UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEMTURA CORP., et al.,	
Plaintiffs,	10 Civ. 503 (RMB)
- against -	Adversary Proceeding No. 09-1719
UNITED STATES, et al.,	**DECISION & ORDER**
Defendants.	

I. Introduction

On January 22, 2010, the United States Government, on behalf of federal and state environmental agencies, filed a motion pursuant to 28 U.S.C. § 157(d) ("Section 157(d)") to withdraw an adversary proceeding pending in the United States Bankruptcy Court for the Southern District of New York (the "Adversary Proceeding") in which Chemtura Corporation, Great Lakes Chemical Corporation, ISCI, Inc., KEM Manufacturing Corp., and Nagatuck Treatment Company (collectively, "Debtors") seek, among other things, "a determination that any environmental obligations on sites that the Debtors did not presently own or operate should be discharged in the bankruptcy." (Mot. at 2, 13.)

The Government argues, among other things, that the Adversary Proceeding is subject to mandatory withdrawal of the reference from the Bankruptcy Court because, among other reasons, "resolution of [a] fundamental disagreement between the parties – i.e., whether the . . . 'ongoing pollution' standard [set forth in In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991)] applies to . . . injunctions issued [pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ('CERCLA'), 42 U.S.C. § 9601 et seq.] with

respect to sites no longer owned or operated by the Debtors – will require substantial and material consideration of [S]ection 106 of CERCLA."[1] (Mot. at 22–23.)

On February 12, 2010, the Debtors filed an opposition arguing, among other things, that mandatory withdrawal is not required because, among other reasons, "the court must construe the [Debtors'] [b]ankruptcy against the backdrop of settled . . . provisions of CERCLA" and because the Debtors do not own the sites at issue, "by definition they cannot be contributing to ongoing pollution at those sites." (Opp'n to Mot., dated Feb. 12, 2010 ("Opp'n"), at 2, 17, 22.) Also on February 12, 2010, the Official Committee of Unsecured Creditors of the Debtors ("Unsecured Creditors") filed an opposition to the Government's motion and in support of the Debtors' opposition arguing, among other things, that "the Adversary Proceeding merely requires an application of the Second Circuit's decision in In re Chateaugay Corp." and that "[t]he Debtors do not own the properties at issue in the Adversary Proceeding and, therefore, cannot comply with the injunctive relief sought." (Creditors' Opp'n to Mot., dated Feb. 12, 2010 ("Unsecured Creditors' Opp'n"), at 8.)

On March 2, 2010, the Government filed a reply. (Reply, dated Mar. 2, 2010 ("Reply").) Oral argument was held on March 18, 2010. (See Tr. of Proceedings, dated Mar. 18, 2010 ("Hr'g Tr.").)

For the reasons set forth below, Plaintiffs' motion to withdraw the reference is granted.

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[1] The Government also argues that this Court should withdraw the reference as a matter of discretion pursuant to Section 157(d). (Mot. at 27; see also Opp'n at 24 ("This dispute is uniquely ill-suited [for] permissive withdrawal."); Unsecured Creditors' Opp'n at 10 ("the adversary proceeding does not warrant permissive withdrawal of the reference").)

II. Legal Standard

Section 157(d) requires the district court to withdraw a proceeding referred to the bankruptcy court if "resolution of the proceeding requires consideration of both [T]itle 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. 157(d). Withdrawal is mandatory if "substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 995 (2d Cir. 1990) (citations omitted). "Withdrawal of the reference is appropriate where the case would require 'the bankruptcy court to engage itself in the intricacies' of non-Bankruptcy law, as opposed to 'routine application' of that law." In re Dana Corp., 379 B.R. 449, 453 (S.D.N.Y. 2007) (quoting In re Ionosphere Clubs, Inc., 922 F.2d at 995). "[W]here matters of first impression are concerned, the burden of establishing a right to mandatory withdrawal is more easily met." In re Manhattan Invest. Fund Ltd., 343 B.R. 63, 67 (S.D.N.Y. 2006) (citations omitted).

III. Analysis

The Government argues that "the Chateaugay court provided no guidance about the meaning of 'current pollution' or 'ongoing pollution,' nor has the Second Circuit or any other court in this district interpreted these terms." (Mot. at 24.) The Debtors counter that "the Supreme Court and Second Circuit recognize that liabilities with respect to . . . non-owned sites are dischargeable" and that the court here is called upon to analyze "settled" interpretations of CERCLA. (Opp'n at 2, 17 (citing Ohio v. Kovacs, 469 U.S. 274 (1985); Chateaugay, 944 F.2d at 997).)

Without ruling upon the ultimate merits of any party's claims, the Court concludes that the Adversary Proceeding should be withdrawn because it implicates consideration and analysis of CERCLA and "'the intricacies' of non-Bankruptcy law, as opposed to 'routine application' of that law." In re Dana Corp., 379 B.R. at 453 (citation omitted). The Court faces an issue of first impression. (Mot. at 23–24; see also Hr'g Tr. at 9:22–10:2 (MR. FOGELMAN (counsel for the Government): "[T]he issue here, your Honor, is that [the] [D]ebtors hotly contest whether or not [the Chateaugay] holding applies to land that is not currently owned. And that issue will require this court . . . to examine CERCLA itself."); 13:13-17 (MR. ZOTT (counsel for the Debtors): "I think Your Honor put your finger on the issue here which is the only issue that we raise in [the] [A]dversary [P]roceeding is whether or not these environmental obligations for non-owned sites are dischargeable claims.")); see Adam P. Strochak et al., Collier Monograph: Environmental Issues in Bankruptcy Cases § 6[1][b] (2009) ("Unfortunately, the [Chateaugay] court provided no guidance as to what constitutes 'current pollution,' except to say that most injunctions will fall under the non-claim side of the line."); see also In re Torwico Elecs., Inc., 8 F.3d 146, 151 (3d Cir. 1993), cert. denied, 511 U.S. 1046 (1994). And, while the Bankruptcy Court in this District, and the Honorable Robert E. Gerber in particular, are supremely capable, resolution of the disputed issues requires considerably more than an analysis and application of bankruptcy law. See Dana, 379 B.R. at 458.[2]

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[2] It should also be noted that the parties dispute that "Debtors may have responsibilities to prevent harm to the environment pursuant to [the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. ("RCRA")], the Clean Water Act, 33 US.C. §§ 1251–1387, [and] the Clean Air Act, 42 U.S.C. §§ 7401–7671q." (Mot. at 26–27; see Hr'g Tr. at 10:5-23 ("MR. FOGELMAN: The [D]ebtors . . . are also seeking a discharge as to any obligations that may later be asserted . . . . under other federal statutes, such as . . . RCRA."); 17:8-14 (MR. ZOTT: "[O]ur complaint does not . . . have any cited issues under federal RCRA; it's only CERCLA.")); see also Torwico, 8 F.3d at 151 n.6.

The Debtors' contention that the CERCLA provisions at issue in the Adversary Proceeding are "settled" in light of Supreme Court and Second Circuit precedent is unpersuasive. (Opp'n at 2 (citing Ohio v. Kovacs, 469 U.S. 274; Chateaugay, 944 F.2d 997).) In Ohio v. Kovacs, 469 U.S. 274, the Supreme Court "was spared the need to determine precisely which obligations of the order, as entered, could be said to constitute a 'claim' . . . ." Chateaugay, 944 F.2d at 1009; see also Ohio v. Kovacs, 469 U.S. at 283 ("[W]e do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee."). In Chateaugay, the Second Circuit also stated that while "the line between 'claim' injunctions and non-'claim' injunctions could arguably be drawn . . . by placing on the non-'claim' side only those injunctions ordering a defendant to stop current activities that add to pollution (e.g., depositing new hazardous substances), while leaving on the 'claim' side all other injunctions, including those that direct the cleanup of sites from which hazardous substances, previously deposited, are currently contributing to pollution . . . we believe that placing on the non-'claim' side all injunctions that seek to remedy on-going pollution is more faithful to the Supreme Court's teachings . . . ." Chateaugay, 944 F.2d at 1009.

Because the Court holds that withdrawal of the reference is mandatory, the Court need not reach the question of whether permissive withdrawal is also warranted. In re Dana Corp., 379 B.R. at 462; see also In re Cablevision S.A., 315 B.R. 818, 821 n.3 (S.D.N.Y. 2004).

IV. Conclusion

For the reasons set forth above, Plaintiffs' motion to withdraw the reference [# 1] is granted.

The parties are directed to serve and file their submissions on the previously agreed-upon schedule.

Dated: March 26, 2010
New York, New York

RICHARD M. BERMAN, U.S.D.J.