



**IT IS ORDERED as set forth below:**

**Date: February 3, 2016**

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro", is written over a horizontal line.

**Barbara Ellis-Monro  
U.S. Bankruptcy Court Judge**

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

IN RE:

GREEN MOUNTAIN MANAGEMENT, LLC,  
and GEORGIA FLATTOP PARTNERS, LLC,

Debtors.

GREEN MOUNTAIN AGGREGATES, LLC,

Plaintiff,

v.

GREEN MOUNTAIN MANAGEMENT, LLC,  
and GEORGIA FLATTOP PARTNERS, LLC,

Defendants.

CASE NO. 14-64287-BEM

CHAPTER 11

ADVERSARY PROCEEDING NO.  
15-5285-BEM

**ORDER**

This matter comes before the Court on Plaintiff's Motion to Remand [Doc. 8]. Plaintiff initiated this action on June 29, 2015, in the Superior Court of Gwinnett County, Georgia, as a Complaint for Declaratory Judgment (the "Complaint") against Chapter 11 debtors Green Mountain Management, LLC ("GMM"), and Georgia Flattop Partners, LLC ("GFP") (collectively, "Debtors"). The Complaint seeks a declaration that Plaintiff owns certain rock mining rights "free and clear." The Debtors removed the action to this Court on July 9, 2015. On August 10, 2015, the Debtors filed an Amended Answer and Counterclaims [Doc. 7] that joined Daniel B. Cowart, Sr. ("Cowart") as a counterclaim defendant, alleging counterclaims for violation of the automatic stay, breach of contract, breach of fiduciary duty, and avoidance of fraudulent transfers.

Plaintiff filed the Motion to Remand on August 10, 2015. On September 8, 2015, the Debtors filed a Response to Plaintiff's Motion to Remand [Doc. 18] and on September 22, 2015, Plaintiff and Cowart filed a Reply In Support of Motion to Remand [Doc. 19]. The Court held a hearing on the Motion to Remand on November 18, 2015. For the reasons below, the Court will deny the Motion to Remand.

## **I. Background of Dispute**

The defendants in this case, GMM and GFP, each filed Chapter 11 bankruptcy petitions on July 25, 2014 (the "Petition Date"). On the Petition Date, GFP was the managing member and majority owner of GMM,<sup>1</sup> and Cowart was the sole member of GFP. Cowart authorized the filing of the Debtors' bankruptcy petitions in his capacity as sole member of GFP.

On the Petition Date, GMM operated a landfill located in Adamsville, Alabama (the "Landfill"), on land leased from the Solid Waste Disposal Authority of the City of Adamsville (the "SWDA"). The land on which the Landfill operates is subject to a reservation of certain

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<sup>1</sup> The two Chapter 11 estates have been jointly administered under GMM's case number since July 31, 2014.

mineral and mining rights in favor of Walter Minerals, Inc. (“Walter Minerals”), including the right to process and remove quarry stone (hereinafter, the “Rock Rights”). The Rock Rights are the subject of the Complaint.

On or around May 25, 2011, GMM entered into an agreement with Walter Minerals under which GMM received a Permit for Rock Removal (the “GMM Permit”). The GMM Permit granted GMM the Rock Rights for three years, was renewable in three-year increments, and was terminable at will by either party on 30 days’ notice.

On or around July 16, 2013, Cowart formed Green Mountain Aggregates, LLC, Plaintiff in this action (“GMA” or “Plaintiff”). Cowart and certain family members appear to be the sole owners of Plaintiff, and neither GMM nor GFP appear to hold any interest in Plaintiff. On or around August 1, 2013, Plaintiff entered into an agreement with Walter Minerals under which Plaintiff received its own Permit for Rock Removal (the “GMA Permit”). The GMA Permit granted Plaintiff the Rock Rights for a 20-year term and was terminable only for cause.

GMM and GFP filed their Chapter 11 petitions after GMM defaulted on bond payments for bonds the SWDA issued to finance the purchase and construction of the Landfill. On November 3, 2014, UMB Bank, N.A., as indenture trustee for those bonds (“UMB”), filed a Motion for the Appointment of a Chapter 11 Trustee [Doc. 108] (the “UMB Motion”) alleging, among other things, that Cowart orchestrated an improper and fraudulent transfer of the Rock Rights from GMM to Plaintiff. The Court held a hearing on the UMB Motion on November 17, 2014, at which the parties announced resolution memorialized in a fully executed term sheet (the “Term Sheet”). The Term Sheet was incorporated into the order resolving the UMB Motion (the “Term Sheet Order”) [Doc. 124]. Under the Term Sheet, Cowart removed himself from all decision-making and authority functions of GMM (in any capacity) and was replaced by Lee

Katz of GlassRatner Advisory & Capital Group, LLC, as manager of GMM. The Term Sheet also contemplated the marketing and eventual sale of the Landfill. As it pertains to the Rock Rights, the Term Sheet provided, in part, for a “Perpetual License” of the GMA Permit to GMM.

The Term Sheet defined the Perpetual License as follows:

GMM is entitled to mine and use rock and dirt consistent with that certain Permit for Rock Removal dated August 1, 2013, between Walter Minerals, Inc. and GMA (the “Rock Permit”),<sup>[2]</sup> as needed by GMM for its day to day operations including, but not limited to, dirt to cover landfill, aggregate to create new cells, and rock for sales (such rock sales shall be approximately \$30,000 per month) consistent with the cash collateral budget. All related revenue and expenses in connection with these activities will remain assets and liabilities of GMM. This would be a perpetual right for the life of the Rock Permit (and/or any subsequent license entered into by GMA or other Cowart Family entities) and run to GMM’s successors and assigns (the “Perpetual License”).

On February 24, 2015, UMB filed a Motion for Entry of an Order Authorizing Rule 2004 Examinations [Doc. 189] (the “Rule 2004 Motion”) as to Cowart, Walter Minerals, and both Debtors. The stated purpose of the Rule 2004 Motion was to seek information on the negotiation and execution of the GMM Permit and the GMA Permit, in hopes of determining the “true ownership” of the Rock Rights before the contemplated sale of the Landfill occurred. On February 26, 2015, the Court entered orders authorizing the Rule 2004 examinations. [Docs. 191, 192, 193]. On March 11, 2015, Cowart filed a Motion to Vacate Order Authorizing 2004 Examinations [Doc. 198] arguing, in part, that any unresolved questions about the Rock Rights were addressed and settled by the Term Sheet and the Term Sheet Order. On March 18, 2015, UMB filed an Objection to Motion to Vacate Order Authorizing 2004 Examinations [Doc. 205], arguing that the Term Sheet and Term Sheet Order resolved only the UMB Motion, not the substantive issues regarding the allegedly improper Rock Rights transfer. After a hearing, the Court entered an Order [Doc. 216] denying the Motion to Vacate.

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<sup>2</sup> Terms defined in the Term Sheet shall have the same meaning herein.

On May 15, 2015, Cowart, Plaintiff, and the Dan Cowart Companies filed a Motion for Appointment of Trustee [Doc. 245] (the “Appointment Motion”), alleging in relevant part that Katz should not have been appointed manager of GMM because he lacked sufficient disinterestedness, that Katz was acting outside the scope of his appointment, and that Katz was mismanaging the Debtors. After a lengthy hearing taking place over several days, the Court entered an Order [Doc. 287] on June 15, 2015, denying the Appointment Motion.

On August 17, 2015, and over the objections of Cowart, Plaintiff, and the Dan Cowart Companies, the Court approved bid procedures for the sale of substantially all of the Debtors’ assets, approved a stalking horse bid, and finally approved the sale of substantially all of Debtor’s assets to Big Sky Environmental, LLC (“Big Sky”). The order approving the sale [Doc. 372] (the “Sale Order”) provides, in part, “Purchaser shall be entitled to enforce all of the Debtors’ rights under Paragraph 2 of the Term Sheet attached to the [Term Sheet Order], which rights are hereby assigned to Purchaser.” Paragraph 2 of the Term Sheet includes the provisions regarding the Perpetual License of the Rock Rights. As to the potential causes of action stemming from the creation of the GMA Permit, § 7.10 of the Asset Purchase Agreement [Doc. 327] (the “APA”) approved by the Sale Order obligated the Debtors to (subject to the Big Sky’s approval) “promptly commence an adversary proceeding and motion against, among others, GMA seeking to recover the Rock Rights obtained by GMA and to otherwise enforce the terms of the Perpetual License ....”

## **II. Procedural History and the Parties’ Contentions**

On June 29, 2015—shortly after the Court’s denial of the Appointment Motion and before the asset sale to Big Sky—Plaintiff filed the Complaint [Doc. 1, Ex. A] in the Superior Court of Gwinnett County, Georgia. In the Complaint, Plaintiff requests “that a determination be

made as to the rights of the parties with respect to the Rock Rights,” and “a declaratory judgment ruling that GMA rightfully owns the Rock Rights free and clear.” Complaint ¶¶ 51-52. The Complaint defines the “Rock Rights” as Plaintiff’s “right to process by crushing and removing commercial quantities of Quarry Stone (as that term is defined in the GMA Rock Permit) from the Landfill (the ‘Rock Rights’).” Complaint ¶ 28.

The Complaint alleges, in relevant part, the following:

- This automatic stay does not apply to this action because the actual controversy arose post-petition, when Plaintiff received notice that the Debtors asserted that GMM is the rightful owner of the Rock Rights. Complaint ¶¶ 7-8, 41-42.
- Under the lease with the SWDA, GMM could operate only a single-purpose entity formed solely for owning and implementing the Landfill. Complaint ¶ 12.
- Moreover, the issuance of tax-free bonds that financed the development of the Landfill depended in part on GMM abiding every term of the lease with SWDA. Complaint ¶ 13.
- GMM’s obtaining a permit with Walter Minerals was done without Cowart’s knowledge and in contradiction to his instructions. Complaint ¶ 20.
- Cowart established Plaintiff and entered into the GMA Permit on the advice of counsel that under GMM’s lease with SWDA, the Rock Rights could be exercised only by a separate entity. Complaint ¶ 26.
- UMB agreed to provide consensual cash collateral and debtor-in-possession financing only on the conditions that Cowart be removed from all decision-making authority and that GMM be granted a sublicense from Plaintiff consistent with GMM’s Landfill operations. Complaint ¶ 37.
- Any allegation of a fraudulent transfer of the Rock Rights is “patently false” because no transfer from GMM to Plaintiff took place. Complaint ¶ 45.
- Cowart did not breach any fiduciary duty because he acted on the advice of counsel. Complaint ¶¶ 46-48.

The Debtors filed a Notice of Removal [Doc. 1] in this Court on July 9, 2015. The Debtors removed the action under 28 U.S.C. § 1452, which provides for removal of actions to

district court on the basis of bankruptcy jurisdiction.<sup>3</sup> On August 10, 2015, the Debtors filed the Amended Answer and Counterclaims [Doc. 7], adding Cowart as a counterclaim defendant and alleging counterclaims for violation of the automatic stay, breach of contract, breach of fiduciary duty, and avoidance of fraudulent transfers.

Also on August 10, 2015, Plaintiff filed the Motion to Remand [Doc. 8] which is currently before the Court. Plaintiff simultaneously filed a Memorandum of Law in Support of Motion to Remand [Docs. 8-1] (the “Memorandum in Support of Motion”). The Debtors filed a Response to Motion to Remand [Doc. 18] (the “Response”) on September 8, 2015, and on September 22, 2015, Plaintiff and Cowart filed a Reply in Support of Motion to Remand [Doc. 19] (the “Reply in Support of Motion”). The parties argued their positions at the hearing on the Motion to Remand, held on November 18, 2015 (the “Hearing”).

As grounds for removal, the Debtors assert that (i) their interest in the Rock Rights is property of GMM’s bankruptcy estate, subject to the exclusive jurisdiction of this Court under 28 U.S.C. § 1334(e), (ii) this action arises in and relates to the Debtors’ bankruptcy cases because it will directly interfere with and impact the Debtors’ interest in the Rock Rights, and by extension, the administration of the estates, (iii) the retention-of-jurisdiction provision in the Term Sheet Order cover the issues raised in the Complaint and the Debtors’ counterclaims, and (iv) remand is not warranted on equitable grounds under 28 U.S.C. 1452 (b) because the relevant factors weigh in favor of retaining this action.

Plaintiff argues that this proceeding must be remanded for the following reasons: (i) this Court does not have jurisdiction over the issues raised in the Complaint because the Complaint involves a post-petition dispute arising under state (contract) law, because the Rock Rights are not estate property, and because the Term Sheet Order’s retention-of-jurisdiction provision is

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<sup>3</sup> The grant of jurisdiction over bankruptcy-related proceedings is at 28 U.S.C. § 1334.

narrow and inapplicable, (ii) if the Court does have jurisdiction, this proceeding is at most a non-core proceeding, subject to mandatory abstention under 28 U.S.C. § 1334(c)(2), (iii) removal directly to the bankruptcy court, rather than to the district court, was procedurally improper, (iv) "venue does not lie with the federal courts" under 28 U.S.C. § 1409 because any claim to the Rock Rights is a post-petition claim arising out of operation of the Debtors' business, and (v) Plaintiff is entitled to a jury trial and will not consent to this Court's entry of final orders or a judgment.

### III. Analysis

Removal under 28 U.S.C. § 1452 ("Removal of claims related to bankruptcy cases") is proper only if the Court has jurisdiction under 28 U.S.C. § 1334. *See* 28 U.S.C. § 1452(a). Pursuant to 28 U.S.C. § 1334(b), the Court's jurisdiction extends to "all civil proceedings arising under title 11, or arising in or related to cases under title 11." A proceeding "arises under" title 11 when it "invok[es] a substantive right created by the Bankruptcy Code." *Continental Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999) (citations omitted). A proceeding "arises in" a case under title 11 when it "involve[s] administrative-type matters" or "matters that could arise only in bankruptcy." *Id.* (citations and internal quotation marks omitted). Under 28 U.S.C. § 157(b)(2), proceedings under title 11 and proceedings arising in a case under title 11 are "core" proceedings—proceedings in which bankruptcy courts can enter final orders and judgments.

A proceeding is "related to" a bankruptcy case when it "could conceivably have an effect on the estate being administered in bankruptcy." *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). In other words, a proceeding "is related to bankruptcy if the outcome could alter the



debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” *Id.* (quoting *Pacor*, 743 F.2d at 994). Under 28 U.S.C. § 157(c), “related to” proceedings are “non-core” proceedings—proceedings in which bankruptcy courts can enter only proposed findings of fact and conclusions of law unless the parties consent to entry of a final order by a bankruptcy judge. A “related to” proceeding “does not invoke a substantive right created by the federal bankruptcy law” and “could exist outside of bankruptcy.” *In re Toledo*, 170 F.3d at 1348.

For the reasons stated below, the Court concludes that the Court has subject matter jurisdiction over the removed state court action because it constitutes a core proceeding.

**1. The Court Has Subject Matter Jurisdiction Because the Complaint is a Disguised Core Proceeding and Because the Court Has Jurisdiction to Construe and Enforce its Own Orders.**

**A. The Complaint Is a Disguised Request to Determine the Merits of Fraudulent Conveyance Claims.**

The non-exclusive list of core proceedings identified in 28 U.S.C. § 157(b)(2) includes “proceedings to determine, avoid, or recover fraudulent conveyances.” 28 U.S.C. § 157(b)(2)(H). The Complaint amounts to a thinly veiled request to determine the validity of the Debtors’ fraudulent conveyance claims. The majority of the Complaint is a description of the events leading to the GMM Permit, GMA Permit, UMB Motion, Term Sheet, Sale Order, and the dispute over the Rock Rights. *See* Complaint ¶¶ 11-43. The Complaint then explains, “Defendants’ apparent theory is elaborated in the motion for appointment of a Chapter 11 Trustee .... The Appointment Motion alleges that Mr. Cowart organized a fraudulent transfer of the Rock Rights from GMM to GMA. This is patently false, as no transfer from GMM to GMA ever took place; GMA’s rights came directly from Walter Minerals.” Complaint ¶¶ 44-45; *see also* Motion to Remand at 10 (same, verbatim).

In other words, the Complaint attacks the merits of the fraudulent conveyance claims and simply re-characterizes the disputed transfer of the Rock Rights as a dispute over ownership of the contract rights underlying the Rock Rights. Thus, adjudicating the Complaint will necessarily require determining the merits of the Debtors' fraudulent conveyance claims and under 28 U.S.C. § 157(b)(2)(H) such proceedings are core proceedings.

**B. Adjudicating the Complaint Will Require the Construction and Possible Enforcement of the Term Sheet Order.**

This Court has jurisdiction to interpret and enforce its own orders. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). Matters involving interpretation and enforcement of a Court's own orders are core proceedings. *See, e.g., Lothian Cassidy, LLC v. Ransom*, 428 B.R. 555, 560 (E.D.N.Y. 2010) ("[M]atters involving the enforcement or construction of a bankruptcy court order fall under 'arise in' jurisdiction."); *In re Motors Liquidation Co.*, 514 B.R. 377, 381 (Bankr. S.D.N.Y. 2014) ("Bankruptcy courts ... have subject matter jurisdiction to enforce their orders in bankruptcy cases and proceedings under those courts' 'airising in' jurisdiction."); *In re Patriot Coal Corp.*, No. 12-51502-659, 2015 WL 5919962, at \*4 (Bankr. E.D. Mo. Oct. 9, 2015) ("And this jurisdiction is core. '[T]he enforcement of orders resulting from core proceedings are considered core proceedings.' ... 'Requests for bankruptcy courts to construe their own orders must be considered to arise under title 11 if the policies underlying the Code are to be effectively implemented.'") (quoting *In re Williams*, 256 B.R. 885, 892 (B.A.P. 8th Cir. 2001); *see also In re Chateaugay Corp.*, 201 B.R. 48, 62 (Bankr. S.D.N.Y. 1996) ("Bankruptcy courts have inherent or ancillary jurisdiction to interpret and enforce their own orders wholly independent of the statutory grant of jurisdiction under 28 U.S.C. § 1334.").

Plaintiff requests, without elaboration, a determination that it owns the Rock Rights "free and clear." Complaint ¶ 52. At the Hearing, Plaintiff argued that Plaintiff requests very narrow

relief—Plaintiff seeks only a determination that Plaintiff owns the GMA Permit free and clear of any obligation to assign the permit to the Debtors, not whether Plaintiff owns the GMA Permit free and clear of rights under the Term Sheet Order and Perpetual License. As a result, Plaintiff argues, the Complaint does not implicate this Court’s orders or any rights GMM may have under the Term Sheet Order or otherwise.

The Court is not persuaded by Plaintiff’s arguments on this point. The narrow definition of “free and clear” Plaintiff provided at the Hearing is belied by Plaintiff’s arguments elsewhere. In the Complaint, the Motion to Remand, and the Reply in Support of Motion to Remand, Plaintiff takes the position that the Term Sheet effected a narrow sublicense to GMM for limited purposes related to a cash collateral budget and debtor-in-possession financing. *See* Complaint ¶ 37; Motion to Remand at 14, 27; Reply in Support of Motion to Remand at 6-7. Moreover, in the Reply in Support of Motion to Remand at 8, Plaintiff asserts that “GMM has no ‘perpetual license.’” These positions establish that this dispute involves, at least in part, the parties’ rights under the Term Sheet, the Term Sheet Order, and any subsequent, related orders.

Also, these positions are consistent with the actual relief requested in the Complaint—a determination that Plaintiff owns the “Rock Rights” free and clear. The Term Sheet Order clearly gave the Debtors rights that encumber Plaintiff’s Rock Rights under the GMA Permit. The Perpetual License at ¶ 2.a of the Term Sheet has already been discussed. The Term Sheet, at ¶ 2.b gave the Debtors certain rights arising in the event Plaintiff commences its own processing of rock and dirt (i.e., in the event Plaintiff exercises its Rock Rights). A determination that Plaintiff owns the “Rock Rights”—as opposed to the GMA Permit—free and clear will necessarily require a court to construe the Term Sheet Order, because the scope and duration of those rights are obviously disputed.

Construing the Term Sheet (and therefore the Term Sheet Order) is necessary to resolve the dispute over the scope and duration of the parties rights under the Term Sheet. Resolving the dispute and this proceeding is therefore a core proceeding.

## **2. Mandatory Abstention**

Mandatory abstention applies only to non-core matters. *See* 28 U.S.C. § 1334(c)(2); *General Instrument Corp. v. Financial and Business Svcs, Inc. (In re Finley)*, 62 B.R. 361, 367 (Bankr. N.D. Ga. 1986) (Cotton, J.). As discussed above, the Court concludes this action is a core proceeding. Mandatory abstention does not apply to this proceeding.

## **3. Removal Procedure**

Plaintiff argues that this Court must remand the proceeding back to state court because the Debtors removed the proceeding directly to this Court rather than to the district court. The majority rule—adopted by the only circuit courts that have addressed the issue—is that removal under 28 U.S.C. § 1452 can be made directly to the bankruptcy court in the relevant district. *See, e.g.,* Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 CUMB. L. REV. 1037, 1063-1064 (1996) (majority of courts allow direct removal to the bankruptcy court); *Townsquare Media, Inc. v. Brill*, 652 F.3d 767, 770 (7th Cir. 2011) (“Although section 1452(a) provides for removal to the district court rather than to the bankruptcy court, Bankruptcy Rule 9027, buttressed by standing orders in the district courts (including the district court for the Southern District of Indiana), transfers removed suits from district court to bankruptcy court.”) (citing *Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237, 247 n.8 (3d Cir. 2007)); *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 661 n. 5 (4th Cir.1985); *General Instrument Corp. v. Financial and Business Svcs, Inc. (In re Finley)*, 62 B.R. 361, 364-366 (Bankr. N.D. Ga. 1986) (Cotton, J.) (issues of removal

and remand are core proceedings subject to automatic referral to bankruptcy court; removal directly to bankruptcy court authorized).

This Court agrees with the majority view. Removal under 28 U.S.C. § 1452 can be made directly to the bankruptcy court in the district where the civil action is proceeding.

#### **4. Venue**

Plaintiff argues "[v]enue [d]oes [n]ot [l]ie with the [f]ederal [c]ourts" under 28 U.S.C. § 1409 because any claim to the Rock Rights is a post-petition claim arising out of operation of the Debtors' business. Memorandum in Support of Motion at 17-18. Plaintiff relies specifically on § 1409(e),<sup>4</sup> noting that this particular subsection is intended to strip a debtor's "home court" advantage for post-petition claims arising out of a debtor's business operations.

Plaintiff's reliance on § 1409(e) is misguided. Section 1409(e) provides for federal venue, so it logically cannot support the contention that venue does not lie with the federal courts. Further, Plaintiff filed this action in state court, not federal court, rendering § 1409(e) inapplicable. The relevant venue statute at this point is 28 U.S.C. § 1452.

Even if this were not the case § 1409(e) is permissive<sup>5</sup> and Plaintiff's chosen forum and the Debtors' bankruptcy cases are located in the same district such that if Plaintiff had availed itself of § 1409(e), venue would still lie in the Northern District of Georgia. Moreover, Plaintiff, GMM, and GFP are each principally located in Gwinnett County [Complaint ¶¶ 1-3] and, as a result, the parties appear to be on identical footing.

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<sup>4</sup> This subsection states that for proceedings based on post-petition claims arising out of a debtor's business operations, venue is proper in any district where the action may have been brought and is proper in the district where the bankruptcy case is pending.

<sup>5</sup> "a proceeding . . . based on a claim arising after commencement of such case from the operation of the business of the debtor, *may be* commenced . . . in the district court from the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim. . .". 28 U.S.C. § 1409(e) (emphasis added).

**5. Remand Under 28 U.S.C. §1452(b)**

The Court is not required to remand this proceeding. However, the Court must determine whether remand is appropriate under 28 U.S.C § 1452(b), which states that remand may be based on “any equitable ground.” Courts consider numerous factors in determining whether to equitably remand a proceeding, including the following:

(1) the effect of abstention on the efficient administration of the bankruptcy estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the basis of bankruptcy jurisdiction, 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 state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; (13) comity; and (14) the possibility of prejudice to other parties in the action.

*Flyboy Aviation Properties, LLC v. Franck*, case no. 13-5111, 2013 Bankr. LEXIS 2139 \*3-\*5 (Bankr. N.D. Ga. May 20, 2013) (Ellis-Monro, J. ) (citing, *Lester v. TitleMax of S.C., Inc. (In re TitleMax Holdings, LLC)*, 447 B.R. 896, 901 (Bankr. S.D. Ga. 2010). Any factors favoring remand are dwarfed by the factors favoring retention of this proceeding.

In this proceeding, two issues are paramount: (i) whether Plaintiff's Rock Rights are subject to avoidance under bankruptcy law and (ii) whether and to what extent the Term Sheet Order affects each party's Rock Rights, if any. Resolving these issues will require application of bankruptcy law and construing this Court's orders. Even the Debtors' state law counterclaims hinge on the resolution of these issues. For example, the Debtors' breach of contract claim is predicated on an alleged breach of the Perpetual License.

Even assuming state law plays a large role in this action, that large role would carry little weight with the Court. The GMA Permit (at ¶ 18) and the GMM Permit (at ¶ 17) have identical provisions stating that the parties' agreement will be governed by Alabama law without regard to Alabama choice of law rules. Comity and related factors are arguably irrelevant if the Superior Court must apply Alabama law and construe this Court's orders.

As to the possibility that a party may be forum shopping, the Court notes that the timing of the Complaint and Plaintiff's positions in this proceeding strongly suggest Plaintiff wanted to litigate this dispute in state court as a contract matter rather than in bankruptcy court as an avoidance action.

Plaintiff's demand for jury trial appears to be the sole factor that favors remand. Plaintiff initially cited O.C.G.A. § 9-4-6 for the asserted right to a jury trial in a declaratory judgment action. *See* Memorandum in Support of Motion at 25 n.73. In the Response to Motion to Remand, the Debtors argued that equitable claims of the sort in the Complaint do not give rise to a Seventh Amendment right to a jury trial. *See* Response to Motion to Remand at 19-20. In Plaintiff and Cowart's Reply in Support of Motion to Remand, Plaintiff and Cowart appear to concede this point but argue that they have a right to a jury trial on Debtors' counterclaims that are legal in nature—the claims for breach of contract and breach of fiduciary duty. *See* Reply in Support of Motion to Remand at 13-14.

The right to a jury trial over the breach of contract and fiduciary duty claims does not require that the entire proceeding be remanded. These claims can be tried in district court if Plaintiff does not consent to a trial conducted by the bankruptcy court. *See* BLR 9015-1; 9015-3.

Because the relevant factors weigh heavily in favor of this Court retaining this proceeding, equitable remand under 28 U.S.C. § 1452(b) is inappropriate.

**IV. Conclusion**

For all the foregoing reasons, it is now hereby

ORDERED that, the Motion to Remand is DENIED.

**END OF ORDER**



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