 - (4) the motion be denied
 - (i) any other matters considered by the bankruptcy court relevant to the decision to withdraw the reference.

Withdrawal of the reference is governed by 28 U.S.C. § 157(d), which provides, in relevant part, that the district court may withdraw, “in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” In *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985), the Fifth Circuit stated that in ruling upon a motion to withdraw the reference, a court should consider several factors: (1) whether the matter involves core, non-core, or mixed issues; (2) whether or not there has been a jury demand; (3) the effect of withdrawal on judicial economy; (4) the effect of withdrawal on the goal of reducing forum shopping; (5) uniformity in bankruptcy administration; (6) the effect of withdrawal on fostering the economical use of the parties' resources; and (7) the effect of withdrawal on the goal of expediting the bankruptcy process.

Legal Analysis

As with most issues in the Heritage bankruptcy case, this one is more complex than it initially appears to be. Consideration of those factors set forth in Local Rule 5011.1 and the *Holland America Ins. Co.* case that can be quickly addressed yields the following results:

No response was filed to the Motion, as it is a joint motion filed by all parties on both sides

of this litigation. No one has moved to stay the Adversary Proceeding pending the District Court's decision on the Motion. The Adversary Proceeding currently involves only non-core, state law claims.¹³ Uniformity of bankruptcy administration, while once a factor which would have weighed heavily in favor of this Court hearing this Adversary Proceeding (since many, similar lawsuits were pending in this Court against the Debtor and/or its former principals) no longer remains as such. As time has passed, settlements have been approved and a plan has been confirmed. Assuming the Defendants' proofs of claim are deemed withdrawn, this Adversary Proceeding no longer has anything to do with this bankruptcy case at all. Uniformity of bankruptcy administration, to the extent there remains a bankruptcy to administer, no longer weighs in favor of this Court presiding over the Adversary Proceeding. Similarly, withdrawal of the reference will have no impact at all on the goal of expediting the bankruptcy process, since the *bankruptcy* process completely concluded quite some time ago. Nor will withdrawal of the reference have a significant impact on the economical use of the remaining parties' resources - as evidenced by the parties' mutual consent to the Motion. Withdrawal of the reference will, however, foster the efficient use of this Court's resources. This Court is one of circumscribed, specialized jurisdiction – authorities higher than this one have determined that bankruptcy courts are not suited to hear disputes unless those disputes are in some way related to a bankruptcy case. While both the parties and this Court acknowledge that this Court has *jurisdiction* over the subject matter of this Adversary Proceeding, it is also true that once all bankruptcy implications of the litigation have fallen away, withdrawal of the reference will

¹³ As originally filed, the lawsuit asserted claims under both state and federal, non-bankruptcy law. As noted earlier, the claims under federal law were dismissed while the case was pending in District Court. Upon referral to this Court, the lawsuit involved only state law claims which were "related to" Heritage's bankruptcy case by virtue of the Defendants' indemnity claims against the estate. No one has taken the position in this Adversary Proceeding that the Plaintiffs' claims are "core" claims.

ensure that this Court's resources are available for use in litigation which *does* have bankruptcy implications remaining.

Several criteria informing this Court's views require more discussion.

1. *Trial Readiness*

Not one, but several, scheduling orders have been entered in this Adversary Proceeding. At the first status conference held in this Adversary Proceeding upon its referral to this Court, the parties agreed to trial dates in July, 2006.¹⁴ Thereafter, a dispute arose as to a deadline by which Kornman would decide whether to revoke his assertion of his 5th Amendment privilege against self-incrimination.¹⁵ Despite this dispute, the parties entered into a stipulation which set discovery deadlines and scheduled a bench trial in this Court for July, 2006. *See* Docket No. 14.

In February of 2006, the Defendants moved for continuance of the trial date, on the ground that the Criminal Case was not set for trial until September, 2006, and Kornman wanted the deadline for the revocation of his 5th Amendment privilege to be set no earlier than ten days after a jury rendered a verdict in the Criminal Case. Notably, Kornman did *not* seek an abatement of discovery or dispositive motions in the Adversary Proceeding. The requested continuance was granted, although an agreed scheduling order was never formally entered (due to the re-setting of the Criminal Case) until March of 2007. On March 23, 2007, the Court entered an agreed scheduling order which, *inter alia*, set a discovery cut-off of July 20, 2007 and specially set the Adversary Proceeding for a

¹⁴ In fact, the Plaintiffs were quite upset over the three year delay from the filing of their initial complaint in the District Court to this potential trial setting.

¹⁵ Kornman was at that time under investigation, which led to a subsequent indictment. The criminal case was pending in federal district court in the Northern District of Texas – *see* United States v. Gary M. Kornman, Criminal Action No. 3:05-CR-0298P (the “Criminal Case”). Kornman entered into a plea agreement on April 9, 2007, in which he pled guilty to one count of making false statements to the Securities and Exchange Commission in violation of 18 U.S.C. § 1001. He was sentenced in July, 2007 to two years’ probation.

bench trial during the weeks of September 10 and 24, 2007.

On July 13, 2007, the Court entered yet another agreed scheduling order which, *inter alia*, set a discovery cut-off of September 14, 2007, and specially set the Adversary Proceeding for a bench trial for two weeks commencing November 5, 2007. On September 11, 2007, the Plaintiffs moved for continuance of the November trial date, on the ground that Kornman had delivered nearly 3,000 audiotapes to the Trustee pursuant to his plea agreement in the Criminal Case, which had not yet been transcribed. Although the motion for continuance suggested that the Plaintiffs *may* need more depositions, the Plaintiffs did not seek modification of the July 13, 2007 scheduling order in any respect other than requesting a continuance of the dates set for trial. The request for continuance was granted, and the Court directed the Plaintiffs to submit a scheduling order providing for a specially-set trial to be held on specified dates in February, 2008.

On October 31, 2007, the Plaintiffs filed a motion for leave to file a Third Amended Complaint. The Defendants did not oppose the motion, and it was granted premised upon the consent of the parties on December 4, 2007. Neither side requested modification of the July 13, 2007 scheduling order or asserted that any new discovery would be required by virtue of the amendment. In fact, on January 25, 2008, the Court entered an "Agreed Supplemental Scheduling Order" which supplemented the prior scheduling order by modifying the deadlines only for (1) the exchange of exhibits and deposition designations and (2) the submission of a pre-trial order, proposed findings of fact and conclusions of law. The Agreed Supplemental Scheduling Order set the Adversary Proceeding for a bench trial before the undersigned during the agreed-upon dates in February, 2008.

Four days after entry of the Agreed Supplemental Scheduling Order, the parties filed an

agreed motion for continuance of the trial to a date subsequent to a scheduled mediation in a related adversary proceeding. Once again, the Court granted that motion, and at a status conference held on February 19, 2008, the Court set the Adversary Proceeding for trial docket call in June with a further status conference to be held in April, 2008 at which the parties would advise the Court of the status of the mediation in the related adversary proceeding. At the April 28, 2008 status conference, the Court was advised that the mediation had been unsuccessful, and the Court directed that trial docket call would be held on June 4, 2008 and the Adversary Proceeding would proceed to trial in June.

As noted earlier, less than two weeks before the scheduled June trial docket call, the Defendants changed counsel, withdrew their proofs of claim, and filed motions to abstain and to continue the trial yet again. And, as noted earlier, the Plaintiffs have agreed, yet again, to this relief.

Notwithstanding the Plaintiffs' initial irritation over the delays in getting to trial expressed at the very first status conference held in this Court upon referral, neither side has been diligent in getting this Adversary Proceeding to trial. This Adversary Proceeding has been specially set for trial, with "firm" trial dates, no less than five times (July 2006, September 2007, November 2007, February 2008, and June 2008). There have been several scheduling orders in the case, each of which was agreed to by the parties. Under the most recent scheduling order which addressed discovery, the discovery cut-off was September 14, 2007. Neither side has sought modification of that Order in any respect other than the modification of the actual trial dates. Until the Defendants' eleventh-hour motion for continuance on May 29, 2008, neither side had indicated, in any of their

requests for continuance, that they were not ready for trial.¹⁶ Discovery has long ago closed, and but for the submission of proposed findings of fact and conclusions of law and a pre-trial order, the Court considers that the Adversary Proceeding is ready for trial. Therefore, there is no need for this Court to preside over further pre-trial proceedings if the reference is withdrawn.

2. *The Existence of a Jury Demand and the Parties' Consent to Entry of Final Order by the Bankruptcy Court*

There was a jury demand, by *the Plaintiffs*, when the case was originally filed in 2003 in District Court.¹⁷ Nevertheless, at the initial status conference in September, 2005, all parties consented to a bench trial in the Bankruptcy Court. Defendants now characterize their waiver of a jury trial right as “conditional.” The condition, however, was that the undersigned would be the presiding judge. That condition still exists, as the Adversary Proceeding has been, and continues to be, scheduled for trial before the undersigned. Therefore, a failure of this condition should not serve as a basis to relieve the Defendants from their prior waiver.

The other stated basis for the Defendants' desire to be relieved from their jury trial waiver is that the “complexion” of the Adversary Proceeding has changed by virtue of events occurring subsequent to their waiver, such that the Adversary Proceeding no longer bears any relationship to the bankruptcy. The Court notes that the “event” which has allegedly resulted in the divorce between

¹⁶ The Defendants' Motion to Abstain contained an alternative request for a continuance of the trial on two grounds: that Defendants have experienced a change in counsel (a factor wholly within their control), and that a Third Amended Complaint has been filed (in December, 2007, with Defendants' consent and without their assertion of the need for more trial preparation). The Court need not rule on Defendants' request, however, since it has been withdrawn. *See* Docket 157 (“The Motion to Abstain is moot based on the Defendants' withdrawal of the Motion to Abstain without prejudice”).

¹⁷ There has been a recent, untimely jury demand by the Defendants in their response to the Plaintiffs' Third Amended Complaint. *See* Docket No. 126. The lateness of the *Defendants'* request, however, is not fatal: when one party has made a demand for a jury, other parties are entitled to rely on the demand with respect to issues covered by the demand and need not make an independent demand of their own. *Dallas & Mavis Specialized Carrier Co. v. Pacific Motor Transport Co.*, No. 3:06-CV-1922-O, 2008 WL 696430 (N.D. Tex. Mar. 12, 2008).

this Adversary Proceeding and the bankruptcy case is an “event” wholly within the Defendants’ own control – the purported “withdrawal” of their proofs of claim. If the Court were to conclude that events within the Defendants’ control could vitiate their waiver, then the law of waiver may as well not exist. However, the Plaintiffs have not opposed the Defendants’ request, perhaps because they too wish to be relieved of *their* waiver, although they have not expressly so stated. Where no party objects to the retraction of the waiver, the Court will not intervene to save the Plaintiffs and the Defendants from each other.

Similarly, although the parties initially consented to entry of a final order by this Court, the Defendants have arguably (although not explicitly) retracted that consent. Once again, the Plaintiffs do not object to the Defendants’ retraction of consent to entry of a final order by this Court. Although both parties consented to a bench trial before this Court back in 2005, both sides appear to have changed their minds and now want a jury trial in District Court.¹⁸ Therefore, withdrawal of the reference at this point would serve judicial economy, since both parties now want a jury trial and neither is contesting the other’s right to have one.

Notwithstanding the motivations expressed by the Defendants for their tactical maneuvers on the eve of a bench trial before this Court, the Court perceives the following to be the more likely animation for the parties’ collective change of heart:

3. *Forum Shopping*

This is not the only motion for withdrawal of the reference before this Court. The Defendants are parties to two other adversary proceedings pending here. *See Faulkner v. Berg*, Adv.

¹⁸ The claims asserted are of the type normally tried to a jury.
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Pro. No. 06-3401-BJH¹⁹ and *Faulkner v. Kornman*, Adv. Pro. No. 06-3377-BJH. In both of those other adversary proceedings, the Defendants have sought similar relief. The parties in the *Berg* case, as in this one, apparently agree to the withdrawal of the reference such that a jury trial can be conducted in the District Court, and no one contests Kornman's right to withdraw his claim²⁰ or demand a jury late in the process. The plaintiff in the *Faulkner v. Kornman* case, however, is the trustee of the creditor trust formed pursuant to the confirmed plan (who was the Trustee of the Heritage bankruptcy estate prior to plan confirmation) – and he vigorously contests almost every

¹⁹ Only Kornman is a party to *Faulkner v. Berg*. He is a third party defendant sued by Berg.

²⁰ Technically, Kornman and GMK no longer hold any claims against “the Debtor.” Rather, in accordance with Section 6.1.3 of the confirmed plan, all claims against the Debtor and the estate and all distribution rights conferred by the plan on account thereof were transferred, on the effective date of the plan, to the Creditor Trust, as that term was defined in the plan. See Order Confirming Trustee's and Client Claimants' Second Amended Joint Plan of Liquidation under Chapter 11 of the United States Bankruptcy Code and, Alternatively, Approving the Trustee's Motion for Approval of Compromise and Settlement with Client Claimants and Mikron Industries, Inc., Docket No. 1281 in Case No. 04-35574-BJH-11 (entered September 12, 2007). The plan went effective on September 25, 2007. See Docket No. 1298 in Case No. 04-35574-BJH-11.

Moreover, the Court is not persuaded that the Defendants may simply withdraw their proofs of claim as of right. Federal Rule of Bankruptcy Procedure 3006 provides:

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper

Here, the Trustee filed objections to the Defendants' proofs of claim. On May 30, 2007, the Trustee objected to GMK's claim (See Docket No. 1131 in 04-35574) and on May 31, 2007, the Trustee objected to Kornman's claim. See Docket No. 1135 in Case No. 04-35574. The Trustee has also initiated a complaint against the Defendants. See Adv. Pro. No. 06-3377-BJH. Moreover, it cannot be disputed that the Defendants have “participated significantly in the case.” See, e.g., Docket No. 92 in Case No. 04-35574-BJH (“Response by GMK Family Holdings, LLC . . . to Motion for Appointment of Chapter 11 Trustee . . .”); Docket No. 775 in Case No. 04-35574-BJH (“Motion of Creditor Gary M. Kornman . . . For Order Granting Leave to Commence and Prosecute Adversary Proceeding on Behalf of the Estate . . .”); Docket No. 1052 in Case No. 04-35574-BJH (“Objection of Gary M. Kornman . . . and GMK Family Holdings, LLC to Approval of Disclosure Statement”).

The Court also assumes, without deciding, that Rule 3006 continues to apply in the post-confirmation context, although its application here makes little sense. Nor does the Court decide whether the withdrawal is effective, whether the withdrawal affects jury trial rights or jurisdiction or anything else. The Court perceives these to be significant issues, but they are more appropriately resolved in the lawsuit in which they are contested – *i.e.*, Adv. Pro. No. 06-3377-BJH. Here, the Defendants simply assert that the purported withdrawal of their claims makes the District Court the preferred forum for resolution of the dispute – an assertion apparently shared by the Plaintiffs.

aspect of the relief sought by Kornman and GMK (and other defendants in that case). In pleadings filed in that adversary proceeding, Kornman admits that a “significant impetus” for the withdrawal of his proof of claim and late request for a jury trial is a desire for a change of fact-finder. Kornman alleges that in this Court’s Prior Memorandum Opinion and Order,

the Court made findings that were deeply troubling to Mr. Kornman. Specifically, the Court made findings that certain parties’ conduct in the bankruptcy case (including the conduct of Mr. Kornman) was ‘inappropriate, arguably obstructive, and [absent the plea agreement entered into between Defendants and the U.S. Attorney] could have resulted in their criminal prosecution in accordance with 18 U.S.C. §§ 152 and 1519. Based on the foregoing comment, Mr. Kornman became concerned that the Court may have already formed an unfavorable opinion based on matters extrinsic to the merits of this lawsuit. While the Court doubtlessly believed it had a good reason for making the above-referenced statement, the validity or invalidity of the Court’s comment does not change the fact that such statement reasonably and rationally caused Mr. Kornman to believe that a jury trial, rather than a bench trial to the Court, would be in his best interests, especially where issues of credibility may prove decisive in the Court’s decision.

Defendants’ Reply to Trustee’s Resp. To Defs’ Mot. For Trial by Jury and, Subject Thereto, Mot. For Leave to Withdraw Claim Against Debtor and Mot. For Continuance of Trial Date and Extension of Pre-Trial Deadlines, and Br. In Supp., ¶ 10 (Docket No. 220 in Adv. Pro. No. 06-3377-BJH).²¹

Although the Plaintiffs have not expressly stated their reasons for agreeing to the relief sought by the Defendants, the Court notes that in the Prior Memorandum Opinion and Order, the Court was called upon to assess the merits of the Plaintiffs’ claims in this Adversary Proceeding against the Heritage bankruptcy estate, in the context of the Trustee’s motion to approve a settlement with the Plaintiffs. *See In re Cajun Elec. Power Coop., Inc.*, 119 F.3d 349, 355-56 (5th Cir. 1997)

²¹ The Court notes that while Kornman claims to have been “deeply troubled” by these findings of fact, they were made nearly nine months ago, after lengthy evidentiary hearings on hotly contested plan confirmation and settlement motion hearings where only Kornman and GMK were objectors and as to which no appeals were filed.

(“the judge must evaluate and set forth in a comprehensible fashion: (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law . . .”). In so doing, the Court reached certain conclusions about the relative strength of the Plaintiffs’ claims against the estate (based upon the evidentiary record then before it), and essentially concluded that there were significant factual and legal impediments to the Plaintiffs’ claims. *See* Prior Memorandum Opinion and Order, pp. 59- 67. The Plaintiffs now appear to be concerned that the Court’s comments would apply equally to the similar claims they assert against the Defendants.

In short, the Court suspects that after entry of the Court’s Prior Memorandum Opinion and Order, both parties here have simply concluded that they would be better off trying their luck with a jury in District Court.

There “is nothing inherently evil in forum-shopping.” *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987). This case does not present the types of forum shopping that the Supreme Court was hoping to prevent in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73-77 (1983). Nor is this a case in which one side is seeking an alternative forum to obtain some unfair, strategic advantage over the other.

Moreover, a certain amount of forum-shopping is contemplated by the statutes defining bankruptcy court jurisdiction. A bankruptcy judge may hear a non-core proceeding that is related to a case under title 11. 28 U.S.C. § 157(c)(1).²² If there is a jury trial right in such a proceeding, the bankruptcy judge may conduct it (if specially designated by the district court to do so), with the consent of the parties. 28 U.S.C. § 157(e). Thus, parties with a jury trial right are given an option:

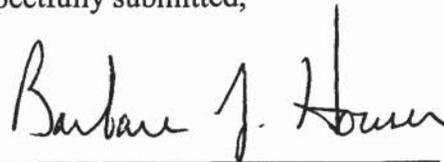
²² In such a proceeding, the bankruptcy judge submits proposed findings of fact and conclusions of law to the district court, with the final order to be entered by the district court, unless the parties consent to entry of a final order by the bankruptcy judge. 28 U.S.C. § 157(c)(1) and (2).

they may consent to a jury trial in the bankruptcy court, or they may withhold their consent, in which case the parties will go to district court. “Complaints about forum shopping expressly made possible by statute are property addressed to Congress, not the courts.” *Goad*, 831 F.2d at 512. n.12.

Lastly, the Court notes that the parties’ original forum was the District Court. The lawsuit would have proceeded in District Court had Heritage’s bankruptcy not been filed, and now that the bankruptcy implications of this lawsuit have changed dramatically, the parties wish to return there. Despite its concerns about the implications to the bankruptcy system of such tactical maneuvers, the Court sees no good reason not to let them return to District Court under the unique circumstances of this case, in light of their mutual agreement.

Therefore, this Court respectfully recommends that the Motion be granted and that the lawsuit be immediately placed upon the District Court’s jury trial calendar. Further trial delays should not be countenanced as the parties were told in February, 2008 when a final continuance was granted to either get the case settled at the April, 2008 mediation or be ready for trial in June, 2008. Shortly before the scheduled June trial docket call, the tactical maneuvers giving rise to this Report and Recommendation occurred, delaying trial yet again. The parties should be put to trial promptly.

Respectfully submitted,

A handwritten signature in cursive script that reads "Barbara J. Houser". The signature is written in black ink and is positioned above a horizontal line.

Barbara J. Houser
Chief United States Bankruptcy Judge