Docket #0055 Date Filed: 6/26/2013

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
RESIDENTIAL CAPITAL, LLC et al.,	Case No. 12-12020 (MG)
Debtors.	Chapter 11
	(Joint Administration)
AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005,	Adv. Pro. No. 12-01934
Plaintiff,	
v.	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, BALBOA INSURANCE COMPANY, and ALLY FINANCIAL, INC.,	
Defendants.	

PLAINTIFF ARE'S SUPPLEMENTAL BRIEF WITH REGARD TO JURISDICTION AND FORUM

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Plaintiff American Residential Equities, LLC ("ARE") respectfully submits this Supplemental Brief With Regard To Jurisdiction and Forum, which it files at the direction of the Court. Specifically, at the hearing conducted on June 12, 2013, the Court asked for supplemental briefing on a) the existence of subject matter jurisdiction as to the claims asserted in this Adversary Proceeding against the non-Debtor defendants Balboa Insurance Co. ("Balboa") and Ally Financial, Inc. ("Ally")[1]; and b) whether the Court should abstain from adjudicating the adversary proceeding given, among other things, the substantial factual and legal overlap with ARE's pre-bankruptcy litigation (the "Florida Litigation") against the Debtor in the U.S. District Court for the Southern District of Florida (the "Florida District Court"), which is currently subject to the automatic stay.

PRELIMINARY STATEMENT

ARE filed these claims in an adversary proceeding in this Court out of respect for this Court's jurisdiction and, in particular, out of respect for the automatic stay that precluded from it proceeding in any other forum without this Court's prior permission. ARE was and is perfectly willing to proceed to litigate these claims in this forum, but also agrees with the practical common-sense points the Court made at the June 12, 2013 hearing regarding the various reasons why it might make more sense for these claims to be adjudicated in the Florida District Court. As set forth below, ARE believes it would indeed make the most sense for the claims to proceed there, which would require this Court to exercise its discretion to abstain and also to lift the automatic stay. ARE also believes, as set forth below, that it would make the most sense for the Court to transfer this Adversary Proceeding to the Florida District Court as a related case to the

[1] As suggested by the Court at the hearing held on June 12, 2013, we have conferred with counsel for Ally and have reached an agreement with them that we will not brief the jurisdictional and abstention issues with respect to Ally and they accordingly will not be required to file a responsive brief on those issues. We will be submitting a joint letter to the Court further memorializing this agreement within the next day or so.

currently-stayed Florida Litigation (rather than dismissing without prejudice, which would add logistical complexity in Florida by requiring either re-filing or motion practice about amending the prior pleadings), and permit the district judge in that district to determine the best way to coordinate or consolidate the new claims and parties present in this matter (but all relating to the same underlying key facts) with the pre-existing Florida Litigation.

As the Court requested, we have conferred with counsel for the Debtor and Balboa. As we understand it, the Debtor's position is that it is happy for the dispute to proceed in the Florida District Court (and the stay to be lifted to permit that to happen) with respect to fixing the amount of ARE's general unsecured claim against the Debtor's estate. However, the Debtor does not believe that the Florida District Court should determine the relevant section 541(d) issues. For its part, ARE believes that there is so much overlap between the 541(d) issues and the rest of the case that they should all proceed in the same forum, whether that be in Florida or here. We believe that the Florida District Court has the jurisdictional and practical competence to adjudicate those issues, as set forth below, but should the Court disagree ARE would prefer to stay in this forum rather than have the case split up between forums.

Balboa's counsel has advised us that Balboa is still considering its position on both the jurisdiction and abstention issues and hopes to discuss them further with us after reviewing this brief. As set forth below, ARE's position is that this Court has subject matter jurisdiction with respect to the claims against Balboa, as would the Florida District Court as a transferee forum. ARE believes that the claims against the Debtor and the claims against Balboa should go forward in a single forum, and is more concerned with not splitting up this dispute among multiple forums than with whether that single forum is this Court or the Florida District Court.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER ARE'S CLAIMS AS TO BALBOA

a. ARE's Claims Against Balboa Are Related To This Bankruptcy Proceeding

Section 1334(b) vests broad primary jurisdiction over bankruptcy proceedings in the District Courts. 28 U.S.C. § 1334. District Courts may then refer bankruptcy matters falling within their jurisdiction under Section 1334 to bankruptcy courts pursuant to 28 U.S.C. §157(a). Specifically, Section 1334(b) grants jurisdiction to the District Courts for matters "arising under title 11, or arising in or related to a case under title 11." 28 U.S.C. § 1334(b). This "related to" jurisdiction "constitutes an extraordinarily broad grant of jurisdiction" to the District Courts. *See Bond St. Assocs., Ltd. v. Ames Dep't Stores, Inc.*, 174 B.R. 28, 32-33 (S.D.N.Y. 1994); *see also City of Ann Arbor Emps. Ret. Sys. v. Citigroup Mortg. Loan Trust Inc.*, 572 F.Supp. 2d 314, 317 (E.D.N.Y. 2008) ("The scope of 'related to' bankruptcy jurisdiction has been broadly interpreted by the Second Circuit.").

This broad grant of jurisdiction has been found to exist where a non-debtor's claims against a non-debtor defendant were "intimately intertwined" with those asserted against the debtor. *See In re Adelphia Communications Corp.*, 285 B.R. 127, 137 (Bankr. S.D.N.Y. 2002) (citing *Nemsa Establishment, S.A. v. Viral Testing Systems Corp.*, 1995 WL 489711 at *9 (S.D.N.Y.1995). "The existence of strong interconnections between the third party action and the bankruptcy has been cited frequently by courts in concluding that the third party litigation is related to the bankruptcy proceeding." *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 322 (S.D.N.Y. 2003) (internal citations omitted) (finding that related to jurisdiction exists in part because the Debtor's conduct was at the heart of all the claims brought against the non-debtor defendants). In *Worldcom*, the District Court found that claims brought against a third party

were related to the bankruptcy in part because the debtor's conduct "will remain at the heart of the [third party] litigation." *Id.*

This standard precisely identifies the situation before the Court: ARE's claims against Balboa are indeed intimately intertwined with ARE's claims against GMAC and in fact derive from the same underlying facts. All of the claims alleged as to Balboa relate directly to the Debtor's conduct: the Amended Complaint alleges that Balboa aided and abetted the Debtors' torts (eighth cause of action), conspired with the Debtor (ninth cause of action); tortuously interfered with ARE's contract with the Debtor (eleventh cause of action); and was unjustly enriched at ARE's expense via improper amounts charged by the Debtor (in consideration of receiving kickbacks from Balboa) to ARE's account (twelfth cause of action). As the District Court phrased it in *Worldcom*, the Debtor would remain at the heart of any litigation brought against Balboa in any court.

Another equally sufficient basis cited by Courts in this District for finding related-to jurisdiction turns on whether the outcome "might have any conceivable effect" on a debtor's estate. *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992). An action can have a "conceivable effect" on an estate if its outcome "could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively)" thereby impacting "the handling and administration of the bankrupt estate." *Worldcom,* 293 B.R. at 322.

Therefore, in the context of litigation involving non-debtors, related to jurisdiction exists over those third party actions where a resulting contribution claim could have a conceivable effect on a bankruptcy proceeding. *Id.* With regard to that conceivable effect on the estate, "certainty, or even likelihood, is not required." *Winstar Holdings, LLC v. Blackstone Grp. L.P.*, 2007 WL 4323003 at *1 (S.D.N.Y. Dec. 10, 2007). "In other words, that obligation need not be

certain, as contingent outcomes can satisfy the "conceivable effects" test, so long as there is the *possibility* of an effect on the estate." *New York Commercial Bank v. Pullo*, 2013 WL 494050, *3 (Bankr. S.D.N.Y. Feb. 7, 2013) (emphasis in original) (*citing Allstate Ins. Co. v. Credit Suisse Sec. (USA) LLC*, 2011 WL 4965150, *4 (S.D.N.Y. Oct. 19, 2011)).

Courts have found that even the possibility that a claim might arise at some point in the future provides a sufficient basis for related-to jurisdiction. "The fact that a claim for contribution is no more than a possibility at this point in time and not a present reality does not foreclose a conclusion that the claims are 'related to'" the bankruptcy. *See In re Dow Corning*, 86 F.3d 482 (6th Cir. 1996) (holding that bankruptcy jurisdiction can exist based on potential claims of contribution and indemnity against the debtor even where proofs of claim have not been filed); *Allen v. Kuhlman Corp.*, 322 B.R. 280, 283 (S.D. Miss. 2005) (holding that given "plaintiffs' allegations of joint tortious conduct by debtor and non-debtor defendants, the exercise of 'related to' jurisdiction against the claims against all defendants is warranted and advisable.")

We note that common law contribution claims, unlike claims for indemnification arising out of pre-petition contracts, do not typically arise until the conclusion of litigation against joint tort-feasors and a fact-finder's apportionment of their pro-rata share of liability. We respectfully believe that a contribution claim arising out of suit alleging joint-and-several liability against the Debtor and a third party presents a different situation than a claim arising out of a pre-petition indemnification contract. Thus, we respectfully believe that the potential contribution claims present here give rise to a different analysis that in the Court's decision in *Sealink Funding, Ltd. v. Deutsche Bank AG*, 489 B.R. 36 (Bankr. S.D.N.Y. 2013).[2]

[2] Moreover, there is no limitation of the "effect" on the debtor's estate to a purely monetary one such as a contribution claim. If ARE obtained a judgment against Balboa in another forum, that judgment would almost certainly be based on factual findings as to the Debtor's own serious misconduct aided and abetted by Balboa. Given, for example, that Balboa and the Debtor were in contractual privity and that Balboa-affiliated personnel were

Here, the fact that the Debtor and Balboa would be jointly and severally liable for the claims alleged by ARE in the Amended Complaint provides this Court with related-to jurisdiction given the potential impact a finding against Balboa could have on the Debtor's estate. *See, e.g.*, *Dow Corning*, 86 F.3d at 494 (finding that because there existed possible claims for contribution under theories of joint and several liability, the "potential for Dow… being held liable in claims for contribution and indemnification… suffices to establish a conceivable impact on the estate in bankruptcy."); *In re Adelphia Communications Corp.*, 285 B.R. 127, 139 (Bankr. S.D.N.Y. 2002) (citing the possibility of joint and several liability between the debtor and the third party defendant as a basis for finding related-to jurisdiction); *In re Olajuwon Interests, Inc.*, 2003 WL 124469 at *1 (N.D. Tex. Jan. 9, 2003) (finding that the Debtor's and co-defendant's joint and several liability gave rise to a possible claim of contribution that were related to the bankruptcy); *In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987) (finding that because debtor and non-debtor co-defendants were jointly and severally liable, claims against them would "have a real and tangible effect on the estate of the debtor.").[3] *See also* CPLR § 1401 (setting forth general rule of right to contribution among tortfeasors jointly and severally liable for same damages). For example, ARE seeks recovery against the Debtor for passing through monies paid to Balboa for excessive premiums associated with over-insured properties (e.g., insuring a $100,000 property as if it were worth $200,000) and seeks recovery against

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acting as the Debtor's agents with respect to some of the acts and omissions giving rise to liability, it is possible that such a judgment against Balboa would have res judicata or collateral estoppels implications for the Debtor even if the Debtor were not a party to that litigation, the ramifications of which could certainly constitute a negative "effect" on the Debtor's bankruptcy estate.

[3] In none of these cases did the courts' analysis primarily focus on whether or not a proof of claim had already been filed with respect to a not-yet-matured potential contribution claim against the debtor. We are not in a position to speak authoritatively for Balboa as to what procedural options they may believe remain open to them to pursue claims for contribution and/or indemnification in light of the passing of the bar date.

Balboa on different theories (including secondary-liability theories such as aiding and abetting and conspiracy) for exactly the same overcharges.

b. In The Alternative, The Court Has Supplemental Jurisdiction Over The Claims Against Balboa

In the alternative, because ARE's claims against Balboa derive from the same set of facts and the same "case or controversy" as ARE's claims against the Debtor, this Court has been granted supplemental jurisdiction over ARE's claims against Balboa pursuant to 28 U.S.C. § 1367.[4]

While some circuits have consistently held that bankruptcy courts may not exercise supplemental jurisdiction as other federal district courts can, the Second Circuit places no such restriction on bankruptcy courts' jurisdictional powers. *See e.g.*, *In re Lionel Corp.*, 29 F.3d 88, 92 (2d. Cir. 1994) (finding that "the bankruptcy court had jurisdiction over the [plaintiff's] claims against the [third party] under principles of supplemental jurisdiction."); *In re Cavalry Constr., Inc.*, 2013 WL 1972235 at *5 (S.D.N.Y. May 13, 2013) ("this Court is bound by [the Second Circuit's] holding that bankruptcy courts may exercise supplemental jurisdiction under § 1367(a)."); *In re Dreier LLP*, 2012 WL 4867376 at * 5 (Bankr. S.D.N.Y. Oct. 12, 2012) ("the Second Circuit Court of Appeals has ruled that a bankruptcy court may acquire jurisdiction over a dispute between third parties under the principles of supplemental jurisdiction."); *In re Radcliffe*, 317 B.R. 581, 590 (Bankr. D.Conn. 2004) ("the Second Circuit Court of Appeals has

[4] The Amended Complaint did not expressly plead section 1367 as an alternative source of federal-court subject matter jurisdiction in addition to section 1334, but obviously could be amended to do so. We note that Balboa did not challenge the existence of subject matter jurisdiction under section 1334 in its motion to dismiss the original Complaint (which was mooted before being fully briefed by the filing of the Amended Complaint), just as it did not raise any issue as to subject matter jurisdiction in its motion to dismiss the Amended Complaint. Had the issue been raised in Balboa's original motion, we likely would have added an express reference to section 1367 as an additional and alternative ground for subject matter jurisdiction when drafting the Amended Complaint.

interpreted Section 1367(a) to confer supplemental jurisdiction… on the bankruptcy courts as well as the district courts.").

Section 1367 provides that Federal courts "shall have supplemental jurisdiction" over claims that are so related to the claims in the original action that they form "part of the same case or controversy." Judicial economy, convenience of the court and fairness to the parties are the factors to be considered when determining whether to exercise supplemental jurisdiction over existing state claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The Court has supplemental jurisdiction over ARE's claims against Balboa because the interrelationship of the claims against the Debtor and Balboa would make it impractical and unnecessarily burdensome for some to be tried in this Court, and some to be tried by another court in another forum. [5]

Furthermore, the claims alleged against Balboa in the Amended Complaint are precisely the types of claims that supplemental jurisdiction is intended for, because their nature is such that they should be adjudicated in the same forum as the claims against the Debtor itself, as to which there is undoubtedly federal-court subject matter jurisdiction. *See e.g.*, *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 478 (S.D.N.Y. 2004) *aff'd*, 166 F. App'x 559 (2d Cir. 2006) ("Supplemental jurisdiction over these [tortious interference claims is appropriate since they arise out of the same nucleus of operative facts as the federal claims… [and] given the substantial overlap of issues, claims and parties in this action and the closely related case."]; *Wiggins v. Hitchens*, 853 F. Supp. 505, 514-15 (D.D.C. 1994) (finding conspiracy and tortious interference claims that "arise from essentially the same conduct…are 'so related' to the other

[5] Federal courts undoubtedly have discretion as to whether or not to exercise their Congressionally-granted supplemental jurisdiction in particular circumstances. Here, ARE believes that the question of whether this Court should do so essentially overlaps with the abstention question, with the proviso that ARE does believe that the claims against Balboa are so closely intertwined with those against the Debtor that they should all be adjudicated in the same forum, whether that is this Court or the Florida District Court.

federal claims in the complaint that they 'form part of the same case or controversy"'); *Rophaiel v. Aiken Murray Corp.*, 1996 WL 221567 (S.D.N.Y. May 2, 1996) (exercising supplemental jurisdiction over state claims for aiding and abetting, among others, asserted against the defendants because those claims were directly related).

II. THE COURT SHOULD CHOOSE TO ABSTAIN FROM THIS PROCEEDING IN LIGHT OF THE FLORIDA LITIGATION

Federal courts may elect to abstain from hearing certain cases pursuant to section 1334(c)(1) of the Bankruptcy Code. That provision provides the Court with authority to abstain from hearing proceedings "in the interest of justice." Bankruptcy courts may exercise discretion to abstain "in favor of another federal court or tribunal, just as it can abstain in favor of a state court." *In re Motors Liquidation Co.*, 457 B.R. 276, 288 (Bankr. S.D.N.Y. 2011) (*citing In re Portrait Corp. of America, Inc.*, 406 B.R. 637, 639 (Bankr. S.D.N.Y. 2009); *In re Lear Corp.*, 2009 WL 3191369, at *3 (Bankr. S.D.N.Y. Sept. 24, 2009)).

Whether to abstain in a bankruptcy proceeding is a matter left to discretion of the court. *In re Petrie Retail, Inc.*, 304 F.3d 223, 232 (2d Cir.2002). In addressing permissive abstention specifically in the context of abstention in favor of *another federal court*, Courts in this district have considered the twelve factors enumerated in *Portrait*.[6] Given that ARE argues for abstention in favor of the Florida District Court, we focus on those twelve factors, which include: "(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which [non-bankruptcy] law issues predominate over bankruptcy

[6] The factors enumerated in *Portrait* and *Motors Liquidation* are broadly consistent with the seven factors considered by other courts in this district when addressing abstention in favor of a state court. Those factors include: (1) the effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the right to a jury trial; and (7) prejudice to the involuntarily removed defendants. *See Farace v. Pereira*, 2004 WL 1638090 at *6-7 (S.D.N.Y. July 22, 2004).

issues, (3) the difficulty or unsettled nature of the applicable [non-bankruptcy] law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing [non-bankruptcy] law claims from core bankruptcy matters to allow judgments to be entered in [non-bankruptcy] 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 a 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." *Motors Liquidation*, 457 B.R. at 289, *citing Portrait Corp.*, 406 B.R. at 613. "Not all of these factors need be applied, however." *Portrait Corp.*, 406 B.R. at 642.

Considering these factors as they relate to the instant proceeding, the Court should abstain from these proceedings given the Florida District Court's involvement in the facts and circumstances of this case. All but one of the causes of action turn on state law such that non-bankruptcy law predominates, and the crux of the dispute concerns facts and issues with which the Southern District of Florida has more familiarity than this Court. Proceeding in the Florida District Court would alleviate the burden placed on this Court's time and resources, impacting the efficiency of the administration of the estate. Such a burden on this Court is unnecessary given the availability of the Florida District Court to continue its adjudication of these matters. Further, the presence of non-debtor parties such as Balboa and the fact that the issues involved are severable from the main bankruptcy case, support abstention in this case. While the issues

surrounding ARE's 541(d) claims against the Debtor concern bankruptcy law, the Florida District Court may rule on this issue and leave the enforcement of its decision to this Court.

Here, the parties and Court seemed in general agreement at the prior hearing that the 541(d) analysis will depend on the resolution of both factual questions and antecedent state-law legal questions (e.g. whether the custodial accounts maintained by the Debtor "in trust for" ARE were in fact an express trust under Pennsylvania law). These are determinations that could easily be made by the Florida District Court. *See, e.g., In re Dynegy Inc.*, 486 B.R. 585, 595 (Bankr. S.D.N.Y. 2013) (abstaining from exercising jurisdiction over a proceeding concerning securities law and one discrete issue of bankruptcy law in favor of the District Court); *Maryland Nat. Indus. Fin. Corp. v. Gold Dust Coal Co.*, 49 B.R. 288, 292 (Bankr. N.D. Ill. 1985) ("Even assuming *arguendo* that the assets… are part of the EEI estate, a bankruptcy court's jurisdiction over the property in question does not prevent it from abstaining where it appears that justice would be served thereby.") (*citations omitted).*

Here, we believe the best way to implement a decision to abstain would *not* be to dismiss the case without prejudice to refiling in the Florida District Court (or for leave of that court to be sought in the first instance to amend the existing pleadings there), but rather for the existing Adversary Proceeding (complete with whatever pending motions remain to be adjudicated) to be transferred to the Florida District Court pursuant to 28 U.S.C. §1404(a) as a case related to the prior Florida Litigation. We would anticipate that the first order of business at a status conference with the Florida District Court would be to discuss the best way to coordinate or integrate the additional claims and defendants that are present in this case with the existing pleadings and procedural status of the prior Florida Litigation, and that resolving that case

management issue is best left to the sound discretion of the Florida District Court once this Court has made clear that that forum may proceed.

"The power of district courts to transfer cases under Section 1404(a) *sua sponte* therefore is well established." *Cento Pearl v. Arts & Craft Supply Inc.*, 2003 WL 1960595 at *1 (S.D.N.Y. Apr. 24, 2003). This Court should transfer the proceeding to the Florida District Court, pursuant to Section 1404(a), rather than dismissing without prejudice, so that the litigation may proceed. *See e.g.*, *Versatrans, Inc. v. Hirsch Intern. Corp.*, 2013 WL 943519 at *9 (E.D. Mich. March 11, 2013) (transferring venue rather than dismissing the proceeding); *World Resorts Intern., LLC v. Interval Intern., Inc.*, 2012 WL 3257607 *2 (D. Ariz. Aug. 8, 2012) (finding that it is more appropriate for the transferee court to decide a pending dismissal motion on the merits).

III. THE COURT SHOULD LIFT THE AUTOMATIC STAY SO THAT THE FLORIDA LITIGATION CAN PROCEED[7]

Section 362(d)(1) of the Bankruptcy Code provides that a court "shall grant relief from the stay… (1) for cause…". 11 U.S.C. §362(d)(1). "The legislative history of Section 362 reveals that Congress intended 'that one of the factors to consider when determining whether to modify the stay is whether doing so would permit pending litigation involving the debtor to continue in a nonbankruptcy forum,' as '[i]t will often be more appropriate to permit proceedings to continue in their place of origin, where no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere *In re Project Orange Associates*, 432 B.R. 89, 100 (Bankr. S.D.N.Y. 2010) (*quoting* H.R.Rep. No. 95–595, at 341 (1977), U.S.Code Cong. & Admin. News 1978, at 5963, 6297; S.Rep. No. 95–989, at 50 (1978), U.S.Code. Cong. & Admin. News 1978,

[7] Debtor's counsel has indicated that they would consent to lifting the stay for the limited purpose of liquidating ARE's unsecured claim through litigation in the Florida District Court.

at 5787, 5836. Here, necessarily implicit in any decision to abstain from adjudicating the Adversary Proceeding under 1334(c)(1) in favor of another forum is that the stay should be lifted to the extent necessary to permit the dispute to be adjudicated in that forum. Since one of the key factors counseling abstention in favor of the Florida District Court is that court's prior familiarity with the pre-existing Florida Litigation and the substantial factual and legal overlap between the claims in the Florida Litigation and those in the Adversary Proceeding, it likewise follows that the stay must be lifted with respect to the pre-existing Florida Litigation in order for the abstention decision to be practically effectuated.

While the Bankruptcy Code does not define the term "cause," the Second Circuit has guided courts to consider a delineated list of factors in considering whether to life the stay in light of prepetition litigation. *See In re Sonnax Indus., Inc*., 907 F.2d 1280, 1286 (2d Cir.1990).[8] Cause is a broad and flexible concept to be determined on a case-by-case basis, and not all of the "Sonnax Factors" are relevant in each case. *See In re Bogdanovich*, 292 F.3d 104, 110 (2d Cir.2002); (citing *In re Mazzeo*, 167 F.3d 139, 143 (2d Cir.1999)). The court need not give equal weight to each of the Sonnax Factors. *See In re Burger Boys, Inc.*, 183 B.R. 682, 688(S.D.N.Y.1994)). Rather, "in deciding whether to lift a stay to allow a creditor to continue litigation in another forum, a bankruptcy court should consider the particular circumstances of the case and 'ascertain what is just to the claimants, the debtor and the estate.'" *In re Watkins*,

[8] The Sonnax Factors include: "(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms." *Sonnax*, 907 F.2d. 1280 *quoting In re Curtis*, 40 B.R. 795, 799-800 (Bankr.D.Utah 1984).

2008 WL 708413 *4 (E.D.N.Y. Aug. 23, 2005) (citing *In re Touloumis*, 170 B.R. 825, 828 (Bankr.S.D.N.Y.1994)).

Here, the relevant Sonnax Factors include (1) whether relief from the stay would result in partial or complete resolution of the issues; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; and (11) whether the parties are ready for trial in the other proceeding. See *In re N.Y. Med. Grp., PC*, 265 B.R. 408, 413 (Bankr. S.D.N.Y.2001). Discovery in the Florida Litigation was well-advanced when the Debtor filed for bankruptcy protection, and the District Court was in the process of resolving disputes (as to which a Magistrate Judge had already issued a report and recommendation) with respect to a new schedule for the completion of discovery and summary judgment practice in light of inadequacies in the Debtor's prior document production. Permitting that litigation to continue in coordination with the transferred Adversary Proceeding will promote judicial economy and the expeditious and economical resolution of the parties' disputes, especially compared to starting over from scratch in this Court which has numerous other aspects of the Debtors' complex reorganization cases to contend with -- aspects with no legal or factual overlap with this dispute and thus no efficiencies to be gained by resolving this dispute here.

CONCLUSION

For all of the foregoing reasons, this Court has subject matter jurisdiction over ARE's claims against Balboa and is fully vested with the authority to adjudicate those claims. However, in the interests of justice the Court should exercise its discretion under section 1334(c)(1) to abstain from adjudicating this case, transfer it to the United States District Court for the Southern District of Florida so that it can be consolidated or coordinated with the pre-existing Florida Litigation pending there, and lift the automatic stay to the extent necessary to allow the entire dispute among the parties to adjudicated in that forum.

Dated: June 26, 2013
New York, New York

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