

IT IS SO ORDERED.

Dated: 10:59 AM June 09 2010



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE No. 10-50494
)	
Fair Finance Company,)	CHAPTER 7
)	
DEBTOR.)	JUDGE MARILYN SHEA-STONUM
)	
)	
Thomas E. McKibben, Sr., <i>et al.</i> ,)	ADV. PRO. No. 10-5038
)	
PLAINTIFFS,)	
)	
vs.)	ORDER OVERRULING OBJECTION
)	AND NON-CONSENT TO REMOVAL
Fair Finance Company, <i>et al.</i> ,)	AND REQUEST FOR ABSTENTION AND
)	REMAND RESPECTING OBJECTOR
DEFENDANTS.)	DEFENDANTS

On April 2, 2010, Brian Bash, the Interim Trustee (the “Trustee”) for the Debtor, commenced the above-captioned adversary proceeding by filing a Notice of Removal (the “Notice of Removal”), in which he sought to remove the state court proceeding presently pending in the Summit County (Ohio) Court of Common Pleas captioned *Thomas E. McKibben, Sr. and Nellie M. McKibben, Individually and on Behalf of all Others Similarly Situated, Plaintiffs vs. Fair Finance Company, et*

al., Defendants, case #2009-12-8732 (the “State Court Case”).¹ On April 20, 2010, Timothy S. Durham, John J. Head, Rick D. Snow, Keith E. Schaffer, Fair Facility I, LLC,² Fair Holdings, Inc., James F. Cochran, Daniel S. Laikin, Obsidian Enterprises, Inc., and DC Investments, LLC, defendants in the State Court Case (collectively the “Objecting Defendants”), filed an Objection to the Notice of Removal (the “Objection”) [docket #6].

The Court held an initial pre-trial conference on May 12, 2010, at which the Court set a deadline for the Objecting Defendants to file a memorandum supporting their Objection and a deadline for the Trustee to file a memorandum in opposition. On May 19, 2010, the Objecting Defendants filed a “Memorandum in Support of (1) Objection and Non--Consent (sic) to Removal Respecting Notice of Removal by Brian Bash, Interim Trustee for Fair Finance Company and (2) Abstention and Remand Respecting Objector Defendants” (the “Defendants’ Memorandum”) [docket #9]. On May 28, 2010, the Trustee filed a “Memorandum in Opposition to Objection and Non-consent to Removal” (the “Trustee’s Memorandum”) [docket #10].

Based upon the Notice of Removal, the Defendants’ Memorandum, and the Trustee’s Memorandum, the Court makes the following findings of fact and conclusions of law.

I. BACKGROUND

1. On February 8, 2010 (the “Petition Date”), certain creditor-investors of the Debtor filed a

¹The named defendants are Fair Finance Company, Fair Holdings, Inc., DC Investments, LLC, Obsidian Enterprises, Inc., Timothy S. Durham, James F. Cochran, Daniel S. Laikin, Jeffrey L. Elgen, Keith E. Schaffer, Rick D. Snow, John J. Head, Charles James, Jr., and John Does 1-20.

²Because Fair Facility I, LLC was not listed as a named defendant in the Amended Complaint, the Court assumes that Fair Facility I, LLC was included in the “John Doe 1-20” group.

petition for involuntary bankruptcy against the Debtor commencing bankruptcy case No. 10-50494 (the “Main Case”).

2. The Court entered an order on February 19, 2010 directing the United States Trustee to appoint an interim trustee in this case. The United States Trustee appointed Brian Bash as the interim trustee.

3. On February 24, 2010, the Debtor filed a notice that it consented to the entry of an order granting relief in this case [docket #35 in the Main Case].

4. On March 2, 2010, the Court entered an order for relief under Chapter 7 as sought by the creditor-investors *nunc pro tunc* as of February 24, 2010 [docket #40 in the Main Case]. Additionally, on March 2, 2010, the United States Trustee filed a Notice of Appointment of Interim Trustee effective as of February 24, 2010 [docket #41 in the Main Case].

6. As of the Petition Date, over 5,000 investors in the Debtor held certificates totaling over \$200,000,000.

7. Prior to the Petition Date, on December 4, 2009, a relatively small number of holders of investment certificates of the Debtor (the “State Court Plaintiffs”) had filed a complaint in the Summit County Court of Common Pleas, commencing the State Court Case [docket #8, Ex. St.1].

8. On February 4, 2010, the State Court Plaintiffs filed an Amended Class Action Complaint with Jury Demand in the State Court Case (the “Amended Complaint”) [docket #8, Ex. St.37]. The Court notes that this was four days before the Petition Date, and as a result of the bankruptcy filing, no substantive progress appears to have been made in the State Court Case.

9. The Amended Complaint alleges 13 causes of action. The alleged causes of action are: (1) Misrepresentations and omissions made in violation of the Ohio Securities Act – R.C. § 1707.41;

(2) Misrepresentations made in violation of the Ohio Securities Act – R.C. § 1707.44(B); (3) Participation in sales made in violation of the Ohio Securities Act and/or aiding the seller in making such sales – RC § 1707.43; (4) Breach of fiduciary duty; (5) Unjust enrichment; (6) Punitive damages; (7) Breach of contract; (8) Negligent misrepresentation; (9) Aiding and abetting; (10) Request for appointment of a receiver against defendants Fair Finance Company and Fair Holdings, Inc.; (11) Violations of the Ohio Uniform Fraudulent Transfer Act – R.C. § 1336.04(A)(1); (12) Violations of the Ohio Uniform Fraudulent Transfer Act – R.C. § 1336.04(A)(2); and (13) Violations of the Ohio Uniform Fraudulent Transfer Act – R.C. § 1336.05.

10. Some of these causes of action are alleged against the Debtor, some against the Objecting Defendants, some against other defendants, and some against various combinations of those defendant parties. *See* Amended Complaint pp. 20-31.

II. DISCUSSION

A. Removal

In his Notice of Removal, the Trustee states that he is removing the State Court Case to this Court pursuant to 28 U.S.C. §§ 1441 and 1452. Notice of Removal at 1. A defendant may remove “any civil action brought in a State court of which the district courts of the United States have original jurisdiction ... to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). As an alternative to Section 1441, Section 1452 provides that

[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 government unit to enforce such governmental unit’s 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 [title 28].
28 U.S.C. § 1452(a). In order to determine whether removal of the State Court Case is appropriate, the Court will examine both of the removal sections that the Trustee relied on in his Notice of Removal.

i. 28 U.S.C. § 1441

In the Defendants' Memorandum, the Objecting Defendants argue that the Trustee has no basis to remove the State Court Case under 28 U.S.C. § 1441. Defendants' Memorandum at 7. The Objecting Defendants argue that "it is apparent that district courts do not have original jurisdiction of the [State Court Case]." *Id.* In the Trustee's Memorandum, the Trustee does not rebut this argument, nor does he address § 1441. *See* Trustee's Memorandum. This Court does not agree that it would not have original jurisdiction over the State Court Case. As discussed below, this Court has jurisdiction over the State Court Case pursuant to 28 U.S.C. § 1334. This Court notes that its primary basis for original jurisdiction is 28 U.S.C. § 1334(b). *See* 28 U.S.C. §§ 1330-1333, 1335 (establishing the categories of cases, other than bankruptcy cases, that a district court shall have original jurisdiction over).

The Objecting Defendants also argue that not all of the defendants have joined in the removal, and that the Objecting Defendants have affirmatively objected to it. Defendants' Memorandum at 7. The Sixth Circuit has held that "all defendants in the action must join in the removal petition or file their consent to removal in writing." *Loftis v. United Parcel Service*, 342 F.3d 509, 516 (6th Cir. 2003). "Failure to obtain unanimous consent [of all defendants] forecloses the opportunity for removal under [28 U.S.C. §] 1446." *Id.* *See also Jeffrey Mining Prods. v Left Fork Mining Co.*, 992 F. Supp 937 (N.D. Ohio 1997) (remanding an improperly removed case to

state court where the codefendants never gave their approval to removal petition and actively opposed removing defendant's motion to transfer venue. The court found that not all defendants supported removal as required by 28 U.S.C. § 1441(a).³

While this Court has the jurisdiction to hear this removed case, it finds that removal under 28 U.S.C. § 1441 is improper as a result of the failure of all defendants to join the removal action.

ii. 28 U.S.C. § 1452(a)

Alternatively, the Trustee bases his Notice of Removal on 28 U.S.C. § 1452(a). As quoted above, 1452(a) deals with the removal of claims related to bankruptcy cases. Unlike 28 U.S.C. § 1441 which requires a defendant or defendants to remove an action, section 1452 allows “a party” to remove “any claim or cause of action in a civil proceeding.” 28 U.S.C. § 1452(a). The Trustee is a “party,” pursuant to that section. *See* 11 U.S.C. § 704 (enumerating the duties of a chapter 7 trustee, including collecting the assets of the estate). The Trustee now is charged with sorting out the legal rights and obligations of the Debtor which is a named defendant in the State Court Case.

The Objecting Defendants argue that “the notion of a single defendant’s unilateral ability to obtain removal under Section 1452 without the joinder of all defendants is by no means clear.” Defendants’ Memorandum at 8 (citing *Ross v. Thousand Adventures of Iowa, Inc.*, 178 F. Supp 2d 996, 1002 (S.D. Iowa 2001)). The opinion in *Ross* has been criticized by several district courts, including an Ohio-based district court. *See Parrett v. Bank One (In re Nat’l Century Fin.*

³The Court notes that this case may be distinguishable from *Loftis* and other cases requiring that all defendants join in the removal. In *Loftis*, all of the defendants were sued on the same cause of action. In this case, the named defendants varied in each cause of action. Because the Trustee did not discuss § 1441 in the Trustee’s Memorandum, the Court will not analyze this issue. However, the Court notes on the causes of action where the Objecting Defendants were not named, the Objecting Defendants likely do not have standing to object to the removal, which would make their need to join the removal moot.

Enters.), 232 F. Supp 2d 861, 873 (S.D. Ohio 2004) (finding the opinion in *Ross* to be unpersuasive). The court in *Parrett* found that *Ross* “incorrectly compared § 1452 with § 1446.” *Id.* The court further opined that “the proper comparison is between § 1452 and § 1441.” *Id.* (citing *Cal. Pub. Empls. Ret. Sys.*, 368 F.3d 86, 2004 WL 1048203, at *13). When the *Parrett* court compared §§ 1441 and 1452 it focused on who may remove an action and on the differing Congressional intent between the two sections. *Id.* The court explained that

[t]he plain language and purpose of § 1452 are different than that of § 1441. Section 1441(a) allows “the defendant or the defendants” to remove, but Section 1452(a) allows “a party” to remove. And while any doubts as to the propriety of removal under § 1441 are resolved in favor of remand, the jurisdictional grant in the 1984 Bankruptcy Amendments is to be “broadly construed.” “Congress, when it added § 1452 to the Judicial Code chapter on removal of cases from state courts ... meant to enlarge, not to rein in, federal trial court removal/remand authority for claims related to bankruptcy cases.” Given § 1452’s plain language and the Congressional purpose behind it, this Court concludes that a single defendant may remove a claim or cause of action related to a bankruptcy proceeding.

Id. (internal citations omitted). See also *Alexander v. Cintas Corp. (In re Terry Mfg. Co.)*, 324 B.R. 147, 151 (Bankr. M.D. Ala. 2005) (“There is nothing in the plain language of [28 U.S.C. § 1452(a)] which would indicate that all defendants ... must join in the removal”).

This Court agrees that the plain language of § 1452(a) allows the Trustee, as a party, to remove the State Court Case without the consent of any other defendant, including the Objecting Defendants.

The Objecting Defendants also argue that the Notice of Removal is deficient because it does not comply with Bankruptcy Rule 9027(a). The Objecting Defendants argue that the Trustee must “identify the claim or cause of action he seeks to remove and demonstrate that such claim or cause of action falls within the jurisdiction provided under Section 1334.” Defendants’

Memorandum at 8.⁴ Bankruptcy Rule 9027(a) provides, in pertinent part, that “the notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core ...” In light of the analysis of the State Court causes of action and the relief sought thereunder, this Court is unpersuaded that the Trustee’s failure to list the individual claims or causes of actions in the Notice of Removal renders that notice deficient. *See In re Louise Corp.*, 77 B.R. 766, 768 (Bankr. C.D. Cal. 1987) (finding that where the notice sought to remove the “state court litigation” to the bankruptcy court, the entire case was removed), *Berry v. Pharmacia Corp.*, 316 B.R. 883, 887 (S.D. Miss. 2004) (finding that entire state court case was removed when the removal petition consistently referred to removing “this action” and “this civil action”). The Notice of Removal in this case states that the Trustee “hereby removes to this court the state court proceeding...” It appears to this Court that such language manifests the Trustee’s intent to remove the entire State Court Case. As further analyzed below, this Court is an appropriate venue to address the resolution of each issue and form of relief addressed in the State Court Case.

B. Jurisdiction Under 28 U.S.C. § 1334

i. Cases arising under title 11, or arising in, or related to cases under title 11

⁴In support of this argument the Objecting Defendants offer the following cite “*In re National Century Financial Enterprises, Inc.*, 323 F. Supp. 2d 861 (S.D. Ohio 2004) (citing *Creasy v. Coleman Furniture Corp.*, (4th Cir. 1985) 763 F.2d 656 [sic]...” The *National Century Financial Enterprises* case is the *Parrett* case cited in this opinion. In fact the portion of that case that quotes *Creasy* does so in order to support the proposition that “[u]nder the bankruptcy removal statute ... any one party has the right to remove the state court action without the consent of the other parties.” *Parrett*, 323 F. Supp 2d at 872 (quoting *Creasy*, 763 F.2d at 660).

As discussed above in section II(A), one of the requirements to remove an action to this Court is that the Court must have jurisdiction over the State Court Case. This Court has jurisdiction over the State Court Case pursuant to 28 U.S.C. § 1334. Pursuant to 28 U.S.C. § 1334(b), “...the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”⁵ The Court will examine the difference between these three types of proceedings: civil proceedings arising under title 11, those arising in cases under title 11, and those related to cases under title 11.

A case that arises under title 11 is a case involving “proceedings that involve a cause of action created or determined by a statutory provision of title 11.” *Best Reception Sys. v. Best Reception Sys. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 943 (Bankr. E.D. Tenn. 1998) (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 92 (5th Cir. 1987)). “The meaning of ‘arising in’ proceedings ... seems to be a reference to those ‘administrative’ matters that arise only in bankruptcy cases ... and not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.” *Id.* (quoting *Wood* 825 F.2d at 97).

To test whether a proceeding is “related to” a case under title 11, a court must examine “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *In re Dow Corning Corp.*, 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). In analyzing this criteria in the context

⁵While 28 U.S.C. § 1334(b) and the removal statutes discussed herein reference “district court(s)”, the District Court for the Northern District of Ohio has referred cases arising under title 11 to this Court pursuant to 28 U.S.C. § 157(a) and by the Standing Order of Reference entered in this District on July 16, 1984. As a result, for the purposes of determining the issues raised herein, this Court takes the place of the “district court(s)” in the removal and jurisdiction statutes.

of that chapter 11 case, the court noted 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 which in any way impacts upon the handling and administration of the bankrupt estate.” *Id.* This definition supports a finding that bankruptcy courts have been granted a broad jurisdictional scope pursuant to 28 U.S.C. § 1334(b). *In re Dow Corning*, 86 F.3d at 489, citing *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 (1995). A bankruptcy court’s “related to” jurisdiction also includes “suits between third parties which have an effect on the bankruptcy estate.” *Id.* at 490 (quoting *Celotex*, 115 S. Ct. 1499 n.5). In the context of this chapter 7 case, this last criterion is a most appropriate measure.

ii. Jurisdiction under 11 U.S.C. 1334(b) as applied to this case

The Court concludes that it has “related to” jurisdiction and “arising under” jurisdiction over the State Court Case. The State Court Case may also give rise to certain administrative matters that will trigger “arising in” jurisdiction.

There is no doubt that the State Court Case falls into the “related to” jurisdiction of a bankruptcy court. Any recovery by the putative class in the State Court Case, if that case were allowed to proceed, would diminish the value of the estate for any non-class member that is similarly situated. In other words, if some certificate holders were able to recover in state court, it would have an effect on the bankruptcy estate as the recovery would be at the expense of non-party certificate holders and other creditors. Additionally, even if the plaintiffs in the State Court Case were able to proceed against the defendants other than the Debtor, including the Objecting Defendants, any recovery may again diminish the bankruptcy estate. The interrelatedness of all the defendants and the history of related-party loans, as shown by the Trustee, suggests a likelihood that monies

recovered from any defendant may ultimately be funds that belong to the Debtor's estate. This scenario appears to be the type of third-party suit that the Supreme Court contemplated in its *Celotex* decision. Another way of conceptualizing these issues is to recognize that functionally the bankruptcy case provides the equivalent of the class relief that the plaintiffs had just begun to pursue.

As previously discussed, a case that arises under title 11 is a case involving "proceedings that involve a cause of action created or determined by a statutory provision of title 11." *Best Reception Sys.*, 220 B.R. at 943. The State Court Case consists of 13 causes of action, which are listed in Section I(9), *supra*. See also Amended Complaint pp. 20-31. The Court recognizes that none of the 13 causes of action are created by a statutory provision of title 11. However, the statutory provisions of title 11 provide a framework for *determining* the causes of action alleged in the State Court Case. This is most evident when one examines the relief sought by the State Court Plaintiffs, as none of the relief sought is better addressed by another court. Additionally, none of the relief sought is personal to any individual State Court Plaintiff, but affects all of the certificate holders of the Debtor. The Amended Complaint seeks the following relief: (a) for a determination that this action is a proper class action and for certification of the Class under Ohio R. Civ. P. 23; (b) for rescission of the purchase of the certificates and damages in the amount paid, plus interest; (c) for compensatory damages in an amount in excess of \$25,000; (d) for punitive damages in an amount in excess of \$25,000; (e) for attorneys' fees and other expenses; (f) for appointment of a receiver to conduct the business of the Debtor and its related companies; (g) that the defendants be enjoined from transferring or disposing of property, taking on more debt, and that all other persons including other creditors, be enjoined from instituting, prosecuting, or continuing to prosecute any action against any of the

defendants that may further diminish the assets of the defendants; (h) for relief under the Ohio Uniform Fraudulent Transfer Act; (i) for taxing of the costs of the action against the defendants; (j) for interest as allowed by law; and (k) for further relief as the State Court deems just and proper.

In a chapter 7 bankruptcy case, the Trustee, as a representative of the estate, must collect assets of the estate and ultimately make distributions to the holders of allowed claims against the estate. 11. U.S.C. § 704(a). All of the certificate holders, including the State Court Plaintiffs, are creditors of the Debtor by virtue of the certificate holders' claims against the Debtor. *See* 11 U.S.C. § 101(5)(a) (defining "claim" as "[a] right to payment..."). Because the bankruptcy code treats similarly situated creditors the same, all of the certificate holders whose claims are allowed will be treated in a similar manner, saving the time and expense of certifying a class in state court.⁶ This treatment in bankruptcy alleviates the need for the State Court Plaintiffs to be certified as a class and the declaration from the state court that the action is a proper class action case, as requested in the first prayer for relief.

The State Court Plaintiffs' prayer for rescission, compensatory damages, and punitive damages should all be addressed in the context of the bankruptcy claims procedure. Part of the claim for rescission is for "damages in the amount paid for [the investment certificates], plus prejudgment interest thereon." Again the request for damages and interest falls squarely under the definition of

⁶ The Court notes that due to the alleged Ponzi scheme nature of investments in the Debtor, certifying a class in state court may have been a confusing process. The nature of a Ponzi scheme would suggest that certain certificate holders may have received some payments while others have not. The varying degree of payments received might have impeded the ability to certify a class. While a class may be broken into subclasses, *see* Ohio R. Civ. P. 23(D), this would have added further expense and could have diminished the potential recovery.

“claim” in 11 U.S.C. § 101(5)(A).⁷ Additionally, a “claim” may include the “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.” 11 U.S.C. § 101(5)(b). Rescission, if available, would be a form of equitable relief. A claim would also include compensatory damages. Claims for punitive damages are likely to be functionally mooted because of the limited size of the estate.

The request for “attorneys’ fees, expert witness fees, other litigation expenses, and court costs” has the potential to quickly diminish assets of the bankruptcy estate. The Court notes that, for purposes of economy, the Trustee is in the best position to accomplish the relief sought by the State Court Plaintiffs. Included in that economic analysis is the fact that the appointment of the Trustee in the bankruptcy case eliminates the need for a receiver to be appointed in the State Court Case, as the Trustee is the functional equivalent of a receiver with additional avoidance and other powers.

The State Court Plaintiffs sought various injunctions against the Debtor, the Objecting Defendants, other defendants, and against third parties that may be seeking to recover assets from those parties, either individually or collectively. The ultimate goal of these injunctions is to preserve estate assets. The Trustee is charged with the same duty. In fact, the Trustee appears to be making progress to marshal assets in the bankruptcy case, including: the filing of a Motion to Substantively Consolidate Fair Holdings, Inc. and DC Investments, LLC into the Estate [docket #145 in the Main Case], recording lis pendens and liens on certain properties owned by various parties, monitoring the dissolution of CLST Asset I, a related company, recovering bank accounts owned by related entities through turnover actions, among other matters. *See* Trustee’s Status Reports [docket ## 106 and 142

⁷The Court notes that the lead State Court Plaintiff, Thomas McKibben, Sr., has filed a claim in the Debtor’s bankruptcy case in the amount of \$98,737.71, reflecting a principal amount of \$93,142.05 and interest amount of \$5,595.66. *See* Claim #85, Main Case.

in the Main Case]. The Trustee has also indicated that he would be filing cross-claims as appropriate in this adversary proceeding to collect and preserve assets of the Debtor's estate. However, the Court notes that the Trustee has not yet done so.

Finally, the relief sought pursuant to the Ohio Uniform Fraudulent Transfer Act can be appropriately addressed by the Trustee. The Trustee is able to avoid fraudulent transactions pursuant to the Bankruptcy Code. *See* 11 U.S.C. §§ 544 and 548. The remainder of the relief sought under the Ohio Uniform Fraudulent Transfer Act in the Amended Complaint is duplicative of other relief sought (i.e., monetary damages, injunction against further transfers, and the appointment of a receiver). Amended Complaint at 34, ¶ h.

While the causes of action alleged in the State Court Case would exist outside of the bankruptcy context, events may occur in this case that would cause the Court to have “arises in” jurisdiction. Collier on Bankruptcy explains that “arising in” jurisdiction “includes such things as administrative matters, orders to turn over property of the estate and determinations of the validity, extent, or priority of liens.” Collier on Bankruptcy, P 3.01[4][c][iv] (15th ed. 2004) (internal quotes and citations omitted). Because the Court has established both “arising under” and “related to” jurisdiction, the Court simply notes that some of the “administrative matters” that fall under “arising in” jurisdiction may present themselves in the process of resolving this case.

iii. This matter is a “core” proceeding pursuant to 28 § U.S.C. 157(b)(2)(A), (B), (H), and (O)

This Court may hear and determine all core proceedings arising under title 11. 28 U.S.C. § 157(b)(1). After determining that this Court has “arises under” jurisdiction, this Court concludes that this is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (H), and (O). As explained above,

any judgment that may be entered against the defendants in the State Court Case may affect the estate due to the interrelatedness of the parties and the assets in this case. Additionally, if a receiver were appointed, he or she would have duties that would overlap or possibly be inconsistent with the duties of the Trustee. Both of these factors would concern the administration of the estate. *See* 28 U.S.C. § 157(b)(2)(A). Bankruptcy courts have the power to resolve claims against the estate. *See* 28 U.S.C. § 157(b)(2)(B). Because the monetary relief sought in the State Court Case will ultimately be resolved through the claims process in the Debtor's bankruptcy case, it is a core function for this Court. *See Id.* The Trustee has the power to seek to avoid the types of alleged fraudulent transfers that the State Court Plaintiffs sought to avoid in the Amended Complaint, also likely a core matter. *See* 28 U.S.C. § 157(b)(2)(H). Finally, because this matter may affect the liquidation of assets of the Debtor's estate or the adjustment of the debtor-creditor relationship, it is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

C. Abstention

The Objecting Defendants argue that the Court should be required to abstain from hearing this case pursuant to the mandatory abstention provision in 28 U.S.C. § 1334(c). Defendants' Memorandum at 13. The Objecting Defendants rely on the five-part test established in *In re Dow Corning Corp.*, 113 F.3d 165 (6th Cir. 1997), to determine whether mandatory abstention applies in a particular proceeding. That test requires

a timely motion by a party to that proceeding, and the proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding.

Id. All five of these factors must be met in order for mandatory abstention to apply. The Court has already explained that this is a core proceeding. *See* Section II(B)(iii), *infra*. Because the fifth factor

is not present, the Court does not need to evaluate the rest of the factors. Mandatory abstention does not apply to this proceeding.

In the alternative, the Objecting Defendants argue that the Court should abstain from hearing the State Court Case based on the permissive abstention provision of 28 U.S.C. § 1334(c)(1). That section provides “[n]othing 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). The Trustee and Objecting Defendants have each suggested different tests for this Court to use to evaluate whether or not it should abstain in this case. In its discretion, the Court will evaluate the more stringent 12-part test suggested by the Objecting Defendants. The Objecting Defendants argue that the Court should look to a number of factors in determining whether permissive abstention under § 1334(c)(1) is appropriate:

- (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention;
- (2) the extent to which state law issues predominate over bankruptcy issues;
- (3) the difficulty or unsettled nature of the applicable law;
- (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court;
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- (7) the substance rather than the form of an asserted core proceeding;
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow

judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden of the bankruptcy court's docket;

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of non-debtor parties.

In re Applegate, 414 B.R. 209, 216 (Bankr. N.D. Ohio 2008) (citing *Delphi Automotive Systems, LLC v. Segway, Inc.*, 519 F.Supp.2d 662, 670-71 (E.D. Mich. 2007)). Not all factors must be met for the Court to abstain. *Id.*

If the Court were to abstain, it would cause delay on the administration of the estate. At the very least, abstention would likely lead to the Court being forced to hear additional motions for relief from the automatic stay in order for the State Court Case to be allowed to proceed. At worst, it could lead to the additional estate funds being dissipated and the Trustee commencing additional avoidance actions. Second, all of the state law issues appear to have analogous bankruptcy issues. Simply stated, to the extent not already effectuated by the entry of the order for relief in this case, the relief sought in the Amended Complaint is appropriately addressed in this Court. Third, this Court is capable of adjudicating the state court issues, as none of those issues appear to be unsettled. Fourth, the Objecting Defendants note that there are at least three other similar proceedings pending in state court. If anything, these pending cases show the impracticality of allowing different groups of plaintiffs to proceed in separate suits. Fifth, as the Objecting Defendants note, this Court is asserting jurisdiction based only on 28 U.S.C. § 1334. Sixth, this case is related directly to the main bankruptcy case. The recovery of assets from the defendants in the State Court Case has a direct

impact on the estate. Seventh, the asserted core proceedings directly bear on the estate and are consistent with bankruptcy law.

Eighth, it is not feasible to separate state law claims from the core bankruptcy matters. Any monetary recovery based on a state law claim is a core bankruptcy claim. Further, any potential recovery paid in the form of a settlement may be avoidable by the Trustee. Such a scenario would defeat the point of proceeding in state court, and would further diminish the estate property as a result of the fees which would inevitably be charged. Ninth, while this Court has a busy docket, the Court notes that the additional work that may arise from abstaining would likely occupy as much time as hearing this proceeding. Tenth, while the Objecting Defendants argue that the Trustee is clearly forum shopping, the Court notes that the Trustee is empowered to bring the proper actions in this Court. Eleventh, the State Court Plaintiffs have requested a jury trial. Finally, the proceeding includes non-debtor parties. These non-debtor parties are so related to the Debtor in this case that the inclusion of these parties is necessary to properly administer the estate.

For the foregoing reasons, the Court does not find that it should abstain from hearing this proceeding based upon 28 U.S.C. § 1334(c)(1). The twelve factors that the Defendant urged the Court to evaluate weigh heavily in favor of this Court not abstaining. The Court notes that the abstention analysis may have been somewhat different if the State Court Plaintiffs would have made any progress in that proceeding, but the Amended Complaint was filed only four days before the Petition Date.

D. Remand

The Objecting Defendants also argue for the Court to remand this proceeding under 28 U.S.C. § 1452(b), which provides, in pertinent part, “[t]he court to which such claim or cause of action is

removed may remand such claim or cause of action on any equitable ground.” The Objecting Defendants argue that “the considerations for mandatory and permissive abstention, themselves, all of which support Objector’s Objection to the Removal Notice, provide an independent equitable basis for the Court’s remand under Section 1452(b).” Defendants’ Memorandum at 18. Because the Court has established that abstention is not warranted in this case, it finds this argument is without merit.

III. CONCLUSION

For the foregoing reasons, this Court finds no reason to abstain in this case, nor does it find any reason to remand the State Court Case to the state court. Therefore, the Objecting Defendant’s Objection is OVERRULED.

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