



IT IS ORDERED as set forth below:

Date: September 28, 2007

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
ANDERSEN 2000, INC.,	:	04-14155-WHD
	:	
Debtor.	:	
_____	:	
	:	
ANDERSEN 2000, INC,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 06-1039
v.	:	
	:	
GREENWICH INSURANCE CO.,	:	
HITACHI, LTD., HITACHI	:	
AMERICA LTD, CROWN	:	
ANDERSEN, INC.	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Defendants.	:	BANKRUPTCY CODE

INTERIM ORDER

Before the Court are a Motion to Dismiss, filed by Greenwich Insurance Company (hereinafter “Greenwich”), and a Motion to Dismiss, filed by Hitachi Ltd. and Hitachi America, Ltd. (collectively referred to herein as “Hitachi”). The Motions arise in connection with a complaint filed by Andersen 2000, Inc. (hereinafter the “Debtor”) and are opposed by the Debtor and Crown Andersen, Inc. (hereinafter “Crown Andersen”).

FACTUAL BACKGROUND

According to the Debtor’s complaint, the Debtor entered into a contract with Hitachi in July 2002 (hereinafter the “Contract”). The Contract consisted of a letter of intent and several attachments thereto, including a subcontract between the Debtor and Science Applications International Corporation. Pursuant to the Contract, the Debtor agreed to manufacture for Hitachi an incinerator system according to certain specifications to be used in a power plant located in Taiwan. The Contract called for the Debtor to deliver the equipment for the incinerator system “FOB” to a common carrier at the Port of Savannah. The Contract also required the Debtor to provide a performance bond to Hitachi in the original amount of the purchase price of the incinerator – \$1,833,654.

The complaint further alleges that the Debtor satisfied the requirement of

providing the performance bond by obtaining a subcontract performance bond from Greenwich. In connection with the bond, the Debtor and Crown Andersen, the Debtor's parent company, executed a General Indemnity Agreement (hereinafter the "Indemnity Agreement").

The Indemnity Agreement provided that:

[The Debtor and Crown Andersen] shall exonerate, indemnify, and keep indemnified [Greenwich] from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interest, court costs, and the cost of services rendered by counsel, investigators, accountants, engineers or other consultants, whether consisting of in-house personnel or third-party service providers) and from and against any and all such losses and/or expenses which [Greenwich] may sustain and incur: (1) By reason of having executed or procured the execution of any Bond; (2) By reason of the failure of the [Debtor] to perform or comply with the covenants and conditions of this Agreement; or (3) In enforcing any of the covenants and conditions of this Agreement. Payment by reason of the aforesaid causes shall be made to [Greenwich] by the [Debtor and Crown Andersen] as soon as liability exists or is asserted against [Greenwich], whether or not [Greenwich] shall have made any payment therefor.

Indemnity Agreement § 2.¹

The Debtor contends that it completed all work on the components for the incinerator system. Thereafter, Hitachi inspected the components and performed

¹ The Court takes judicial notice of the terms of the Indemnity Agreement, which has been filed as an attachment to the proof of claim filed in the Debtor's related bankruptcy case, 04-14155-WHD, and has been referred to in the Debtor's complaint.

testing at the Debtor's facility in Peachtree City, Georgia. Following the successful testing of the components, they were packaged and shipped to Savannah. When the components arrived in Savannah, they were placed in the possession of the agreed-upon shipping company for transport to Taiwan. A portion of the components was delayed by US Customs, but all components were received no later than August 15, 2004. Despite receipt, the components were placed in storage and never installed in the power plant because of delays in the completion of the plant.

Shortly after the components left Savannah, Hitachi paid the Debtor \$1 million in accordance with the terms of the Contract. Pursuant to the Contract, the Debtor was to receive a final payment of \$91,682.70 after the components were installed and tested. The Contract did not obligate the Debtor to install the system, but the parties contemplated that installation would be the subject of a future contract between the Debtor and Hitachi. This subsequent contract was never negotiated.

The Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code on December 20, 2004. Hitachi received notice of the Debtor's bankruptcy case and has not filed a claim in the case. On October 4, 2005, Hitachi made a claim against the performance bond in the amount of \$1,833,654. Hitachi claimed

that the components suffered rust and damage during transportation due to the Debtor's improper packing; that several of the components were anticipated to fail; and that the Debtor failed to provide necessary manuals, drawings, and other contractual documentation. Hitachi has notified the Debtor of its intent to modify the incinerator system and of its intent to replace certain of the components manufactured by the Debtor with parts manufactured by parties other than the Debtor.

Upon the filing of a claim against the bond, Greenwich contacted the Debtor and learned of its status as a debtor-in-possession. On January 30, 2006, Greenwich filed a proof of claim in the amount of \$1,850,254. Greenwich may also exercise its indemnification rights against Crown Andersen in the event it is required to pay Hitachi's claim against the bond. Crown Andersen has not filed a petition under the Bankruptcy Code.

In Count 1 of the complaint, the Debtor objects to the claim filed by Greenwich and seeks to have the claim disallowed on the basis that Hitachi is not entitled to make a claim against the performance bond. In Count 2 of the complaint, the Debtor requests that, pursuant to section 502(c), the Court estimate Greenwich's claim to be zero for all purposes, including allowance, voting, and distribution. Count 3 of the complaint seeks the turnover by Hitachi of the final

payment amount of \$91,682.70. In Count 4, the Debtor seeks a declaration that it is not indebted to Hitachi in any amount pursuant to the Contract; that the Debtor is entitled to \$91,682.70 plus attorney's fees under the terms of the Contract; that Hitachi is not entitled to make a claim against the performance bond; and that neither the Debtor nor Crown Andersen is liable to Greenwich with respect to the performance bond. Finally, in Count 5, the Debtor seeks "injunctive relief" in the form of an order directing Greenwich not to pay Hitachi's claim and to refrain from any attempts to exercise its rights under the Indemnity Agreement against either the Debtor or Crown Andersen until this Court can determine that Hitachi's claim against the bond is valid and that Greenwich's claim is allowable.

In its motion to dismiss, Hitachi seeks dismissal of Counts 3, 4, and 5 of the Debtor's complaint for: 1) failure to state a claim; 2) lack of standing; and 3) lack of subject matter jurisdiction. In its motion, Greenwich seeks dismissal of Counts 1, 2, 4, and 5 for failure to state a claim. Alternatively, Greenwich proposes that these counts be stayed with regard to Greenwich until the Court resolves the underlying contract dispute between Hitachi and the Debtor. During a hearing on Greenwich's motion to dismiss, counsel for the Debtor agreed that there is "some logic" to staying the counts with regard to Greenwich until the Court can determine whether Hitachi's claim against the bond is valid. The Court agrees.

Accordingly, the Court will grant Greenwich's motion to the extent that the Debtor's complaint against Greenwich shall be stayed pending further resolution of the Debtor's claims against Hitachi.

CONCLUSIONS OF LAW

A. *Dismissal of Count 3 is Not Warranted*

Hitachi seeks dismissal of Count 3 pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7012. FED. R. CIV. P. 12(b)(6); FED. R. BANKR. P. 7012. “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). “As this standard indicates, the complaint must be construed in the light most favorable to the plaintiff, and the facts as alleged must be accepted as true.” *In re Jones*, 277 B.R. 816 (Bankr. M.D. Ga. 2001) (citing *Kirby v. Siegelman*, 195 F.3d 1285, 1295 (11th Cir. 1999)). However, the court need not accept conclusions of law asserted in the complaint as true. *See In re Barton*, 266 B.R. 922 (Bankr. S.D. Ga. 2001) (citing *Solis-Ramirez v. United States*, 758 F.2d 1426, 1429 (11th Cir. 1985)). Finally, “[b]ecause a Rule 12(b)(6)

motion tests the facial sufficiency of the complaint, typically it must be analyzed in conjunction with Rule 8, which provides that a claim for relief must simply contain ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *In re Jones*, 277 B.R. at 818-19 (quoting FED. R. CIV. P. 8(a)(2)).

In Count 3, the Debtor seeks turnover of the remaining \$91,000 allegedly due under the Contract. Hitachi contends that the turnover claim is improper because the Debtor is attempting to use the turnover powers of section 542 to resolve a contractual dispute and to mandate the payment of an unliquidated debt without affording Hitachi an opportunity to defend. Hitachi correctly argues that section 542 of the Bankruptcy Code is not properly invoked as a means to “liquidate disputed contract claims.” *In re Charter Co.*, 913 F.2d 1575 (11th Cir. 1990); *see also In re Ven-Mar Int’l*, 166 B.R. 191 (Bankr. M.D. Fla. 1994). The obligation to turnover property of a bankruptcy estate or to pay a debt owed to the estate pursuant to section 542 applies only to “tangible property and money due to the debtor without dispute which are fully matured and payable on demand.” *Charter*, 913 F.2d at 1579.

The Debtor is asking the Court to determine that it is entitled to full payment under the Contract. The Contract terms specifically state that the final

payment would not be due to the Debtor until after the installation and testing of the system. According to the Debtor's complaint, the system was never installed or tested. The Debtor's theory as to why it is entitled to the retainage is that Hitachi breached its obligations under the Contract. The Court cannot make that determination as part of a ruling on a complaint for turnover, as it requires the resolution of a contract dispute in accordance with applicable nonbankruptcy law.

That being said, a liberal reading of the complaint supports the conclusion that the Debtor has also alleged a breach of contract claim against Hitachi. The Debtor, as debtor-in-possession, has succeeded to any claim that the Debtor may have brought against Hitachi for the unpaid amounts due under the Contract. *See* 11 U.S.C. § 541(a). The Debtor asserts that Hitachi breached the Contract and prevented the Debtor from satisfying the conditions precedent that would have entitled the Debtor to the retainage. Hitachi, in fact, states in its brief in support of its motion to dismiss that, while the Debtor "asserts a claim for breach of contract excusing these conditions precedent, these assertions are based on facts in dispute and remain matters for trial on the merits."

To the extent that Count 3 seeks an automatic turnover of the retainage pursuant to section 542(b) without first establishing that Hitachi has breached its obligations under the Contract, Count 3 does fail to state a claim. However, the

Court construes the complaint to assert a breach of contract claim, which the Debtor appears willing to litigate pursuant to applicable non-bankruptcy law. Accordingly, Hitachi will not be denied “due process” or any “procedural safeguards” to which it is entitled, and dismissal of Count 3 for failure to state a claim would be inappropriate.

B. Dismissal of Counts 4 and 5

Hitachi asserts that Counts 4 and 5 should be dismissed due to lack of subject matter jurisdiction, mootness, lack of standing, and failure to state a claim. As noted above, in Count 4, the Debtor seeks a declaration that it is not indebted to Hitachi in any amount pursuant to the Contract; that the Debtor is entitled to \$91,682.70 plus attorney’s fees under the terms of the Contract; that Hitachi is not entitled to make a claim against the performance bond; and that neither the Debtor nor Crown Andersen is liable to Greenwich with respect to the performance bond. In Count 5, the Debtor asks the Court to enjoin Greenwich from paying Hitachi’s claim and from exercising its rights under the Indemnity Agreement against either the Debtor or Crown Andersen until this Court determines whether Hitachi’s claim against the bond is valid and that Greenwich’s claim is allowable as filed.

Hitachi first submits that the Court lacks jurisdiction because the Debtor

seeks relief with regard to rights between Hitachi, Greenwich, and Crown Andersen - third parties who are not debtors before the Court - and with regard to a claim against a bond that is not property of the estate. Additionally, Hitachi argues that the Court lacks even “related to” jurisdiction over the Debtor’s request for injunctive and declaratory relief because such relief could have no conceivable effect on the Debtor or the bankruptcy estate, as the Debtor’s liability to Greenwich has already been triggered by Hitachi’s assertion of a claim against the bond, regardless of whether Greenwich pays that claim. With regard to the standing and mootness arguments, the crux of Hitachi’s position is that the Debtor has already suffered any harm that would come from Greenwich’s paying Hitachi’s claim against the performance bond for the reason that Greenwich is entitled to indemnification and has filed a claim against the Debtor. Accordingly, Hitachi submits that any injunctive or declaratory relief granted under Counts 4 and 5 would come too late to address the Debtor’s injury.

As Hitachi notes, this Court is required to examine its subject matter jurisdiction at the earliest opportunity. Pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a), this Court may exercise “jurisdiction in three categories of civil proceedings: those that ‘arise under title 11,’ those that ‘arise in cases under title 11,’ and those ‘related to cases under title 11.’” *In re Happy Hocker Pawn Shop*,

Inc., 212 Fed. Appx. 811 (11th Cir. 2006).

Hitachi has not filed a claim against the Debtor in the Debtor's bankruptcy case. Contrary to the Debtor's position, Counts 4 and 5 do not seek allowance or disallowance of a claim. These counts contain no causes of action that are peculiar to bankruptcy. Rather, these counts seek an injunction that would prohibit Greenwich from acting until the Court can resolve an ordinary contract dispute and a declaration, once the Court has done so, that Hitachi is not entitled to any damages under the contract. Nonetheless, the Court concludes that these counts are "related to" the Debtor's bankruptcy case.

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or the debtor's property. 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.

In re Lemco Gypsum, Inc., 910 F.2d 784 (11th Cir. 1990).

Hitachi argues that, even if the Court stopped Greenwich from paying Hitachi's claim or declared that Hitachi was not entitled to make a claim against the bond, such relief would not impact the Debtor or the estate. In Hitachi's view, this is true because Greenwich is legally entitled to payment from the Debtor for

the full amount of Hitachi's claim, regardless of whether Greenwich pays Hitachi or whether Hitachi's claim against the bond is later determined to be invalid. For the same reasons, Hitachi contends that the Debtor lacks standing to pursue the requested relief and that the matter is moot.

Having considered the various arguments, the Court is persuaded that the requested relief could conceivably impact the Debtor's liabilities. The purpose of the requested injunction and the declaratory relief is to prevent Greenwich from paying Hitachi's claim in an amount that exceeds Hitachi's actual entitlement under the Contract. If Greenwich is prevented from paying Hitachi's claim, Greenwich's claim against the Debtor may yet be reduced if the Debtor succeeds on its claim against Hitachi. Although Greenwich has an existing right to payment from the Debtor, if the Debtor had satisfied its obligation under the Indemnity Agreement to provide collateral security to Greenwich, and Greenwich did not later incur a loss equal to the amount of funds provided, Greenwich would have been obligated to return the remaining amount of the collateral security. *See American Motorists Ins. Co. v. United Furnace Co., Inc.*, 876 F.2d 293 (2d Cir. 1989); *The Hanover Ins. Co. v. Clark*, 2006 WL 2375428 (N.D. Ill. Aug. 15, 2006). In this case, if Greenwich's actual loss turns out to be less than its filed claim, it would stand to reason that Greenwich would have a similar obligation to

amend its proof of claim to reflect the amount of its actual loss, or the Debtor could seek to have the claim reduced on that basis. Assuming facts in the light most favorable to the Debtor, either the injunctive or the declaratory relief requested could “conceivably” affect the Debtor’s liabilities. Therefore, “related to” jurisdiction exists. For this same reason, the Court finds that the Debtor does not lack standing and the matter is not moot.

Finally, Hitachi seeks dismissal of the Debtor’s request for injunctive and declaratory relief on the basis that the requests fail to state a claim upon which relief may be granted. As noted above, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

1. *Dismissal of Count 4 for Failure to State a Claim*

To obtain a judgment for declaratory relief, a party must prove (1) that the plaintiff has a present bona fide need for a declaration; (2) that the plaintiff is in doubt as to his rights; (3) that all parties necessary to the resolution of these issues are presently before the court; and (4) that the plaintiff is not merely seeking legal advice, but is rather seeking a resolution of his rights regarding a present controversy. *In re Pro Greens, Inc.*, 305 B.R. 356 (Bankr. M.D. Fla. 2003).

In essence, the Debtor seeks a declaration from the Court that the Debtor performed all of its obligations under the Contract. Such a finding is required before the Court can declare that Hitachi is not entitled to make a claim against the bond, that the Debtor is entitled to the retainage, and that neither the Debtor nor Crown Andersen is obligated to indemnify Greenwich. Hitachi asserts that the Debtor lacks a present bona fide need for such a declaration because Hitachi has already made its claim against the bond and because the Debtor can obtain the relief requested through its breach of contract action.

Hitachi has already made a claim against the bond, and Hitachi's assertion of liability has triggered Greenwich's right, in its own discretion, to settle the matter with Hitachi. Greenwich has, however, not yet done so. If the Debtor were to obtain a declaration from this Court that Hitachi was not entitled to make a claim against the bond, it is conceivable (and quite probable) that Greenwich would not pay Hitachi's claim. If Greenwich was not required to pay Hitachi's claim, or paid an amount less than the amount claimed by Hitachi, Greenwich's claim against the Debtor would be reduced. So long as Greenwich has not exercised its right to settle with Hitachi, the Debtor has a present bona fide need for a declaration that Hitachi's claim against the bond was not proper, and a present controversy as to the parties' respective rights exists. For this reason, the

Court will not dismiss Count 4.

2. Dismissal of Count 5 for Failure to State a Claim

Hitachi argues that, even assuming the facts alleged in the complaint are true, the Debtor cannot demonstrate that it is entitled to an injunction because it cannot show that it will suffer irreparable injury if the Court does not enjoin Greenwich from paying Hitachi's claim or from exercising its indemnification rights. Hitachi further submits that the Debtor's request for a declaration that it does not owe Hitachi any amount under the Contract must fail because the Debtor cannot demonstrate a "present bona fide need for a declaration."

This Court has the authority, pursuant to section 105 of the Bankruptcy Code, to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Code. 11 U.S.C. § 105(a). This authority encompasses the power to issue a preliminary injunction "in special situations." *In re 1600 Pasadena Offices, Ltd.*, 64 B.R. 192, 194 (Bankr. M.D. Fla. 1986). To obtain a preliminary injunction, the movant must demonstrate that: 1) it has a substantial likelihood of success on the merits; 2) irreparable injury will be suffered unless the injunction issues; 3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing

party; and 4) if issued, the injunction would not be adverse to the public interest.” *Siegel v. LePore* 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc); *In re Bell*, 279 B.R. 890 (Bankr. N.D. Ga. 2002) (Bonapfel, J.); *In re Lickman*, 286 B.R. 821 (Bankr. M.D. Fla. 2002); *In re Excel Innovations, Inc.*, ___ F.3d ___, 2007 WL 2555941 (9th Cir. Sept. 7, 2007) (applying traditional test for injunctive relief to determine whether the bankruptcy court properly issued a section 105 injunction). Injunctive relief is “an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites.” *McDonald’s Corp. v. Robertson*, 147 F.3d 1301 (11th Cir. 1998).

In the bankruptcy context, the irreparable injury may be one that would be suffered by the debtor or the debtor’s creditors absent the imposition of an injunction. *See Lickman*, 286 B.R. at 829. As Hitachi correctly argues, however, if the harm that would ensue absent the entry of an injunction can be remedied by the payment of money damages, the harm is not irreparable. *See Northeastern Florida Chapter of Ass’n of General Contractors of Amer. v. City of Jacksonville, Florida*, 896 F.2d 1283 (11th Cir. 1990); *1600 Pasadena Offices, Ltd.*, 64 B.R. at 195.

In this case, considering all of the facts alleged by the Debtor to be true, the Court concludes that Greenwich’s payment of Hitachi’s claim would not result in

irreparable injury to the Debtor. The Debtor has proposed a Chapter 11 plan that anticipates the continued liquidation of the Debtor's assets and payment of the resulting proceeds to the Debtor's remaining creditors. *See* Debtor's Disclosure Statement and Proposed Plan, Case No. 04-14155-WHD. Thus, allowing Greenwich to exercise its rights and to perform its obligations under the Indemnity Agreement would not interfere in any way with the Debtor's rehabilitation.

Further, it does not appear that the issuance of an injunction would improve the Debtor's situation or save the Debtor from having to litigate further with Hitachi. If Greenwich pays Hitachi's claim in full, Greenwich's claim against the Debtor will be established without the possibility of a future reduction in the amount. While this fact would result in the Debtor's inability to reduce its liability to Greenwich, it would not eradicate the Debtor's claim against Hitachi for breach of the Contract. Following confirmation of the Debtor's plan, the Debtor would be entitled to pursue its claim against Hitachi, and any funds recovered from Hitachi could be used to fund the plan and to increase the dividend to the Debtor's general unsecured creditors. Even if the Court were to grant the requested relief, the Debtor would be required to pursue its claim against Hitachi in order to establish that Greenwich's claim should be reduced. Under the circumstances of the Debtor's case, the Debtor's complaint contains no allegations of fact that

would support the conclusion that, without an injunction, the Debtor would suffer irreparable injury.² For this reason, the Court concludes that Count 5 should be dismissed for failure to state a claim.

The Court is of the opinion, however, that the Debtor's request for injunctive relief is a "non-core" proceeding because it "does not involve a right created by federal bankruptcy law, and it is not a proceeding that would arise only in bankruptcy." *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791 (11th Cir. 2007) (citing *In re Toledo*, 170 F.3d 1340 (11th Cir. 1999)). Had the Debtor not filed a bankruptcy petition, the Debtor could have sought to enjoin preliminarily Greenwich from paying Hitachi's claim against the bond in another forum. *See, e.g., KMW Intern. v. Chase Manhattan Bank, N.A.*, 606 F.2d 10 (2d Cir. 1979) (review of district court's grant of request to enjoin bank from honoring an irrevocable letter of credit). The Court may "hear" a non-core proceeding that is "related to" the bankruptcy case, but may only "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court." 28 U.S.C. § 157(c)(1). As the parties may consent to this Court's entry of a final order dismissing Count 5, *see* 28 U.S.C. §

² The Debtor has not alleged that Hitachi would be incapable of satisfying any money judgment that might be awarded against it on the Debtor's breach of contract claim.

157(c)(2), the Court will allow the parties an opportunity to do so prior to the Court's submission of proposed findings of fact and conclusions of law to the District Court.

CONCLUSION

For the reasons stated above, the Motion to Dismiss filed by Greenwich Insurance Company is **GRANTED in part**. Proceedings regarding the Debtor's claims against Greenwich, with the exception of Count 5, shall be stayed until further order of the Court. At any time, any party shall be free to file a request that the Court lift the stay.

The Motion to Dismiss filed by Hitachi Ltd. and Hitachi America, Ltd. is **DENIED** with the exception of Hitachi's request for the dismissal of Count 5. The Court has concluded that Count 5 constitutes a non-core proceeding. Absent the parties' consent to entry by this Court of a final order dismissing this claim, the Court must submit proposed findings of fact and conclusions of law to the District. Within fifteen (15) days of the date of the entry of this Order, all parties shall file a notice with the Court indicating whether they consent or do not consent to the entry by this Court of a final order dismissing Count 5. Any party who fails to file a notice will be deemed to have consented. If all parties consent or are

deemed to consent, the Court will enter a supplemental order dismissing Count 5 and certifying the dismissal as a final order pursuant to Rule 54. If any party does not consent, the Court will file with the District Court proposed findings of fact and conclusions of law regarding the dismissal of Count 5.

END OF DOCUMENT

Distribution List

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