IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
SPEEDCAST INTERNATIONAL LIMITED, et al.,	§	Case No. 20-32243 (MI)
	§	
Debtors.	§	Chapter 11
	§	
CATHERINE E. YOUNGMAN, in her capacity as Class 3 Trustee for the Speedcast SFA Lenders' Litigation Trust	§	Jointly Administered
	§	
Plaintiff,	§	
	§	
v.	§	Adversary No. 22-03019
	§	
PETER SHAPER,	§	
	§	
Defendant.	§	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO REMAND

Plaintiff Catherine E. Youngman in her capacity as Class 3 Trustee for the Speedcast SFA Lenders' Litigation Trust (the "**Trustee**") files this reply in support of her Motion to Remand.

The essential issue in this case is whether Peter Shaper breached his fiduciary duties — and participated in another fiduciary's breaches of the same — by refusing to consider offers for Speedcast that did not serve his personal interests and those of his private equity firm, Genesis Park. In opposing remand, Shaper confuses state law claims that happened to have occurred in the context of a bankruptcy with claims that affect the administration of an estate. The claims at issue in this case are distinctly the former — the Trustee asserts state-law breach of fiduciary duty claims that do not implicate or affect an ongoing estate administration. The Trustee's claims do not call

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for re-litigation of the Bankruptcy and do not challenge the Joint Chapter 11 Plan in any way.[1] On the contrary, by prosecuting these claims, the Trustee is discharging her duties carefully delineated by the bankruptcy court and set out in the Plan, which specifically provides that these claims may be brought in state court. The Court should honor the state law nature of these claims and the Trustee's choice of forum and grant the Motion to Remand.

A. Mandatory Abstention Applies

Contrary to Plaintiff's assertions, mandatory abstention under 28 U.S.C. § 1334(c)(2) is warranted here.

The Proceeding is Non-Core. Shaper does not dispute that the Trustee's claims do not invoke a substantive right provided by title 11 or fall within the list of core proceedings in 28 U.S.C. § 157(b)(2). Rather, he argues this case is core because (i) it involves actions taken during a bankruptcy, (ii) would not exist "but for" the bankruptcy, and (iii) "implicates the bankruptcy process." (*See* Shaper's Response to Pl.'s Mot. to Remand, Dkt. No. 21 ("**Response**") at ¶¶ 20, 23-24, 31). Shaper's framing, however, avoids the determinative question, which is whether the claims "could *only* arise in the context of a bankruptcy case," looking to the nature of the claims — both their form and substance — rather than their particular factual circumstances. *See Matter of Wood*, 825 F.2d 90, 97 (5th Cir. 1987); *In re Cano*, 410 B.R. 506, 545 (Bankr. S.D. Tex. 2009).

A proceeding is not core just because it arose in the context of a bankruptcy or would not exist "but for" the filing of bankruptcy. *In re Dune Energy Inc.*, 575 B.R. 716, 727 (Bankr. W.D. Tex. 2017) ("'[C]ore jurisdiction exists if the claims are of the type that can only exist in a bankruptcy case.") (emphasis added); *see also Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 664-65

[1] *In re Speedcast*, Order Approving Joint Ch. 11 Plan (Dkt. No. 1397) (Jan. 22, 2021) (the "**Order**") and Ex. A thereto (the "**Plan**").

(1st Cir. 2017) (same). Shaper argues, however, that an action for breach of fiduciary duty alleging conduct during a bankruptcy proceeding is necessarily core, and falls within "arising in" jurisdiction, by relying on inapposite cases. *See* Response ¶ 7. Contrary to Shaper's contention, *Southmark* does not control here. As explained in the Trustee's Motion to Remand,[2] the plaintiff in *Southmark* sought the return of fees paid to a court-appointed professional under the supervision and approval of the bankruptcy court. 163 F.3d 925, 931 (5th Cir. 1999). As such, those claims directly implicated the bankruptcy court's function of awarding professional fees and enforcing "appropriate standards of conduct." *Id.* Effectively, the case presented a "counterclaim" against the professional's administrative claim to obtain its fees in bankruptcy court. *See id.* at 931-32. Shaper argues that *Southmark* is not limited to the context of court-appointed professionals, but his reading is undermined by the court's express reliance on cases holding that "professional malpractice claims against *court-appointed professionals* are [] core matters." *Id.* at 932 (emphasis added).

Moreover, Shaper's claim that *In re ABC Dentistry, P.A.* represents an extension of *Southmark* to "suits involving non-court-appointed fiduciaries" is wrong. 2021 WL 955932 (Bankr. S.D. Tex. Mar. 12, 2021) (cited Response ¶ 22). *ABC Dentistry* involved state-law fraud claims arising from a bankruptcy hearing on a motion to approve a settlement agreement. Three features of that case were central to the court's holding. *First*, like *Southmark*, the plaintiff's claims directly challenged the professional conduct of entities that had been awarded fees "under the superintendence of the bankruptcy court." *Id.* at *3 (quoting *Southmark*, 163 F.3d at 931). *Second*, if the plaintiff's fraud allegations were true, not only would plaintiff have been defrauded — it would have also been fraud on the bankruptcy court. Critically, in that case any finding of fraud

[2] Pl.'s Mot. to Remand, Dkt. No. 20 ("**Mot. Remand**") at 8-9.

had the potential to undo the settlement and allocation approved by the bankruptcy court. *Id.* at *4 (observing "[t]he Court may necessarily be required to revisit the November 2017 settlement order pending the results of this litigation"). *Third*, the "[settlement] order and the [bankruptcy court's] hearings . . . [were] factually central to this dispute" because the attorneys' misrepresentations to plaintiff and to the bankruptcy court occurred *during* the settlement hearing. *Id.* at *3-4. Thus, the dispute arose in the bankruptcy court "both literally and figuratively." *Id.* at *4.

None of the three features that were central to the holding in *ABC Dentistry* are present here. *First*, unlike the defendant attorneys in *ABC Dentistry*, Shaper did not earn professional fees under the bankruptcy court's supervision. *Southmark's* emphasis on the bankruptcy court's function of awarding and approving professional fees — which informed the holding in *ABC Dentistry* — is not implicated. *See* Mot. Remand at 7-8. *Second*, the Trustee does not allege that Shaper committed fraud on the Court; nor do her claims jeopardize the Plan Confirmation Order or Plan Settlement Agreement.[3] *See* Mot. Remand at 11-13. Rather, the Trustee's claims are entirely consistent with the Plan and Settlement Agreement which expressly contemplated prosecution of these claims in state court. *See* Plan at 70 ("[T]he Bankruptcy Court's jurisdiction with respect to the Litigation Trust Causes of Action and the Class 3 Trust Causes of Action *shall not be exclusive*.") (emphasis added). *Third*, Shaper's breaches of fiduciary duty did not occur *during* a hearing before this Court that affected the estate's administration.[4]

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[3] *In re Speedcast*, **Order** and Ex. B thereto (the "**Settlement Agreement**").

[4] In advocating for an extension of *Southmark*, Shaper also relies on *Comtel Telcom Assets LP v. Alvarez & Marsal, Inc.*, 2009 WL 2407621, at *1 (N.D. Tex. Aug. 5, 2009). But *Comtel* also does not represent an extension of *Southmark* outside the context of court-appointed professionals. *Comtel* involved a claim against court-appointed restructuring officers for mismanagement of assets purchased from the bankruptcy estate. Since it involved court-appointed professionals, the case fell squarely within "the language [of] *Southmark*." *Id.* at *2.

This case is also distinguishable from cases where the state law claims "involve the interpretation of substantive rights provided by title 11," *see In re Stonebridge Technologies, Inc.*, 430 F.3d 260, 267 (5th Cir. 2005), or are "inextricably linked" to an order of the bankruptcy court, *see In re H & M Oil & Gas, LLC.*, 514 B.R. 790, 799 (Bankr. N.D. Tex. 2014). Although Shaper avers that the Trustee's allegations "invoke[] quintessential bankruptcy processes," (Response ¶ 29), there is a meaningful difference between claims alleging *factual* events occurring during a bankruptcy and claims that *turn on* bankruptcy law or orders from a bankruptcy court. The essential issue in this case is "whether the defendants are liable to the plaintiffs under state law." *See In re Petroleum Prod. & Servs., Inc.*, 556 B.R. 296, 302 (Bankr. S.D. Tex. 2016) (quoting *Matter of Wood*, 825 F.2d at 98). Since the Trustee's claims do not "invoke the special powers of bankruptcy or raise any primary issues in bankruptcy," they fall only within this Court's "related to" jurisdiction. *See, e.g.*, *In re Mugica*, 362 B.R. 782, 789 (Bankr. S.D. Tex. 2007); *In re Castex Energy Partners, LP*, 584 B.R. 150, 157 (Bankr. S.D. Tex. 2018), *aff'd sub nom. In re Castex Energy Partners LP*, 2018 WL 3068803 (S.D. Tex. June 21, 2018).[5]

Shaper further argues that this case is core because it "will require the Court to review and interpret its own orders, including the Confirmation Order, and the extent of the releases and findings of reasonableness and good faith previously entered by the Court." Response ¶ 32. However, the *only* provision of the Confirmation Order that Shaper identifies concerns the Trustee's ability to make allegations related to another fiduciary as part of her claims against

[5] Shaper also claims that "[m]uch of the Complaint is a rehashing of Black Diamond's previously aired complaints about the bankruptcy process." Response ¶ 63. The Trustee disagrees. Shaper's fiduciary breaches were not the fulcrum of the confirmation hearings, which included a host of thorny legal and factual issues about the confirmability of iterations of the Plan. In any event, to the extent Shaper contends this supports a finding that this is a core proceeding, the argument is devoid of merit. *See WRT Creditors Liquidation Tr. v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp.2d 596, 601 (S.D. Tex. 1999) (holding that the fact that state law claims "asserted many of the same facts and same legal theories" as adversary proceedings in bankruptcy did not make the proceeding core).

Shaper. *Id.* n.6 (citing Paragraph Z(4) of the Confirmation Order). This provision, however, unambiguously provides that the Trustee is permitted to do so:

> [T]he Class 3 Trustee and the Class 3 Trust (as assignee of the Class 3 Trust Assets) reserve their rights, if any, solely for purposes of any subsequent litigation against Peter Shaper as to (i) ***whether certain actions taken by such Released Parties prior to the parties' entry into the Settlement Agreement*** (and the related amendments and modifications to the Plan) ***were inconsistent with those parties' applicable duties and obligations***[.]

Order at 16 (emphasis added).

Even if interpretation of this unambiguous provision were necessary (it is not), it does not support a finding that this case is core. This is because "state courts are qualified to interpret the language of bankruptcy plans and orders and routinely engage in such interpretation." *Malesovas v. Sanders*, 2005 WL 1155073 at *3 n.6 (S.D. Tex. May 16, 2005); *see also In re Dune Energy, Inc.*, 575 B.R. at 728-29 (collecting cases).[6]

Finally, Shaper notes that the Trustee served Rule 2004 requests before filing her Petition, but he cites no authority holding that this is a relevant consideration in the core/non-core analysis. In general, availing oneself of bankruptcy procedure — by, for instance, filing a proof of claim — does not transform a non-core proceeding into a core proceeding. *See In re Castex Energy Partners, LP*, 584 B.R. at 156.

The claims asserted by the Trustee are non-core.

There is No Independent Basis for Federal Jurisdiction. Shaper's notice of removal invokes § 1334(b), and it is undisputed that Shaper could not have removed to federal court on any other jurisdictional hook. *See* Not. Removal, Dkt. No. 1, ¶ 2; Response ¶ 36. Shaper's stated objective is to try this case in federal district court, even though the forum defendant rule prohibits

[6] Nor is this case core simply because the Petition contains "excerpts from this Court's own confirmation hearing." Response ¶ 33; *see In re Dune Energy, Inc.*, 575 B.R. at 729 (core jurisdiction does not exist just "because the Complaint expressly mentions the Plan").

him from removing there directly. *See* Response ¶ 54; *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 392 (5th Cir. 2009). His attempt to achieve through an end run what is not directly permitted constitutes impermissible forum shopping.

Despite failing to invoke any grounds for removal other than § 1334(b), Shaper argues that there is an independent basis for federal jurisdiction because there is diversity between the parties. *See* Response ¶ 36. However, Shaper concedes (as he must) that removal on diversity grounds was foreclosed by the forum defendant rule. *See id.* And contrary to Shaper's argument, the fact that the forum defendant rule is a procedural bar, rather than a jurisdictional requirement, does not mean an independent jurisdictional basis exists. Rather, as this Court has held, complete diversity between the parties does not create an independent jurisdictional basis when the defendant is procedurally barred from invoking diversity jurisdiction. *See In re Mugica*, 362 B.R. at 792-93 (complete diversity does not provide an independent jurisdictional basis for mandatory-abstention purposes when the defendant failed to assert diversity jurisdiction within one year from the commencement of the action as required by § 1446(b)).[7] Moreover, courts in other jurisdictions have directly addressed, and rejected, Shaper's precise argument. *See, e.g.*, *Nat'l Acceptance Co. of Calif. v. Levin*, 75 B.R. 457, 460 (D. Ariz. 1987) ("Defendants being unable to remove this action in the first instance, they cannot now rely on the diversity statute as an independent basis for federal jurisdiction such as to defeat the mandatory provisions of section 1334(c)(2).").

Thus, a jurisdictional basis that is subject to a procedural bar cannot constitute an "independent basis for jurisdiction" in the mandatory-abstention analysis. Shaper's argument fails, and this element of mandatory abstention is satisfied.

[7] Like the forum defendant rule, the removal time limits in § 1446(b) that were at issue in *Mugica* are a procedural bar to jurisdiction. *See Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 (5th Cir. 2003) ("[T]he time limit for removal is not jurisdictional" and "may be waived." (quotes and cite omitted)).

An Action has been Commenced in State Court. Shaper argues that this factor is only satisfied when the state action was commenced before the bankruptcy by relying on earlier decisions by this Court. Courts in this Circuit have recently held, however, that it is "uncontroversial" that this factor is satisfied when a state court action has been filed — even if that filing occurred post-petition.[8] "Courts have often mandatorily abstained from post-confirmation suits filed by a plan trustee in state court, even though (obviously) the suit was commenced after the filing of the bankruptcy case." *In re Dune Energy*, 575 B.R. at 730 n.11. This is because the rationale animating this requirement is that without a parallel proceeding in state court, there is no action "in favor of which the federal court must, or may, abstain."[9] Section 1334(c)(2) does not specify *when* the state court action must be filed; it only says there must be a pending state court action at the time the district court abstains. Further, a rigid timing rule — ignoring efficiency considerations and the plaintiff's choice of forum — frustrates Congressional intent in codifying § 1334 "to encourage the efficient administration of judicial proceedings while maintaining respect for the plaintiff's choice of forum." *See In re Mugica*, 362 B.R. at 792.

The Action can be Timely Adjudicated in State Court. Shaper does not dispute that this action can be timely adjudicated in state court. *See* Response ¶ 35.

Since all four requirements under § 1334(c)(2) are satisfied, the Court should mandatorily remand this action to the state court.

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[8] *See, e.g.*, *In re Reagor-Dykes Motors, LP*, 2021 WL 4823525, at *5 (Bankr. N.D. Tex. Oct. 14, 2021) (requirement satisfied by state court action filed five months after plan confirmation); *In re Senior Care Centers, LLC*, 611 B.R. 791, 800 (Bankr. N.D. Tex. 2019) (It is "not controversial" that requirement is satisfied by state court action filed three months after petition date); *Schmidt v. Nordlicht*, 2017 WL 526017, at *4 (S.D. Tex. Feb. 9, 2017) ("[U]ncontroversial" that requirement is satisfied by state court action filed over a year after petition date).

[9] *See Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1009 (9th Cir. 1997); *In re Lorax Corp.*, 295 B.R. 83, 92 n.27, 96 (Bankr. N.D. Tex. 2003) (collecting cases).

B. Equitable Remand and Permissive Abstention Are Appropriate

In the event the Court determines that mandatory abstention does not apply, it should still remand the case under the doctrines of equitable remand or permissive abstention. *See* 28 U.S.C. §§ 1452(b), 1334(c)(1).

(1) Effect or lack thereof on the efficient administration of the estate if the court recommends remand or abstention. Shaper argues this factor weighs against remand for four reasons. Each is meritless.

First, Shaper argues that the Trustee's claims "will directly impact the amount of recovery for creditors of the Bankruptcy Estate" — *i.e.*, Black Diamond. Response ¶ 39. But Black Diamond — and other beneficiaries of the Class 3 Trust — are no longer creditors of the Estate, nor are their claims being prosecuted for the benefit of the Bankruptcy Estate. *See In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 390 (5th Cir. 2011). Any recovery here will go to the beneficiaries of the Class 3 Trust which was specifically formed to facilitate recovery *apart from* the Estate. Notably, the case Shaper cites — *In re Hassell* — involved pre-confirmation claims, so there was still an estate being administered. *See* 2020 WL 728890, at *4 (Bankr. S.D. Tex. Jan. 7, 2020).

Second, Shaper argues that this proceeding will require the Court to "re-evaluate" and "interpret" the Confirmation Order and the Plan. *See* Response ¶ 40. But Shaper fails to identify any provision of either that a court would need to "re-evaluate" or "interpret" in order to decide the purely state law matters at issue. Even if there were provisions that require interpretation (there are not), this does not weigh against abstention because state courts routinely interpret bankruptcy orders. *See Malesovas*, 2005 WL 1155073 at *3. Further, Shaper conflates litigation considerations with inefficient administration of the bankruptcy estate. Since estate administration is not ongoing

here, the efficient litigation of these claims is not relevant to the analysis under this factor.[10] *See In re Southland Sys., Inc.*, 2007 WL 2819806, at *3 (Bankr. S.D. Tex. Sept. 21, 2007); *Hicks v. Safeway Ins. Co.*, 2006 WL 839557, at *5 (S.D. Miss. Mar. 28, 2006).

Third, Shaper asserts that the Court's confirmation of the Plan does not weigh in favor of abstention because the Motion for Final Decree "specifically indicates that jurisdiction is retained over this proceeding." *Id.* ¶ 41. But whether jurisdiction is retained is irrelevant. The issue is whether abstention would produce inefficiency in the administration of the bankruptcy estate and it would not.[11]

Fourth, Shaper argues that the case should proceed in this Court because of "efficiencies" gained from the familiarity with the facts and circumstances alleged in the Petition. *Id.* ¶ 42. This argument rings hollow, however, as Shaper admits that he plans to withdraw the reference and also refuses to consent to final orders or judgments being entered by this Court. *See id.* ¶ 54; Not. Removal, Dkt. No. 1, ¶ 16. Thus, not remanding will inevitably require two courts (this Court and the district court) to familiarize themselves with the facts and claims at issue. Shaper cannot explain how it would be any less "efficient" for a state court to learn the facts and circumstances of this case as opposed to the district court (whether on *de novo* review of proposed findings or on the eve of trial).

[10] Since Shaper does not consent to trial before this Court, his arguments that the Court is best positioned to resolve the issues presented is not persuasive. *See* Not. Removal, Dkt. No. 1, ¶ 16. However, in the event the Court denies the Motion to Remand, the Trustee would urge the Court to adjudicate all pretrial matters and retain the case until trial.

[11] Shaper also says that "[i]f Plaintiff were correct that confirmation mandates abstention, courts would abstain from *all* post-confirmation adversary proceedings, which clearly is not the case." Response ¶ 41. But the Trustee has not argued that confirmation *mandates* abstention, only that post-confirmation claims generally have no tendency to affect the administration of the estate, whether they are litigated in state or federal court.

The cases Shaper relies on for this argument are also inapposite. In *In re Senior Care Centers, LLC*, the state law claims at issue required "interpretation of complex aspects of bankruptcy law" which "overwhelm[ed]" the state law issues. 622 B.R. 680, 694 (Bankr. N.D. Tex. 2020). As such, the court concluded "it should be this court rather than the Texas state district court who determines the parties' respective rights and responsibilities." *Id.* This case is vastly different from *Senior Care Centers*, as discussed *infra*. The other case Shaper relies on — *In re Schlotzsky's, Inc.* — is also distinguishable on the basis that it was the defendant, not the plaintiff, who sought permissive abstention. *See* 351 B.R. 430, 435 (Bankr. W.D. Tex. 2006). The plaintiff had "chosen the federal court as its preferred forum, as is its right. Federal courts generally will respect this right, and even speak of a 'duty to sit' so as to afford the plaintiff the forum that the plaintiff first selected." *Id.* Notably, unlike this case, there was no pending state action in *Schlotzsky's* in favor of which to abstain. *See id.* at 433-34.

Thus, the first factor weighs in favor of abstention.

(2) State law issues predominate. This factor clearly favors abstention and remand because the Trustee brings only state law claims. *See Special Value Continuation Partners, L.P.*, 2011 WL 5593058, at *9 (Bankr. S.D. Tex. Nov. 10, 2011) (second factor "strongly supports abstention and remand" when only state causes of action are at issue); *see also In re Houston Reg'l Sports Network, L.P.*, 514 B.R. 211, 215 (Bankr. S.D. Tex. 2014) (same). Shaper's assertion that this case only "nominally raises state law issues" and requires the Court to "re-litigate the bankruptcy proceeding" strains credulity. *See* Response ¶ 43. In making these arguments, Shaper analogizes this case to *Senior Care Centers*, which is not remotely on point. *See id.* In *Senior Care Center*, the plaintiff was seeking what "in substance, [was] a collateral attack on the Confirmation Order." There, the plan and confirmation order had established a trust to sell stock, and the plaintiff sought

an injunction preventing the trust from liquidating that stock in state court. The trustee then sought a declaration of its rights under the plan which required "interpretation of complex aspects of bankruptcy law" which "overwhelm[ed]" the state law issues. 622 B.R. at 689-94.

Here, by contrast, it cannot be credibly argued that the Trustee is somehow seeking to collaterally attack the Order or Plan through these state law claims. On the contrary, the Plan specifically assigned these claims to the Class 3 Trust to prosecute. *See* Order at 41-43; Plan at 43-47. And both the Order and the Class 3 Trust Agreement (the "**Trust Agreement**") are clear that the claims shall not be construed as a collateral attack on the Order or Plan, and that the Order shall not be *res judicata* to the claims "in any way." *See* Order at 15-16; Trust Agreement at 7.

In addition, Shaper's breaches of fiduciary duty both before and after the bankruptcy petition was filed, "do[] not raise as primary issues such matters as dischargeability, allowance of the claim, or other bankruptcy matters." *Matter of Wood*, 825 F.2d at 98. Since the state court is the appropriate forum to address these state law claims for breach of fiduciary duty, this factor favors abstention. *See In re SBMC Healthcare, LLC*, 519 B.R. 172, 191 (Bankr. S.D. Tex. 2014), *aff'd,* 2017 WL 2062992 (S.D. Tex. May 11, 2017).

(3) Difficult or unsettled nature of applicable law. Shaper calls it "[b]izarre[]" for the Trustee to maintain that her claims are well-established under Texas law while also saying this factor favors remand. *See* Response ¶ 46. But it is Shaper, not the Trustee, taking inconsistent positions on this factor. In his Motion to Dismiss, Shaper argues that this case presents unsettled issues of state law. *See* Mot. to Dismiss, Dkt. No. 8, at 27 n.7 ("The Texas Supreme Court 'has not expressly decided whether Texas recognizes a cause of action for aiding and abetting.'" (quoting *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017)). He should not be permitted to urge the Court to address unsettled state law while simultaneously

arguing that this factor counsels against remand. To the extent Texas law is unsettled, the Court should remand this action so that Texas state courts can clarify the issue.

(4) The Trustee commenced the Action in state court. Shaper argues this factor weighs against abstention because there is no proceeding pending in state court *other than this proceeding*. Response ¶ 47. But the best interpretation of this factor is that it counsels for abstention when a state court action has been filed and removed, but not when no state court action has been filed at all. *See In re Lorax Corp.*, 295 B.R. 83, 96 (Bankr. N.D. Tex. 2003) (noting that "comity is not a factor" when no state action has yet been filed); *William M. Condrey, P.C. v. Endeavour Highrise, L.P.*, 425 B.R. 402, 420 n.12 (Bankr. S.D. Tex. 2010) ("There does not need to be a pending state court action for this Court to abstain from adjudicating a dispute. . . . Rather, this Court can decide to abstain from adjudicating a dispute brought to this Court, and issue an order authorizing the party seeking abstention to proceed to state court to prosecute the suit." (cite omitted)).[12] Since this action was first filed in Harris County District Court, principles of comity are at play and this factor favors abstention.

(5) Jurisdictional basis, if any, other than § 1334. This factor favors remand and abstention because there is no independent jurisdictional basis other than § 1334. As explained in connection with mandatory abstention, Shaper, as a forum defendant, would have no vehicle to get this case into a federal forum, except through § 1334. *See supra* at 6-7.

[12] *See also In re SBMC Healthcare, LLC*, 519 B.R. at 191 (removed action constituted "related proceeding commenced in state court"); *In re IO AT Tech Ridge LP*, 2018 WL 2431640, at *5 (Bankr. W.D. Tex. May 3, 2018) (same); *cf. In re McClenon*, 2019 WL 451241, at *3 (Bankr. S.D. Tex. Feb. 4, 2019) (factor inapplicable where action was filed in federal court); *In re CHC Grp. Ltd.*, 2017 WL 1380514, at *21 (Bankr. N.D. Tex. Mar. 28, 2017) (same); *In re Pickett*, 362 B.R. 794, 798 (Bankr. S.D. Tex. 2007) (same); *In re Hanna*, 2018 WL 6601869, at *3 (Bankr. S.D. Tex. Dec. 13, 2018) (same); *In re Waggoner Cattle, LLC*, 2018 WL 6060351, at *5 (Bankr. N.D. Tex. Nov. 19, 2018) (same).

(6) Degree of relatedness or remoteness of proceeding to main bankruptcy case. Shaper argues this factor counsels against abstention because this case is "an attempted re-litigation" of the Bankruptcy. Response ¶ 50. But Shaper fails to identify any core bankruptcy issues that will have to be litigated again in this case, noting only that the actions the Trustee complains of "*relate to*" negotiations conducted in the Bankruptcy. *Id.* The fact that these claims include actions taken during the period of the Bankruptcy, however, does not mean that they implicate issues of bankruptcy law or interpretation of the Plan or the Court's prior orders. *Cf. In re Senior Care Centers, LLC*, 622 B.R. at 694. Here, this factor favors remand because (1) the Plan has been confirmed and the debtor discharged; (2) the Court specifically provided for adjudication of these claims separate from the Bankruptcy; and (3) this action is not a core proceeding. *See In re Pickett*, 362 B.R. 794, 798 (Bankr. S.D. Tex. 2007) ("[T]his case is not closely related to the main bankruptcy case because the Debtor has already received a discharge[.]"); *In re Montalvo*, 559 B.R. 825, 837 (Bankr. S.D. Tex. 2016) (factor favored abstention because the action "does not *arise under* title 11 or *arise in* a case under title 11").

(7) The substance of the complaint. Shaper argues this factor weighs against remand because "this is a 'core' proceeding." Response ¶ 51. But as explained above, this proceeding is not core. The non-core nature of this proceeding, together with the state law nature of the claims and the fact that the Plan specifically contemplated a state action, counsels for remand. *See In re Houston Reg'l Sports Network, L.P.*, 514 B.R. at 216; *Sabre Techs., L.P. v. TSM Skyline Exhibits, Inc*., 2008 WL 4330897, at *5 (S.D. Tex. Sept. 18, 2008); *Matter of Wood*, 825 F.2d at 97.

(8) The feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in state court with enforcement left to the bankruptcy court. This factor favors remand and abstention because there are no core bankruptcy matters remaining from which

the state law claims can be severed. *See In re SBMC Healthcare, LLC*, 519 B.R. at 192. Shaper argues this factor counsels against abstention because "both the primary and secondary claims are all related and therefore there is no way to sever certain ones and remand others." Response ¶ 51. But Shaper's argument misses the point. The question is whether the state law claims are severable from core bankruptcy matters, not whether some state law claims can be severed from other state law claims. *See In re SBMC Healthcare, LLC*, 519 B.R. at 192. (observing the relevant question as whether bankruptcy matters can be severed from state law claims)

(9) The burden of the bankruptcy court's docket. Because Shaper does not consent to trial in this Court, the question is whether this case will be tried in Harris County District Court or in the United States District Court for the Southern District of Texas. *See* Not. Removal, Dkt. No. 1, ¶ 16. While Shaper notes that the Harris County civil courts "have an historic number of active cases pending," he acknowledges that the same is true of courts generally. *See* Response ¶ 52. Despite its caseload, the statistics show that the Harris County District Court clears close to 100% of its civil docket. *See* Harris County District Courts Civil District Courts Dashboard, https://www.justex.net/dashboard/Civil (last accessed April 6, 2022). This factor favors remand.

(10) The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties. Shaper insists there is "no evidence" that he has engaged in forum shopping. Response ¶ 53. However, Shaper admits that his end-goal is to defend the claims in federal district court, and it is undisputed that he could not have removed there directly. *See id.* ¶¶ 36, 54. Targeting a forum through a multistep process designed to circumvent the forum defendant rule is classic forum shopping. This factor strongly favors remand.

(11) The existence of a right to a jury trial. Shaper's contention that this factor is neutral because he "intends to move to withdraw the reference" is unavailing. *Id.* ¶ 54. Here, unlike in *In*

re Houston Regional Sports Network, there has been no motion to withdraw the reference. 514 B.R. at 211.

It is undisputed that these claims present a right to a jury trial, and both parties have made a jury demand. Because Shaper does not consent to trial in this forum, trial will be had in either state court or federal district court. Trial of these state claims should take place in the state forum chosen by the Trustee. *See In re Hanna*, 2018 WL 6601869, at *4 (Bankr. S.D. Tex. Dec. 13, 2018) ("This factor weighs in favor of abstention because [defendant] has the right to a jury trial in state court given the causes of action asserted in this adversary proceeding."); *In re Mugica*, 362 B.R. at 792 ("Congress' intent, as codified in 28 U.S.C. §§ 1332, 1334, & 1452, has been to encourage the efficient administration of judicial proceedings while maintaining respect for the plaintiff's choice of forum."). Thus, this factor favors remand.

(12) The presence in the proceeding of non-debtor parties. This factor favors remand because the parties are non-debtors. In arguing this factor is neutral, Shaper relies on *Special Value Continuation Partners*. But unlike that case — where the defendants were officers and directors of the debtor — the Class 3 Trust is "legally separate and distinct" from the Debtors, and the Debtors have "no direct or indirect control, influence, or authority" over the Class 3 Trust. 2011 WL 5593058, at *1, 10; *see* Order at 42; Plan at 4. Shaper also relies on *Dune Energy*, but the litigation trust at issue there was not expressly distinguished from the debtors under the terms of the plan, like the Class 3 Trust here. 575 B.R. at 734; *see* Order at 42; Plan at 4.

(13) Comity. This factor favors abstention because Shaper removed this action from state court. *See, e.g.*, *In re SBMC Healthcare, LLC*, 519 B.R. at 192. Shaper says this factor counsels retaining jurisdiction because whatever court adjudicates this case will have to interpret the Court's prior orders, understand complex bankruptcy processes, and "may" have to apply Australian law.

Response ¶ 56. But federal courts further comity by allowing state courts to adjudicate state law claims, not by taking over when they fear the state courts may bungle the issues. *Cf. Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) (noting that the general rule, informed by comity concerns, is to decline to exercise pendent jurisdiction over state claims after federal claims are dismissed). There is no reason to believe the Harris County District Court is not competent to adjudicate the issues presented, even if they may somehow involve Australian law (which is doubtful).[13]

(14) Possibility of prejudice to other parties in the action. This factor favors remand and abstention because Shaper will not be prejudiced by defending himself in the courts of his home state, while the Trustee will be prejudiced if she is denied the forum of her choice, particularly where only state law claims are at issue. Shaper asserts that the Trustee could not possibly suffer prejudice because a litigation trustee is "a legal fiction." Response ¶ 57. But a corporation is also a legal fiction, and it is well-settled that a corporation can suffer prejudice. *See In re Complaint of ENSCO Offshore Co.*, 9 F.Supp.3d 713, 717 n.1 (S.D. Tex. 2014) ("[A] corporation is a legal fiction which must act through individuals[.]"); *Cunningham v. Richeson Mgmt. Corp.*, 2005 WL 8158180, at *2 (N.D. Tex. Feb. 17, 2005) (observing a corporation "would suffer some prejudice" by a late-amended complaint); *Nolan v. M/V SANTA FE*, 1992 WL 193502, at *1 (E.D. La. June 16, 1992), *aff'd sub nom. Nolan v. M/V SANTE FE*, 25 F.3d 1043 (5th Cir. 1994) (same).

* * *

In sum, these factors weigh strongly in favor of the state court forum. Shaper reaches the opposite conclusion by misapplying the governing law and exaggerating the extent to which the

[13] The Trustee does not believe that Australian law controls any aspect of this case. Notably, Shaper omits the part of the quotation from *In re Schepps* making clear that a director's duties are governed by the law of the company's state of incorporation only "[p]rior to bankruptcy." 160 B.R. 792, 797 (Bankr. S.D. Tex. 1993).

claims implicate complex bankruptcy issues. Even if the Court declines to exercise mandatory abstention, it should use its discretion to permissively abstain and equitably remand this case to the Texas state court.

For the foregoing reasons, this Court should remand the case to the 61st Judicial District of Harris County, Texas, where the case can and will be fully and fairly adjudicated.

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Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF SPEEDCAST SFA LENDERS' LITIGATION TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022, a true and correct copy of the foregoing was served upon all counsel of record via the Court's ECF system.

/s/ Susanna R. Allen
Susanna R. Allen