

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS APR -1 AM 8:53
SAN ANTONIO DIVISION

DISTRIBUTION CENTER

IN RE: §
§
HOME OWNERS LONG DISTANCE, INC., §
§
DEBTOR §

BANKRUPTCY No. 02-50080-RBK
CHAPTER 7 PROCEEDING

MCI WORLD COM, INC. F/K/A WORLD COM, §
INC., F/K/A LDDS COMMUNICATIONS, INC. OF §
TEXAS, AND F/K/A LDDS METROMEDIA §
COMMUNICATIONS, AND MCI WORLD COM §
NETWORK SERVICES, INC. F/K/A MCI §
TELECOMMUNICATIONS CORP., §
§
PLAINTIFFS, §

ADVERSARY No. 02-5021 K
CHAPTER 7 PROCEEDING

V. §
§
HOME OWNERS LONG DISTANCE, INC., §
JOSEPH W. WEBB, AN INDIVIDUAL; JAMES A. §
YOUNG, AN INDIVIDUAL; AND EDWARD L. §
DUNN, AN INDIVIDUAL, PHILIP S. DUNN, §
INDIVIDUALLY AND AS TRUSTEE FOR §
THE DUNN STOCK TRUST FUND No. 1 §
§
DEFENDANTS §

**PLAINTIFFS' BRIEF IN RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE WHY
ADVERSARY PROCEEDING SHOULD NOT BE REMANDED TO STATE COURT**

I. INTRODUCTION

1. On February 7, 2002, Plaintiff removed its lawsuit against the debtor Home Owners Long Distance, Inc., and its insiders, Joseph Webb, James Young, Edward Dunn and Philip Dunn to this Court pursuant to 28 U.S.C. § 1452(a). This Court subsequently issued an Order to Show

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Cause Why Adversary Proceeding Should Not Be Remanded to State Court (the “Show Cause Order”) on February 14, 2002, which has been reset for hearing on March 25, 2002.

2. When determining whether a case that has been removed to bankruptcy court under Section 1452(a) should be remanded, courts are guided by Section 1452(b) and the equitable considerations enunciated by the Fifth Circuit in *Browning v. Navarro*, 743 F.2d 1069, 1076 (5th Cir. 1984). There is also some authority indicating that a bankruptcy court may remand a case if the statutory abstention requirements under 28 U.S.C. § 1334(c)(2) are met. Unless sufficient equitable grounds exist to warrant remand of all of the statutory abstention requirements are met, the court must retain the action.

3. In the instant case, Plaintiff has brought claims against the debtor Home Owners Long Distance, Inc. (“HOLD”), and its insiders, Joseph Webb, James Young, Edward Dunn and Philip Dunn for: (1) fraudulent transfers; (2) violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18. U.S.C. § 1962, *et seq.*; (3) corporate denuding and piercing the corporate veil; (5) breach of tariffs; and (6) suit on a sworn account. A balance of the equitable considerations applicable to cases such as this clearly weigh in favor of retaining this case on the Court’s docket. Likewise, no timely motions to abstain have been filed by any party and the statutory abstention elements have not been met. Thus, this Court should retain this action on its docket.

II. REMOVAL UNDER 28 U.S.C. § 1452(a)

4. Section 1452(a) provides that “a party may remove any claim or cause of action in a civil action ... to the district court for the district where such civil action is pending, if such district

court has jurisdiction of such claim or cause of action under section 1334 of this title.”¹

Section 1334 grants bankruptcy courts original jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” In this context, it has been held that “[t]he scope of core jurisdiction is essentially coterminous with the ‘arising in’ and ‘arising under’ aspects of bankruptcy jurisdiction.” *In re Wright*, 231 B.R. 597, 599 (Bankr. W.D. Tex. 1999); *see also In re Simmons*, 205 B.R. 834, 843 (Bankr. W.D. Tex. 1997). Thus, a matter is “core” if it “involves a substantive right solely created by the federal bankruptcy law or could not exist outside of bankruptcy.” *Id.*; *see also* 28 U.S.C. § 157(b)(2) (providing a non-exclusive list of core proceedings). On the other hand, a civil proceeding is “related to” the bankruptcy case if it is “not core” and if the outcome of the proceeding “could conceivably have an effect on the administration of the bankruptcy estate.” *In re Wright*, 231 B.R. at 599; *citing In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987).

III. EQUITABLE REMAND UNDER 28 U.S.C. § 1452(B)²

5. Section 1452(b) provides that the “court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.” The Fifth Circuit has laid out the following equitable factors which a court should consider when evaluating a motion to remand under Section 1452(b):

¹There have been questions in other jurisdictions over the issue of whether a party is required to file its notice of removal in the bankruptcy court or the federal district court. This issue has been resolved in our district as a result of L. Rule 9027, which provides that any notice of removal founded on Section 1452(a) “shall be filed with the Clerk of the Bankruptcy Court.”

²Similar to the concept of equitable remand under 28 U.S.C. § 1452(b) is the concept of discretionary abstention under 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) allows bankruptcy courts to abstain from hearing a particular action “arising under title 11 or arising in or related to a case under title 11.” Courts have generally held that the same equitable standards used to evaluate a motion to remand under Section 1452(b) are also used for the purpose of evaluating whether discretionary abstention is appropriate under 1334(c)(1). *See In re Wright*, 231 B.R. 597 (Bankr. W.D. Tex. 1999); *In re Fairchild Aircraft Corp.*, 4 Tex. Bankr. Ct. Rep. 308, 313 (Bankr. W.D. Tex. 1990)(not for publication, but recommendation adopted, slip op. (W.D. Tex. 1990); *WRT Creditors Liquidation Trust*, 75 F. Supp.2d 596, 603 n.1. (Bankr. S.D. Tex. 1999).

- (1) forum non conveniens;
- (2) a holding that, if the civil action has been bifurcated by removal, the entire action should be tried in the same court;
- (3) a holding that a state court is better able to respond to questions involving state law;
- (4) expertise of the particular court;
- (5) duplicative and uneconomic effort of judicial resources in two forums;
- (6) prejudice to the involuntarily removed parties;
- (7) comity considerations; and
- (8) a lessened possibility of an inconsistent result.

Browning v. Navarro, 743 F.2d 1069, 1076 (5th Cir. 1984); *see also WRT Creditors Liquidation Trust*, F. Supp.2d 596, 603 n.1 (Bankr. S.D. Tex. 1999), and *In re Fairchild Aircraft Corporation*, 4 Tex. Bankr Ct. Rep. 308, *14 (Bankr. W.D. Tex. 1990)(not for publication, but recommendation adopted, slip op. (W.D. Tex. 1990)). An application of the equitable considerations enunciated in *Navarro* to the facts of this case weighs overwhelmingly against remand.

Factors 1 and 2 - Forum Non Conveniens Is Not an Issue and the Action Is Not Bifurcated

6. This case was removed to the United States Bankruptcy Court for the Western District of Texas, San Antonio Division, from the Bexar County District Court, San Antonio, Texas. The two courthouses are literally only blocks away from each other. Additionally, this civil action has not been bifurcated. Thus, factors 1 and 2 do not come into play and do not weigh in favor of remand.

Factors 3 and 4 - This Court Has Expertise in Dealing with the Claims Raised and a State Court Is Not More Capable to Respond

7. Plaintiffs have asserted claims for fraudulent transfers, violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) 18 U.S.C. § 1962 *et seq.*, corporate denuding

and piercing the corporate veil, and suit on a sworn account and breach of tariffs. This Court has considerable expertise in dealing with fraudulent transfer and it has jurisdiction over the RICO claims. Likewise, a state court has no inherently greater capability over this Court to deal with the other claims asserted. Thus, factors 3 and 4 clearly weigh in favor of retaining this case on the Court's docket.

Factor 5 - Removal Avoids Duplicative and Uneconomical Effort of Judicial Resources

8. One of the primary reasons for Plaintiff's removal of the state court action to this Court was to avoid the duplicative and uneconomical expenditure of judicial resources, as well as the parties' resources. Because the Plaintiffs' claims are based in whole or in part on fraudulent transfers to HOLD's insiders, it is a near certainty that any state court judgment on the Plaintiffs' claims would result in additional litigation in front of this Court with respect to who owns WorldCom's claims - WorldCom or the Chapter 7 Trustee. *See In the Matter of Schimmelpenninck*, 183 F.3d 347, 359 (5th Cir. 1999). In fact, Mr. Clay Gregory, attorney for the Debtor, has already stated his intent to reach a settlement over these issues with the Chapter 7 Trustee. *See Exhibit "A,"* January 8, 2002 letter from Clay Gregory to Randall Pulman. Accordingly, Factor 5 weighs heavily in favor of retaining this case on the Court's docket.

Factors 6 and 7 - There Is No Prejudice to Removed Parties and No Comity Considerations

9. None of the parties have filed any motions to remand³ or motions to abstain, and none of the parties have alleged in any way that they would be prejudiced if this Court retains the case on its docket. Likewise, there are no comity considerations at issue herein. Thus, Factors 6 and 7 weigh in favor of retaining this case on the Court's docket.

³Defendants E. Dunn, P. Dunn, and J. Young filed a Motion to Remand on March 4, 2002, but then appeared before this Court on March 4, 2002 and asked to withdraw the Motion.

Factor 8 - Removal Lessens the Possibility of an Inconsistent Result

10. Just as the removal of this action to this Court avoids duplicative and uneconomical effort of judicial resources, it also lessens the possibility of inconsistent results. As stated, Plaintiffs' claims center heavily on the fraudulent transfers to HOLD's insiders. It is likely that the Chapter 7 Trustee for HOLD may also attempt to assert some claims against HOLD's insiders for fraudulent transfers. In that context, there may be some issues raised as to which claims may be brought by the Trustee and which claims may be brought by the Plaintiffs, and there may be some issues regarding the effect, if any, that the applicable statute of limitations may have on the Trustee's claims. Retaining the case on this Court's docket would ensure that all of these issues are resolved consistently. Thus, Factor 8 also weighs in favor of retaining this case on the Court's docket.

11. When examined individually and as a whole, a balance of the relevant equitable considerations weighs overwhelmingly in favor of retaining this case on the Court's docket.

IV. ABSTENTION UNDER 28 U.S.C. § 1334(C)(2)

12. Section 1334(c)(2), provides:

Upon timely motion of a party in a proceeding based upon a State law claim or a State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

In accordance with Section 1334(c)(2), a bankruptcy court may only abstain from hearing a proceeding if:

- (1) a timely motion is made;
- (2) the proceeding is based on a state law claim or state law cause of action;
- (3) the proceeding is related to a case under title 11;
- (4) the proceeding does not arise under title 11;

(5) the action could not have been commenced in federal court absent jurisdiction under 28 U.S.C. § 1334; and

(6) an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction.

In re Sunpoint Securities, Inc., 262 B.R. 384, 397 (Bankr. E.D. Tex. 2001), citing *In re Simmons*, 205 B.R. 834, 847 (Bankr. W.D. Tex. 1997), and *Shulman v. California*, 237 F.3d 967, 981 (9th Cir. 2001) (“...abstention can exist only where there is a parallel proceeding in state court.”).

13. The language in the statute is clear that all six elements must be met in order for a bankruptcy court to abstain under Section 1334(c)(2). In this case, at least five of the six statutory requirements necessary for abstention are completely absent.

14. First, no timely motion for abstention has been filed by any party. Second, the underlying claim to which most of Plaintiffs’ other claims directly relate is the fraudulent transfer claim. This Court has jurisdiction over fraudulent transfer claims and this Court is uniquely qualified to adjudicate such claims.⁴ Third, fraudulent transfer claims are identified as “core” and “arise under title 11.” See 28 U.S.C. § 157(b)(2). Fourth, Plaintiffs have also asserted civil RICO claims against the Defendants, which claims could have been commenced in federal court absent jurisdiction under 28 U.S.C. § 1334.⁵ Fifth, since this action has been removed to this Court, there is no longer any action pending in state court. Thus, if this Court were to abstain and dismiss

⁴The elements of Plaintiffs’ state law fraudulent transfer claims are substantively identical to fraudulent transfer claims under the Bankruptcy Code. Thus, if this case is remanded, then when the Chapter 7 Trustee asserts his fraudulent transfer claims against the Defendants there will be competing identical claims in two different forums. Of these competing claims, WorldCom’s will reach further back in time (by several years) since the Chapter 7 Trustee will most likely be faced with statute of limitations issues.

⁵There is no question that this Court had jurisdiction over this matter under 28 U.S.C. § 1334 at the exact moment it was removed, because HOLD had already filed for bankruptcy and this case, at a minimum, “relates to” the HOLD bankruptcy. See *In re Wright*, 231 B.R. at 599. While the mere fact that Plaintiffs’ pleading was amended after removal to add a federal RICO claim might have had some significance if this Court did not already have jurisdiction under Section 1334, it has absolutely no impact on the issues of equitable remand or abstention under Sections 1452(b) and 1334(c)(2). In this context, the existence of Plaintiffs’ RICO claim is a valid and necessary factor for this Court to consider when making a determination to retain or remand this action.

(instead of remand) this case, the action could not be timely adjudicated in a state forum of appropriate jurisdiction.⁶ For these reasons, statutory abstention is not appropriate in this case and the action should be retained on this Court's docket.

V. TRUSTEE'S CHOICE OF FORUM IS AFFORDED SIGNIFICANT WEIGHT

15. The Trustee's choice of forum "to pursue litigation should also be honored . . . in deference to the fundamental purpose of the removal statute to centralize the administration of the bankruptcy estate and to maximize the ability of the trustee to manage the estate to best effect." *In re Biglari Import & Export, Inc.*, 142 B.R. 777, 781 (Bankr. W.D. Tex. 1992), citing *In re El Paso Pharm, Inc.*, 130 B.R. 492, 497 (Bankr. W.D. Tex. 1991). Likewise, in the case of *In re Fairchild Aircraft*, the Court denied a motion to remand, holding that the trustee's selection of forum should be accorded "significant weight." *In re Fairchild Aircraft Corp.*, 4 Tex. Bankr. Ct. Rptr. 312, 317 (Bankr. W.D. Tex. 1990) *recommendation adopted slip op.* (W.D. Tex. 1990) (Garza, D.J.).

16. In this case, the Trustee, Mr. Jose Rodriguez, has indicated that his preference is to retain this case on the Court's docket. Thus, in accordance with the Trustee's preference, and in order to centralize the administration and management of HOLD's bankruptcy estate, this action should be retained on the Court's docket.

⁶There has been much debate over whether abstention is even appropriate in the context of a removal action such as this. The debate stems from inconsistent historical remedies for abstention and remand. Simply put, when an action is remanded, it is sent back from whence it came and there is at all times only one action. In the context of abstention, however, there are two separate actions and when one court abstains it dismisses only one of the actions. The other action remains alive in the other forum. See *In re Branded Products, Inc.*, 154 B.R. 936 (Bankr. W.D. Tex. 1993); *In re Wright*, 231 B.R. 597, 601 (Bankr. W.D. Tex. 1999); *In re Southmark Corp.*, 163 F.3d 925, 929 (5th Cir. 1999); and *Wright & Miller, Federal Pract. & Proc.*, Jurisdiction 2d, Section 424 at 102 (2nd ed. 1988). Thus, the problem, as noted on several occasions by Judge Leif M. Clark, is that if a court abstains in a removal action and dismisses the case, the action has been effectively killed. This would lead to the inequitable result of forcing the plaintiff to re-file a new action in state court and grant to the defendant a potential defense on statute of limitations grounds. *Id.* For these same reasons, at least one other bankruptcy court in Texas has held that "mandatory [statutory] abstention, if met, requires a district court to remand the case to state court." *WRT Creditors Liquidation Trust*, 75 F. Supp.2d 596, 603 (Bankr. S.D. Tex. 1999).

VI. CONCLUSION

17. Because a balance of the equitable remand considerations clearly weighs in favor of retaining this case on the Court's docket and because all of the elements necessary to support abstention do not exist, this Court should not remand this action back to state court, but should retain it on the docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2002, a true and correct copy of the above and foregoing Plaintiff's Brief in Response to Court's Show Cause Order has been transmitted by telecopier, addressed as follows:

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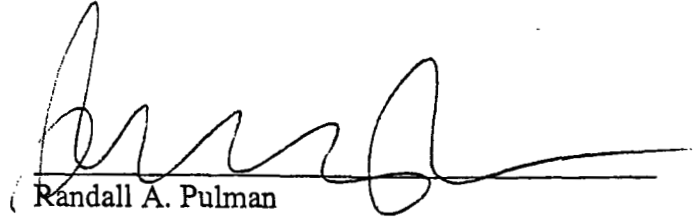
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I hereby further certify that on the 28th day of March, 2002, a true and correct copy of the above and foregoing Plaintiff's Brief in Response to Court's Show Cause Order has been transmitted by United States Postal Service First Class Mail to the parties listed on the attached Exhibit "B."


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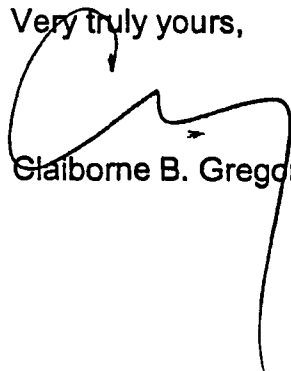
Re: MCI Worldcom/Webb, et al

Dear Randy:

Enclosed please find a copy of the Chapter 7 petition which was filed today on behalf of Home Owners Long Distance, Inc. I am sorry that we were unable to work anything out relative to Mr. Webb prior to the filing of this case, because I think it would have been in our respective clients' best interest that we do so. Nonetheless, the time frames within which we had to work somewhat limited our efforts in that regard.

Obviously, I do not know who the Chapter 7 Trustee is at this point. Nonetheless, it will be my intention to reach a settlement with the Trustee as soon as possible. These disputes have gone on far too long.

Very truly yours,



Claiborne B. Gregory, Jr.

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Enclosure

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Commonwealth of Pennsylvania
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Public Utilities Commission
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Public Utilities Commission
Commonwealth of Pennsylvania
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Public Utilities Commission
State of Nevada
727 Fairview Drive
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Secretary of State (MN)
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Corporations Division
Secretary of State (RI)
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Attention: Mr. Mike Coonet
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Secretary of State (Maine)
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Annual Reports
Secretary of State (NC)
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Raleigh, North Carolina 27626-0525

State Comptroller of Public Accounts
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Secretary of State (ND)
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State of Delaware
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