IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
THE HERITAGE ORGANIZATION, L.L.C.,	§	**CASE NO. 04-35574-BJH-11**
	§	
Debtor.	§	
	§	
DENNIS FAULKNER, TRUSTEE,	§	
Plaintiff,	§	**ADV. PRO. NO. 06-3401-BJH**
	§	**(Civ. Action No. 3:08-cv-1074-L)**
- against -	§	
	§	
CARL E. BERG,	§	
Defendant.	§	
	§	
CARL E. BERG,	§	
Counter-Plaintiff,	§	
	§	
- against -	§	
	§	
DENNIS FAULKNER, TRUSTEE	§	
Counter-Defendant.	§	
	§	
CARL E. BERG,	§	
Third-Party Plaintiff,	§	
	§	
- against -	§	
	§	
GARY M. KORNMAN,	§	
Third-Party Defendant.	§	

REPORT AND RECOMMENDATION ON MOTION TO WITHDRAW REFERENCE

This lawsuit initially began as an adversary complaint (the "Adversary Proceeding") filed by the Chapter 11 Trustee (the "Trustee") of the estate of The Heritage Organization, L.L.C. (the "Debtor" or "Heritage") against Carl E. Berg ("Berg") to recover on a promissory note executed by

Berg in favor of the Debtor. The Trustee asserted theories of breach of contract and turn-over of property of the estate under 11 U.S.C. § 542, both of which were "core" claims pursuant to 28 U.S.C. § 157(b)(2)(E) and (O). Berg asserted multiple affirmative defenses, filed counterclaims against the Debtor, and filed third-party claims against Gary Kornman ("Kornman"), the principal officer and indirect shareholder of the Debtor. The counterclaims and third-party claims asserted claims for fraudulent misrepresentation, fraudulent inducement, fraud by non-disclosure, breach of fiduciary duty, negligent misrepresentation, and negligence. Through these claims, Berg initially sought to recover damages from both the Debtor and Kornman.[1] These claims are non-core.

Now before the Court is a motion to withdraw reference (the "Motion to Withdraw Reference") filed by Berg. This is the second such motion; the first was filed on November 2, 2006. *See* Docket No. 31 (the "First Motion"). After a status conference on November 27, 2006, this Court entered a Report and Recommendation dated December 15, 2006 (the "Prior Report"). *See* Docket No. 76. The Prior Report set forth the procedural and factual background underlying this lawsuit, which the Court now incorporates by reference. In essence, the Prior Report recommended that the First Motion be denied, for several reasons. First, the Court noted that it had subject matter jurisdiction over the claims (even as to those between Berg and Kornman, both non-debtors), because on September 15, 2004, Kornman filed a proof of claim in the Debtor's bankruptcy case, alleging a right to indemnity, contribution, and/or reimbursement against the Debtor for any and all claims that were asserted against Kornman based upon his association with the Debtor (including

[1] Berg's proof of claim against the estate, however, was not timely filed. In other words, Berg filed his proof of claim in the Debtor's bankruptcy case after the bar date for the filing of claims. Therefore, the parties agreed that Berg could not assert these claims to obtain an affirmative recovery from the estate, but he could use them defensively – *i.e.*, to offset any liability that he may have owed on the Note. *See* Docket No. 958 in Case No. 04-35574-BJH.

those asserted by Berg).[2] Therefore, all of the claims were "related to" the Debtor's Chapter 11 case within the meaning of 28 U.S.C. § 1334, because if Berg succeeded in his claims against Kornman, the amount of Kornman's claim against the estate for indemnification and/or reimbursement would increase.[3] Second, the Court noted that while the Adversary Proceeding asserted both "core" and "non-core" claims, the "core" issues predominated. Third, the Court noted that the Adversary Proceeding was one of twenty-five separate adversary proceedings associated with the Debtor's bankruptcy case, several of which involved what the parties had all come to call "client claims" – *i.e.*, claims asserted by the Debtor's former clients. The so-called "client claims," including Berg's claims, all raised similar factual and legal issues. Therefore, the Court believed that judicial economy would best be served by allowing all related litigation to pend in one forum. Further, no party to the Berg Adversary Proceeding had asserted a right to a jury trial.

On January 5, 2007, the United States District Court for the Northern District of Texas (Godbey, D.J.) denied the First Motion. *See* Docket No. 84 (copy of Order on Motion to Withdraw Reference in Civ. Action No. 3:06-CV-2030-N).

There have been significant developments in this and other, similar cases since the First Motion was denied. Most importantly, on August 31, 2007, the Court entered a Memorandum Opinion and Order which approved a settlement between the Trustee and Berg with respect to the

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[2] Kornman amended his proof of claim on September 15, 2004 and May 10, 2007.

[3] "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); *In re Wood,* 825 F.2d at 93. 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." *Feld v. Zale Corp. (In re Zale Corp.),* 62 F.3d 746, 753 (5th Cir. 1995) (internal citations omitted). Since Berg's third-party claims against Kornman could conceivably have an effect on the Debtor's estate, the Court concluded that it possessed subject matter jurisdiction over those claims.

claims pending between them.[4] *See* Docket No. 1267 in Case No. 04-35574-BJH. On October 9, 2007, the Trustee and Berg filed a joint stipulation which provided that the claims asserted by the Trustee against Berg and Berg's counterclaims against the estate would be dismissed with prejudice. *See* Docket No. 102. The Court entered an Agreed Order of Dismissal of those claims on October 17, 2007. *See* Docket No. 104. As a result, the only claims still pending in this Adversary Proceeding are Berg's claims against Kornman, *id.*, which are non-core claims between non-debtors.

Similarly, on August 31, 2007, the Court entered a Memorandum Opinion and Order which (1) approved a settlement between the Trustee and the other client claimants and (2) confirmed a Chapter 11 plan of liquidation jointly proposed by the Trustee and certain client claimants which incorporated the terms of the settlement.[5] *See* Docket No. 1266 in Case No. 04-35574-BJH-11 (*reported at* 375 B.R. 230 (Bankr. N.D. Tex. 2007)). As a result of this and other settlements, virtually all of the litigation between the Trustee and the Client Claimants has been resolved.[6]

Recently, new counsel filed an appearance for Kornman in the Adversary Proceeding.[7] On May 27, 2008, Kornman filed a "Notice of Withdrawal of Certain Claims Against the Debtor by Gary M. Kornman" (the "Notice of Withdrawal"). In the Notice of Withdrawal, Kornman purported

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[4] Under the terms of the settlement, Berg paid $975,000 to the Chapter 11 Trustee and Berg and the estate released each other from all claims.

[5] The Court approved the settlement and confirmed the plan over the vigorous objection of Kornman, who was the President of the Debtor and allegedly in direct or indirect control of a group of entities affiliated with the Debtor.

[6] Adversary Proceeding No. 05-3699 is still pending. However, as with this Adversary Proceeding, the claims which originally involved the Debtor and/or its estate have been resolved and the only claims remaining are those between certain client claimants and Kornman (and an entity related to Kornman).

[7] Kornman's former attorney, Lynn, Tillotson & Pinker, LLP, initially moved to withdraw as counsel in September, 2007. They did not set their motion for hearing, however; they filed an amended motion in January, 2008, after the firm of Crouch & Ramey, LLP filed a notice of appearance for Kornman. On January 11, 2008, the Court granted the amended motion permitting Lynn, Tillotson & Pinker to withdraw as counsel. New counsel (Wick Phillips, LLP) filed a formal appearance on May 21, 2008, and Crouch & Ramey moved to withdraw as attorney on June 3, 2008.

to withdraw

> 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 Mr. Kornman in the Amended Kornman Claim that related solely to this Adversary Proceeding.

On that same date, Kornman filed his "Motion to Abstain and Brief in Support Thereof" ("Motion to Abstain"). *See* Docket No. 137. Berg did not file opposition to the Motion to Abstain, and a hearing was scheduled for June 25, 2008. On June 24, 2008, Kornman withdrew the Motion to Abstain, and filed the Motion to Withdraw Reference. Also on June 24, 2008, Kornman filed a "Motion for Trial by Jury and, Subject Thereto, Motion for Leave to Withdraw Claim Against Debtor and Brief in Support" (the "Jury Trial Motion"). The Jury Trial Motion was not set for hearing.

Despite the withdrawal of the Motion to Abstain, the parties appeared at the scheduled June 25, 2008 hearing on the Motion to Abstain. At that hearing, Kornman announced his withdrawal of the Motion to Abstain and the filing of the Motion to Withdraw Reference and the Jury Trial Motion. Berg's counsel indicated that Berg may not oppose either withdrawal of the reference or Kornman's late request for a jury trial, but wanted time to consider the issues, and the Court set a status conference for July 3, 2008, at which time Berg could inform the Court of his position with respect to the Motion to Withdraw Reference and the Jury Trial Motion.

On July 3, 2008, Berg's counsel informed the Court that Berg does not oppose either the Motion to Withdraw Reference or the Jury Trial Motion. Further, the parties tendered an agreed form of order which provided that (1) the Jury Trial Motion (which also sought leave to withdraw Kornman's claim against the Debtor) would be granted, and (2) the order would "constitute a

recommendation by the Court that the Motion to Withdraw the Reference . . . shall be granted and this Adversary withdrawn to the District Court." Accordingly, the Court deemed the July 3, 2008 hearing to be the status conference normally conducted upon the filing of a motion to withdraw reference. *See* Local Rule 5011.1 of the Local Rules of the Bankruptcy Court for the Northern District of Texas. The Court further indicated that based upon the agreement of the parties, the Court would grant the Jury Trial Motion and would recommend that the reference be withdrawn. The Court reserved the right, however, to enter its own Report and Recommendation (instead of the parties' proposed agreed order) so that the District Court could be fully informed with respect to this Court's views.

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 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
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> (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

Here, several issues can be quickly addressed. No response to the Motion to Withdraw Reference has been filed; instead, Berg consents to the relief. No party has moved to stay the Adversary Proceeding pending the District Court's decision on the Motion to Withdraw Reference. The Adversary Proceeding currently involves only non-core claims, since the Trustee's "core" claims have been settled. Kornman does not consent to trial by jury before this Court. *See* Jury Trial Motion, ¶ 9. A jury trial has not been *timely* requested, but Berg consents to the late request. The parties apparently agree to the withdrawal of the reference such that a jury trial can be conducted in the District Court, and Berg does not contest Kornman's right to withdraw his proof of claim or his

right to demand a jury trial late in the process.[8]

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 that Kornman's proof of claim is 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

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[8] Technically, Kornman no longer hold any claims against "the Debtor" to be withdrawn. 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 Kornman may simply withdraw his proof 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 Kornman's proof of claim on May 31, 2007. *See* Docket No. 1135 in Case No. 04-35574). The Trustee has also initiated a complaint against Kornman and others. *See* Adv. Pro. No. 06-3377-BJH. Morever, it cannot be disputed that Kornman has "participated significantly in the case." *See, e.g.*, 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 . . . 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, Kornman simply asserts that the purported withdrawal of his claim makes the District Court the preferred forum for resolution of the dispute – an assertion apparently shared by Berg.

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 to Withdraw Reference. 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 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*

This Court has previously entered a scheduling order in the Adversary Proceeding; the Adversary Proceeding was initially set for trial docket call in November, 2006.[9] However, Kornman was involved in a criminal case, and his assertion of his 5th Amendment privilege has made discovery difficult.[10] For that reason, trial docket call has been re-set both due to the pendency of the criminal

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[9] 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 November would be expected to proceed to trial during the second week of November.

[10] Kornman's 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.

case and to on-going proceedings in the Heritage bankruptcy case.[11] In November, 2007, this Adversary Proceeding was specially set for trial in May, 2008. On March 25, 2008, Berg filed an Agreed Motion for Continuance (the "Continuance Motion"). The Continuance Motion alleged that because of Kornman's assertion of his Fifth Amendment rights and Kornman's "recent intention to withdraw the assertion of those rights, Berg has been prejudiced unfairly by the inability to obtain any discovery from Kornman." Third-Party Plaintiff's Agreed Mot. for Continuance, ¶ 8. Berg therefore requested a continuance to allow the parties to conduct adequate discovery.[12] This Court granted the Continuance Motion by Order entered on April 3, 2008, which also provided that the prior pretrial deadlines were "withdrawn," and that the Adversary Proceeding would be set for a further status conference in June, 2008, at which the Court would set new discovery deadlines and a new trial date.

By the time of the June status conference, however, Kornman had filed the Motion to Abstain. In addition, it has become clear that discovery is not yet completed. As noted earlier, Kornman subsequently withdrew the Motion to Abstain and filed the Motion to Withdraw Reference and the Jury Trial Motion, both of which are agreed to by Berg. In any event, it does not appear that the parties are ready for trial. Therefore, there may be further discovery matters and other pre-trial motions that arise.

2. *Forum Shopping*

This is not the only motion for withdrawal of the reference before this Court. Kornman is

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[11] Berg's lead counsel was also deployed to Iraq.

[12] The parties agreed that Kornman would provide responses to discovery by May 12, 2008, and would appear for a deposition on May 22, 2008.

a party to two other adversary proceedings still pending here. *See Meralex, LP v. The Heritage Organization, LLC,* Adv. Pro. No. 05-3699 and *Faulkner v. Kornman*, Adv. Pro. No. 06-3377-BJH. In both of those other adversary proceedings, Kornman has sought similar relief. The parties in the *Meralex* 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 claim 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 aspect of the relief sought by Kornman (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 August 31, 2007 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).[13]

Berg has always preferred a different forum for the resolution of his claims. *See* Docket No. 13 (Def. Carl E. Berg's Mot. To Compel Arbitration and for Stay Pending Arbitration); Docket No. 31 (the First Motion). Kornman has, until recently, been content to defend against Berg's claims against him in this Court. *See* Docket No. 23 (Kornman's Resp. In Opp. To Def. Carl E. Berg's Mot. to Compel Arbitration and Br. In Supp.); Docket No. 51 (Kornman's Resp. To Def.'s Mot. To Withdraw Bankruptcy Reference and Br. In Supp.). However, after the entry of the Court's August 31, 2007 Memorandum Opinion and Order, Kornman has simply concluded that he would be better off trying his 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 – both sides agree to the alternative forum.

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).[14] 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

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[13] 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.

[14] 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).

consent of the parties. 28 U.S.C. § 157(e). Thus, parties with a jury trial right are given an option: they may consent to a jury trial in the bankruptcy court, or they may withhold their consent and the case must 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.

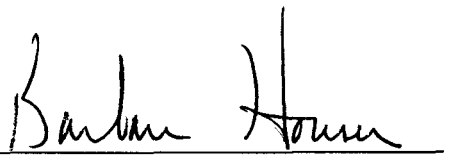
Lastly, the Court notes that the parties have represented to this Court that there is diversity between them, and thus the District Court would properly have jurisdiction over the claims asserted in the Adversary Proceeding. The parties wish to proceed in District Court, and the right to trial by jury is a fundamental right which should not be lightly disturbed. Therefore, despite its concerns about the implications to the bankruptcy system of Kornman's tactical maneuvers, the Court sees no good reason not to let them proceed in District Court under the unique circumstances of this case, in light of their mutual agreement. The Court bases its Report and Recommendation upon the agreement of the parties and expresses no view as to whether it would have permitted any or all of these maneuvers, or ruled in any particular fashion with respect to the effect of Kornman's acts, in the absence of Berg's agreement.

Therefore, this Court respectfully recommends that the Motion be granted and that the District Court preside over such pre-trial matters as may be remaining. This is not a case in which there have been repeated discovery disputes requiring this Court's intervention, and thus there is no need for this Court to continue to preside over this Adversary Proceeding in order to enforce its own orders. Moreover, the Court orally denied a summary judgment motion by Berg in January, 2008, so the Adversary Proceeding is moving towards trial. Since the District Court will preside over that trial, it is in the best position to manage its own pre-trial schedule.

By separate Order, this Court will grant, by agreement of the parties, Kornman's Jury Trial

Motion – which sought both a jury trial and leave to withdraw his claim.

Respectfully submitted,



Barbara J. Houser
Chief United States Bankruptcy Judge