UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: **National Century Financial Enterprises, Inc. Financial Investment Litigation.**	**Case No. 2:03-MD-1565-JLG-MRA** **Judge Graham** **Magistrate Judge Abel**

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Rebecca S. Parrett, Plaintiff, vs. Bank One, N.A., et al., Defendants.	No. CIV-03-541 PHX-MHM

PLAINTIFF REBECCA S. PARRETT'S RENEWED
AND REVISED MOTION FOR REMAND OR ABSTENTION

Pursuant to 28 U.S.C. §§ 1447(c), 1452(b) and/or 1334(c), this Court's Case Management Order, dated December 19, 2003, and for the reasons set forth in the following supporting memorandum of law, Rebecca S. Parrett ("Parrett"), who is the plaintiff in *Parrett v. Bank One, N.A., et al.*, Arizona case No. CIV-03-541 PHX-MHM, which the Judicial Panel on Multi-District Litigation ("JPML") transferred to this Court for coordinated and consolidated pretrial proceedings with various other cases, including three other cases from the District of Arizona, all of which arise out of the alleged wrongful and illegal conduct of certain entities and individuals associated with National Century Financial Enterprises, Inc. ("NCFE"), hereby submits her renewed and revised motion for remand or abstention.

MEMORANDUM OF LAW IN SUPPORT OF PARRETT'S RENEWED AND REVISED MOTION FOR REMAND OR ABSTENTION

I. Introduction

A. Why Parrett Is Filing a Renewed and Revised Motion for Remand or Abstention.

This case, as well as the other cases transferred to this Court from the District of Arizona, originally began in Arizona state court. Before the JPML transfer, Defendants J.P. Morgan Chase & Co. and JPMorgan Chase Bank (collectively "JPMorgan") removed this case to the U.S. District Court for the District of Arizona. Parrett timely filed a motion to remand, JPMorgan filed a response and Parrett filed her reply. However, before the Arizona District Court ruled on the remand motion, the JPML, upon motion by various defendants and over Parrett's objection, transferred this case to this Court for coordinated and consolidated pretrial proceedings with other cases involving similar claims. In the JPML Transfer Order and this Court's Case Management Order, Parrett was authorized and instructed to resubmit her motion for remand or abstention to this Court for consideration.

The following discussion incorporates the information and applicable arguments previously stated in Parrett's original remand/abstention motion. To the extent that the Ninth Circuit case law cited in the original motion is in accord with Sixth Circuit case law, the Ninth Circuit case law is retained. However, to the extent that Sixth Circuit case law is contrary to Ninth Circuit case law relating to the issues involved in the removal, remand and abstention of this case, applicable Sixth Circuit authority is cited instead because by virtue of the JPML transfer, Sixth Circuit authority now governs the determination of this motion. *See In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 823 (E.D. Mich. 1999) (applying Sixth Circuit law to determine remand motion in case transferred by JPML from a district court in another circuit); *Burke v. Northwest Airlines, Inc. (In re Air Disaster)*, 819 F. Supp. 1352, 1371 (E.D. Mich.

1993) (same); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (once a case has been transferred, the "transferee court … is bound only [that] circuit's precedent.").

B. Pre-Transfer Procedural History of This Case.

Parrett, a former NCFE director and officer, filed her Complaint, which alleges only state-law claims, in Arizona Superior Court for Maricopa County on February 11, 2003, against those entities that were involved in the wrongful and illegal funding and accounting for NCFE's operations and against various other inside and outside NCFE directors and NCFE officers, who were responsible for those illicit activities. None of the Defendants in this case are debtors in the NCFE bankruptcy proceedings. Parrett was the first to file such claims against these defendants, and others quickly followed suit by filing similar actions, including three other actions filed in the same state court in Arizona, which repeated many of the allegations and causes of action contained in Parrett's Complaint.

The first service of Parrett's Complaint was made on Defendants Bank One, N.A., Bank One Corporation (collectively "Bank One"), PricewaterhouseCoopers LLP ("PwC"), Deloitte & Touche LLP ("D&T"), and JPMorgan on February 19, 2003. Defendants Richard Heuer and Slade Hafner were served and/or accepted service on March 10, 2003. Counsel for Defendant Credit Suisse First Boston Corporation ("CSFB") was provided with and acknowledged receipt of a copy of the Complaint on March 13, 2003, when he notified Parrett's counsel that CSFB was not properly served on February 19th because service had been made on a CSFB subsidiary instead. At that time, CFSB's counsel informed Parrett's counsel that he would accept service on behalf of CSFB if the latter would prepare an "Acceptance of Service" to that effect to be filed with the court (then the Maricopa County Superior Court). The undersigned did so for filing with the state court, but before it could be executed, the case was removed to the U.S. District Court for the District of Arizona.

On March 20, 2003, JPMorgan filed a Notice of Removal removing this case from Maricopa County Superior Court to the U.S. District Court for the District of Arizona pursuant to 28 U.S.C. §§ 1452(a) and 1334(b) on the grounds that Parrett's action was a non-core proceeding related to NCFE's jointly administered bankruptcy case, which is presently pending in this District's Bankruptcy Court (Case No. 02-65235), because any losses that JPMorgan might incur as the result of Parrett's action would be indemnifiable by one of the NCFE debtors, NPF VI, Inc. (who, like NCFE, is not a party to this case). In the Notice of Removal, JPMorgan also stated that it was exercising its right to a jury trial on Parrett's claims, that it did not consent to have such a jury trial in, or any final orders and judgments entered by, the Bankruptcy Court, and that it had "consulted" with counsel for Defendants Bank One, N.A., CSFB, PwC and D&T, and "that none of these defendants objects to the removal of this Action …." (Not. of Removal ¶ 7).

The next day, on March 21, 2003, D&T filed a "Notice of Reservation of Rights and Appearance," in which D&T concurred with JPMorgan's allegation that Parrett's action was a non-core bankruptcy-related proceeding, that it was also asserting its right to a jury trial and it did not consent to having the bankruptcy court conduct a jury trial, and therefore, this case should not be referred to the Bankruptcy Court, but should be maintained in the District Court. However, D&T did not file a formal joinder to JPMorgan's removal, and no other defendant, who was served before the removal notice was filed, has appeared or filed any consent or joinder in the removal of this case from the state court.

Parrett filed her original motion for remand or abstention on April 9th. Following the subsequent removals of the other transferred Arizona state-court cases and after Parrett filed her original remand/abstention motion in this case, the plaintiffs in those other cases filed similar motions based primarily on Parrett's arguments, reasoning and authority. JPMorgan, Bank One, PwC and D&T filed their response to Parrett's original motion on April 28th and Parrett filed her

reply in support of remand or abstention on May 23rd, all in the Arizona District Court. However, that court never considered her motion before this case was transferred to this Court on November 13th.

II. Argument: Why Remand or Abstention Is Required

Federal statutes governing removal are strictly construed and federal courts must reject jurisdiction over removed cases "'if there is any doubt as to the right of removal in the first instance.'" *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)); *accord Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989). "The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction." *Prize Frize, Inc. v. Matrix (U.S.), Inc.*167 F.3d 1261, 1265 (9th Cir. 1999); *Schwartz v. FHP Int'l Corp.*, 947 F. Supp. 1354, 1360 (D. Ariz. 1996); *accord Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). Therefore, JPMorgan has "the burden of establishing that removal was proper." *Duncan*, *supra.*

A. The removal is procedurally invalid because all properly served defendants have not joined in or consented to removal.

In the Sixth Circuit, all served defendants must join in the removal of a state-court action to federal court. "The rule of unanimity requires that in order for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal." *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *accord Hicks v. Emery Worldwide, Inc.*, 254 F. Supp. 2d 968, 972 (S.D. Ohio 2003).

The Sixth Circuit, noting that it follows the prevailing view and citing case law from six other circuits, recently restated and reconfirmed the rule as follows:

> all defendants in the action must join in the removal petition or file their consent to removal in writing within thirty days of receipt of (1) a summons when the initial pleading demonstrates that the case is one that may be removed, or (2) other paper in the case from which it can be ascertained that a previously unremovable case has become removable.

Loftis v. United Parcel Service, Inc., 342 F.3d 509, 516 (6th Cir. 2003). Unanimity is mandatory and not a mere technicality. *Ross v. Thousand Adventures of Iowa, Inc.*, 163 F. Supp. 2d 1044, 1049-50 (S.D. Iowa 2001) (citing *Egle Nursing Home, Inc. v. Erie Ins. Group*, 981 F. Supp. 932, 935 (D. Md. 1997), and *Alexander by Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217, 1221-22 (M.D. Ala. 1991)).

JPMorgan has not met the requirement of unanimity because not all the defendants who were served when JPMorgan filed its removal notice joined in the removal or consented to removal in writing. That lack of unanimity constitutes a fatal procedural defect to the removal of this case and requires it be remanded to state court. *Prize Frize, Inc. v. Matrix (U.S.), Inc*., 167 F.3d 1261, 1266 n.4 (9th Cir. 1999) ("the failure to adhere to the unanimity rule is dispositive."); *Schwartz v. FHP Int'l Corp.*, 947 F. Supp. 1354, 1362 (D. Ariz. 1996) (if all defendants who have been served "do not join, the action cannot be removed."); *accord Loftis*; *Hicks*.

Moreover, JPMorgan, as the removing party, has the burden "to explain affirmatively the absence of any co-defendants in the notice for removal." *Prize Frize*, 167 F.3d at 1266. "A Notice of Removal filed by less than all defendants 'is considered defective if it does not contain an explanation for the non-joinder of those defendants.'" *Hicks*, 254 F. Supp. 2d at 972-73 (quoting *Klein v. Manor Healthcare Corp.*, 19 F.3d 1433, 1994 WL 19786, n.8 (6th Cir. 1994)). Moreover, as the Western Division of this Court has made clear, the consent of all properly

served defendants must be unambiguous and evidenced by either signing the Notice of Removal or the filing of a written consent to the removal. *Hicks,* 254 F. Supp. 2d at 974-75.

No defendant other than JPMorgan signed the removal notice, no written consents to removal have been filed by any other defendant, and all that is JPMorgan stated in its removal notice in this regard is that it "has consulted with counsel for certain named defendants, including defendants Bank One, N.A., Credit Suisse First Boston Corporation, Deloitte & Touche LLP and PricewaterhouseCoopers LLP, and represents that none of these defendants objects to the removal of this Action …." (Not. of Removal ¶ 7). That does not satisfy the unanimity requirement because ***a statement in the removal notice that other defendants do not object to the removal is insufficient***. *Hicks* at 975; *accord Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988); *McShares, Inc. v. Barry*, 979 F. Supp. 1338, 1342 (D. Kan. 1997) (citing *Landman v. Borough of Bristol*, 896 F. Supp. 406, 408-09 (E.D. Pa. 1995). "***One defendant's attempt to speak on behalf of another defendant will not suffice***." *Landman*, 896 F. Supp. at 409 (emphasis added)..

In short, because it is indisputable that all of the Defendants in this case who were served as of the date JPMorgan filed the removal notice have not joined therein, because JPMorgan has not explained why all of the defendants named in the Complaint have not joined in the removal, and because the time limit has expired for correcting these procedural defects, JPMorgan's removal was improper, and because this Circuit and this Court favors remanding procedurally defective removals, this case must be remanded to the Arizona Superior Court for Maricopa County.

In response to Parrett's original remand motion, JPMorgan argued that the unanimity rule does not apply to removals based on bankruptcy-relatedness under 28 U.S. § 1452. However, regardless of the jurisdictional basis for removal, the prevailing and better-reasoned view is that

any removal of a case from a state court to a federal court must comply with the procedural requirements of 28 U.S.C. § 1446. *See Ross v. Thousand Adventures of Iowa, Inc.* 178 F. Supp. 2d 996, 1002 (S.D. Iowa 2001). *Ross* instructs that all "sections governing removal, 28 U.S.C. §§ 1441-1452, must be read together. The [§ 1446] unanimity rule is a strong rule governing notices of removal, and enforcement of the rule allows the plaintiff's choice of forum strong deference." *Id.*; *see also*, *Loftis*, 342 F.3d at 516 ("Failure to obtain unanimous consent forecloses the opportunity for removal under Section 1446").

Other cases that unequivocally hold that the unanimity rule applies to § 1452 removals include: *Goodman v. Med. Eng'g Corp.*, 189 F.3d 477, 1999 U.S. App. LEXIS 20850, at *8 (10th Cir. 1999) (joinder by all defendants is prerequisite for bankruptcy-related removals); *Newby v. Enron Corp. (In re Enron Corp. Sec. Derivative & ERISA Litig).*, 2003 WL 22472155, at *2 (S.D. Tex. 2003) (remand to state court appropriate because of defective § 1452 removal that lacked consent of other defendants); *Weinrach v. White Metal Rolling & Stamping Corp.*, 1999 U.S. Dist. LEXIS 168, at *2 (E.D. Pa. Jan. 6, 1999); *Hills v. Hernandez*, 1998 U.S. Dist. LEXIS 7475, 1998 WL 241518 (E.D. La. May 13, 1998) (unanimity required for § 1452 removals based on Fifth Circuit decisions regarding § 1446). Probably the best explanation as to why the unanimity rule applies to § 1452 removals is provided by the well-reasoned and often-cited decision in *Retirement Sys. of Ala. v. Merrill Lynch & Co*. 209 F. Supp. 2d 1257 (M.D. Ala. 2002).

Moreover, the following analysis by the Supreme Court in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995), clearly supports the conclusion that the unanimity requirement of § 1446 also applies to § 1452 removals:

> There is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy. Nor is there any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage. The fact that § 1452 contains its own provision governing certain types of remands in bankruptcy, *see* § 1452(b) (authorizing

> remand on "any equitable ground" and precluding appellate review of any decision to remand or not to remand on this basis), does not change our conclusion. There is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both. *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992).

By the same logic, there is no reason §§ 1446 and 1452 cannot coexist and for not giving effect to both. *Retirement Sys. of Ala.*, at 1264.

B. JPMorgan's removal is substantively invalid because this Court lacks subject-matter jurisdiction over Parrett's claims, which do not arise under Title 11 and are not "related" to the Ohio bankruptcy proceedings.

Assuming for the sake of argument that JPMorgan's removal passes procedural muster, which, of course, it does not for the reasons stated above, the next inquiry for this Court is whether the removal was substantively valid, *i.e.*, whether this Court has subject-matter jurisdiction over Parrett's claims. As previously noted, "The burden of establishing jurisdiction rests 'clearly upon the defendants as the removing party.' … The federal courts strictly construe removal petitions in a manner that resolves all doubts against removal." *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 823 (E.D. Mich. 1999); *accord Sullivan v. First Affiliated Sec.*, 813 F.2d 1368, 1371 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987).

The statutory authority that JPMorgan invokes for removal is 28 U.S.C. § 1452(a), which provides for removal of a state court claim or cause of action if the district court "has jurisdiction of such claim or cause of action under [28 U.S.C. §] 1334 …." Accordingly, the sole basis that JPMorgan alleges for federal jurisdiction of this action is 28 U.S.C. § 1334(b), which provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [core proceedings], or arising in ***or related to*** cases under title 11 [non-core proceedings]." (Emphasis added).

In JPMorgan's removal notice and in D&T's reservation of rights notice, both expressly assert that Parrett's action is a "non-core" proceeding, *i.e.*, a proceeding that is "related to" a

bankruptcy case but that does not arise under Title 11 or a case under Title 11. Therefore, in order to sustain its burden of establishing that this Court has subject-matter jurisdiction over this action, *a fortiori*, JPMorgan has the burden of establishing that Parrett's claims or causes of action are "related to" NCFE's bankruptcy case.

In an attempt to do that, JPMorgan nebulously stated in its removal notice that the acts that Parrett alleged in her Complaint that Defendants committed caused a diminution in the value of NCFE's stock, which, in turn, affects the "legal and equitable interests of the debtor [NCFE] in property as of the commencement of the case[,]" (Not. of Removal, ¶ 2), whatever that means. JPMorgan also stated that because NPF VI, which is an NCFE affiliate and a debtor in NCFE's bankruptcy case, agreed to indemnify JPMorgan for any NPF VI act or omission, so that "[l]osses incurred by [JPMorgan] in connection with [Parrett's] [a]ction are thus indemnifiable by NPF VI." (*Id.*, ¶ 3).

However, both of these statements fail to take into account that (1) neither NCFE nor NPF VI are defendants in this action, (2) none of the defendants in this action are debtors in the NCFE bankruptcy proceedings, or (3) in this action, Parrett is not seeking any damages from, and none of her claims affect, any property belonging to NCFE or any of its affiliates. Parrett's Complaint essentially alleges that all of the defendants participated in and/or facilitated the commission of a Ponzi scheme that ultimately caused her millions of dollars in damages. Specifically, she alleges in her Complaint state-law claims for fraud (Count I), breaches of fiduciary duty (Count II), state RICO (Count III), tortious interference (Count VI), and deceptive trade practices (Count VII) against all defendants, including JPMorgan, which arise out of these non-debtor defendants' individual wrongful acts and omissions. In addition, she alleges claims for professional negligence or malpractice against the accountants, including D&T (Count IV) and lawyers (Count V), who by their wrongful acts and omissions facilitated the Ponzi scheme.

"If the complaint relies only on state law [as does Parrett's Complaint], the district court generally lacks subject matter jurisdiction and the action is not removable." *Burke v. Northwest Airlines, Inc. (In re Air Disaster),* 819 F. Supp. 1352, 1355 (E. D. Mich. 1993). Moreover, case law clearly demonstrates that, contrary to JPMorgan's assertion in its removal notice, such state-law claims simply do not "affect" NCFE's "legal and equitable interests in property" and are not "related to" NCFE's bankruptcy case.

For example, in *Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.),* 205 B.R. 231 (B.A.P. 9th Cir. 1997), the court remanded the plaintiff's state-law claims brought against a bankruptcy debtor's officers, corporate attorneys, banker and suppliers who facilitated a similar Ponzi-scheme investment deal because those claims were not related to the debtor's bankruptcy case. Therefore, the removal to federal court was improper and the federal court had no subject-matter jurisdiction. The court reached that conclusion by finding that even though the plaintiffs' complaint contained several allegations about the debtor's conduct, the claims were based solely on state law, they did not directly affect the bankruptcy estate, were not intertwined with bankruptcy issues and arose of out the non-debtor defendants' pre-petition conduct, the plaintiffs were not attempting to usurp any of the bankruptcy trustee's causes of action, and all defendants were non-debtors. 205 B.R. at 235-38. Similarly, in *R & R Hardwood v. Action Mortgage Co. (In re Pond),* 1999 WL 33490237, at *4 (Bankr. D. Idaho 1999), the court held that it did not have subject-matter jurisdiction over the plaintiff's federal and state RICO claims against the non-debtor defendants.

As for JPMorgan's indemnification argument, first of all, how can JPMorgan honestly believe it could maintain a claim for indemnification against NPF VI for its own misconduct or the misconduct of its own officers, Defendants Harold Pote and Eric Wilkinson, where that misconduct is alleged in Parrett's Complaint as the basis for JPMorgan's, Pote's and Wilkinson's

liability to her? It seems rather naïve or disingenuous, to say the least, for JPMorgan, who controlled NPF VI as its trustee, and whose officers Pote and Wilkinson sat on NPF VI's board of directors, to think that it could have an indemnification claim against NPF VI for the defalcations and derelictions of JPMorgan and its officers that form the basis for their alleged liability to Parrett. (*See, e.g.*, Complaint, ¶¶ 87, 95, 98, 100, 149). That, of course, would be tantamount to saying that if Parrett prevails on her claims against JPMorgan and its officers for their complicity in the alleged Ponzi scheme, JPMorgan would be entitled to indemnify itself for its own wrongdoing!

Second, NPF VI's purported agreement to indemnify JPMorgan would relate to indemnification only for NPF VI's wrongful acts, but those acts are not in issue here because Parrett is not making any claims against NPF VI for its wrongful acts. Therefore, the alleged NPF VI indemnification agreement would be irrelevant to this action.

Third, even if JPMorgan or any other defendant potentially might have an indemnification claim against NPF VI for damages from Parrett's claims, her claims still are not "related to" the bankruptcy case, and therefore, such potential indemnification does not establish that this Court has subject-matter jurisdiction. At best, Parrett's action is only a precursor to JPMorgan's potential indemnification claims against NPF VI because if this action results in a judgment against JPMorgan, it would in no way be binding on NPF VI, which is not a party to this action, and, therefore, NPF VI would still be free to defend against any subsequent indemnification claim by JPMorgan. *See Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 995 (3d Cir. 1984) (adopted by both the Sixth and Ninth Circuits as the standard for determining what is necessary to establish "related to" jurisdiction under § 1334, *Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1142-43 (6th Cir. 1991); *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988)).

Two recent cases very similar to this one should dispel any doubt about the unrelatedness of this case to the NCFE bankruptcy proceedings. In *Retirement Sys. of Ala. v. Merrill Lynch & Co*. 209 F. Supp. 2d 1257 (M.D. Ala. 2002), and *Retirement Sys. of Ala. v. J.P. Morgan Chase & Co*., 285 B.R. 519 (M.D. Ala. 2002), this very same defendant, JPMorgan, along with CSFB and a national accounting firm like D&T, also attempted to remove state court actions based on the same allegation that the actions were related to the Enron and WorldCom bankruptcy cases, respectively, because of indemnification agreements.

In the *Merrill Lynch* case, the court observed that "it appears that under the *Pacor* test, actions between non-debtors that may give rise to indemnity claims against a bankruptcy estate are not sufficiently 'related to' bankruptcy so as to support jurisdiction under § 1334(b)." 209 F. Supp. 2d at 1265. While in the *J.P. Morgan* case, the court concluded, "Defendants' purported basis for jurisdiction [under] §§ 1334(b) and 1452 … is tenuous at best. To exercise jurisdiction would contradict the guidance …, which favors remand in cases where federal jurisdiction is not absolutely clear." 285 B.R. at 531.

A bankruptcy judge's astute observation adds:

> An argument could certainly be constructed that various possible outcomes in the suit might, like a series of dominos, lead to some sort of an impact on [NCFE's or NPF VI's] reorganization or liquidation. But this type of argument ends up reading the "could conceivably have any effect" language of the case law so expansively that frankly little would remain outside the bankruptcy court's § 1334(b) reach. The Court does not agree with such an all-encompassing reading of the "related to" jurisdictional grant. *Accord, Celotex Corp v. Edwards,* 514 U.S. at 308, 115 S.Ct. at 1499 ("related to" jurisdiction is "comprehensive" but not "limitless").

Agincourt, L.L.C. v. Stewart (In re Lake Country Invs.), 2000 WL 33712216, at *6 (Bankr. D. Idaho 2000) (footnotes omitted).

Numerous other courts have refused to find bankruptcy-related jurisdiction based on contractual indemnity or guaranty agreements between removing defendants and bankruptcy

debtors. *See, e.g., Work/Family Directions, Inc. v. Children's Discovery Ctrs., Inc. (In re Santa Clara Cty. Child Care Consortium)*, 223 B.R. 40 (B.A.P. 1st Cir. 1998); *In re Asbestos Litig*, 271 B.R. 118 (S.D. W. Va. 2001); *Spaulding & Co. v. Buchanan (In re Spaulding & Co.)*, 131 B.R. 84 (N.D. Ill. 1990); *In re Federal-Mogul Global, Inc.*, D.C. No. 01-10578, 2002 Bankr. LEXIS 105 (Bankr. D. Del. Feb. 8, 2002), *appeal dismissed*, 300 F.3d 368 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 884 (2003); *City of Joliet v. Bank One, Chicago, N.A. (In re Green)*, 210 B.R. 556 (Bankr. N.D. Ill. 1997).

In short, Parrett's seven "causes of action, asserted entirely among non-debtor parties … [that] are based solely upon state law, … do not constitute 'related to' proceedings." *Agincourt*, at *5. The outcome of Parrett's action "[w]ould not alter [NCFE's] rights, liabilities, options or freedom of action (either positively or negatively) and [would not] impact[] upon the handling and administration of the bankrupt [NCFE] estate." *Maitland v. Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 515 U.S. 1131 (1995); *cf., Smith Elec. Contractors, Inc. v. Premier Hotel Dev. Group (In re Premier Hotel Dev. Group)*, 270 B.R. 243, 254-55 (E.D. Tenn. 2001) (most important factor in determining whether administration of bankruptcy case would be adversely affected by adjudication of claims in state court is whether bankruptcy case is a liquidation, as NCFE's bankruptcy is,[1] or a reorganization).

This conclusion is further buttressed by the fact that after Parrett filed her Complaint, the undersigned discussed her claims with NCFE and NPF IV's bankruptcy counsel, who stated that her claims would have no affect on, and were of no interest to, the debtors or their bankruptcy proceedings. Even more compelling is the fact that subsequent to that discussion, counsel for the plaintiffs in the three other transferred Arizona cases, which involve similar state-law claims against the same defendants arising out of the same wrongful and illicit acts, Gibbs & Bruns,

[1] See note 2, *supra*.

L.L.P. ("G&B"), was appointed by the NCFE Bankruptcy Court as special counsel for the NCFE Bankruptcy debtors, and has also moved for remand or abstention of their cases on the very same grounds that Parrett is moving to remand her case, *i.e.*, that none of these actions are related to the NCFE Bankruptcy proceedings. ***If counsel for the bankruptcy debtors advocate that these claims are not related to the bankruptcy proceedings and will not affect to the bankruptcy estate, how can anyone argue otherwise?***

C. Even if related to the bankruptcy proceedings, the Court should abstain from hearing this case and remand it to state court.

Even if this case qualifies as bankruptcy related, remand is still dictated by the principles of mandatory and/or permissive abstention pursuant to 28 U.S.C. § 1334(c). Under the express language of § 1334(c)(2) (mandatory abstention), a District Court must abstain from hearing an action if it is based on state-law claims that merely "relate to," but do not arise under, a bankruptcy case (non-core only), and if the action was commenced in a state court that can timely adjudicate it. Under § 1334(c)(1) (permissive or discretionary abstention), "in the interest of comity with State courts or respect for State law," a District Court may abstain from hearing an action that "arises under," or is "related to," a bankruptcy case (a "core" or "non-core" proceeding, respectively).

1. Mandatory Abstention

Under the Sixth Circuit's interpretation and application of § 1334(c)(2), "[f]or mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding." *In re Dow Corning Corp.*, 86 F.3d 482, 497 (6th Cir. 1996).

All five requirements for mandatory abstention under Sixth Circuit law are met here: (1) Parrett's action is based solely on state law claims and causes of action; (2) JPMorgan admitted in its removal notice and its response to Parrett's original remand/abstention motion that absent the NCFE bankruptcy proceedings there is no basis for federal jurisdiction; (3) this action was commenced in state court, the Arizona Superior Court for Maricopa County; (4) that court is capable of timely adjudicating Parrett's claims by virtue of having established its own specialized Complex Civil Litigation Court, which is designed specifically to expeditiously handle large, complex civil litigation like this (*see* G&B's *Supplemental Brief Concerning Governing Sixth Cir. Law on Plaintiffs' Motions for Remand or Abstention* at 10-12 and Exs. B-D); and (5) again, based on the removal notice and related papers, it is undisputed that this is a non-core proceeding.

In fact, the only one of these five requirements that JPMorgan challenged in its response to Parrett's original remand/abstention motion in opposition to abstention, either mandatory or permissive, was the third one regarding commencement in a state forum. That challenge was based upon a very illogical and widely criticized rule established by the Ninth Circuit in *Security Farms v. Int'l Brotherhood of Teamsters*, 124 F.3d 999, 1009 (9th Cir. 1997). In that case, the Ninth Circuit judicially created the rule that neither the permissive nor mandatory abstention provisions apply to cases that have been removed from a state court because "commenced" means "pending" and once a case has been removed from the state court, it is no longer any pending in that court.

That rule clearly contradicts the overwhelming majority rule in other circuits, including the Sixth Circuit, and it has been sharply criticized by numerous courts outside the Ninth Circuit. *See, e.g., Robinson v. Mich. Consol. Gas Co.*, 918 F.2d 579, 584 n.3 (6th Cir. 1990); *Christo v. Padgett*, 223 F.3d 1324, 1331 (11th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001); *Southmark*

Corp. v. Coopers & Lybrand (In re Southmark Corp.), 163 F.3d 925, 929 (5th Cir. 1999), *cert. denied*, 527 U.S. 1004 (1999); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 774 (B.A.P. 10th Cir. 1987); *Thomas v. R.J. Reynolds Tobacco Co.*, 259 B.R. 571, 576 n.5 (S.D. Miss. 2001); *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 869 n.7 (N.D. Ill. 1991); *E.S. Bankest, LLC v. United Beverage Florida, LLC (In re United Container LLC)*, 284 B.R. 162 (Bankr. S.D. Fla. 2002); *Murray v. On-Line Bus. Sys., Inc. (In re Revco D.S., Inc.)*, 99 B.R. 768, 773 (N.D. Ohio 1989);.

Regardless, as previously noted, Sixth Circuit, not Ninth Circuit, law now governs these proceedings, including the determination of this motion, and under Sixth Circuit law, "[t]he abstention provisions of 28 U.S.C. § 1334(c)(2 apply even though a case has been removed pursuant to 28 U.S.C. § 1452." *Robinson*, 918 F.2d at 584 n.3; *accord Murray*, 99 B.R. at 773. Therefore, because JPMorgan cannot meet its burden of showing why this action is not capable of timely adjudication in the state court where it was originally commenced,[2] Parrett has met all of the requirements for mandatory abstention, including the requirement for "commencement in a state forum of appropriate jurisdiction." *French v. Fisher*, 290 B.R. 313, 318 (N.D. Ohio 2003).

2. Permissive Abstention

Even if mandatory abstention is not required in this case, under Sixth Circuit law, discretionary abstention under 28 U.S.C. § 1334(c)(1) applies to this case and is clearly warranted. *See Beneficial Nat'l Bank USA v. Best Receptions Sys., Inc. (In re Best Reception Sys. Inc.)*, 220 B.R. 932, 952-58 (Bankr. E.D. Tenn. 1998).

[2] As discussed in great detail in G&B's Supplemental Brief Concerning Governing Sixth Circuit Law on Plaintiffs' Motions for Remand or Abstention, *supra*, at 7-9, because the NCFE bankruptcy is a liquidation with no contemplated reorganization, and because those bankruptcy proceedings are nearing conclusion, the requirement for timely adjudication of Parrett's claims in state court is of little concern and adjudication in that court will have no discernible effect on the administration of the bankruptcy proceedings. *See Smith Elec. Contractors, Inc. v. Premier Hotel Dev. Group (In re Premier Hotel Dev. Group)*, 270 B.R. 243, 254-55 (E.D. Tenn. 2001).

There are twelve factors that this courts uniformly consider to exercise discretionary abstention:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (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 nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C.A. § 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; and (12) the presence in the proceeding of non-debtor parties.

In re Best Reception, 220 B.R. at 953; *accord Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir. 1990).

These factors, at least those that apply to this case, clearly favor abstention here. Most of these factors have already been discussed: the lack of any adverse effect on the administration of NCFE's or NPF VI's bankruptcy estates and the fact that the bankruptcy proceedings are concluding (factors 1 and 9), *see* note 2, *supra*; all of Parrett's claims involve only state-law issues and there are no bankruptcy issues (factors 2 and 3); this case was commenced in a state court with a Complex Civil Litigation division, which is better equipped to handle it (factors 4 and 8); the only basis for federal jurisdiction is 28 U.S.C. § 1334 (factor 5); Parrett's claims are not related to the NCFE bankruptcy case (factor 6); this is not a core proceeding (factors 7 and 8); and no bankruptcy debtors are parties (factor 12).

That leaves only factors 10 and 11. Both Parrett and JPMorgan, as well as D&T and PwC have filed demands for or have asserted the right to a jury trial of this case. It is abundantly clear that JPMorgan has used removal, in conjunction with the JPML transfer, to defeat Parrett's right

to have her claims tried by a court in the jurisdiction of her residence. JPMorgan clearly has used removal and JPML transfer as a means of forum shopping not only to pull Parrett's action out of Arizona state courts, but out of Arizona altogether.

In addition to the decisions from this Circuit cited above (*French*, *Premier Hotel*, *Best Reception*), decisions from other jurisdictions clearly support this conclusion. *See*, *e.g.*, *Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.*, 837 F.2d 325, 332-33 (8th Cir. 1988); *Banlavoura-I, Inc. Trust v. McCarthy, Gyemant & Babbits (In re M, G & B, Inc.)*, 1996 U.S. Dist. LEXIS 6826 (N.D. Cal. 1996); *Nat'l Acceptance Co. v. Levin*, 75 B.R. 457, 459 (D. Ariz. 1987); *In re Pac. Gas & Elec. Co.*, 279 B.R. 561, 570-71 (Bankr. N.D. Cal. 2002);

D. Even if the removal was valid, equitable grounds exist for remand.

Assuming for the sake of argument that JPMorgan can sustain its burden of establishing that its removal is both procedurally and substantively valid, this Court still can and should remand this case under 28 U.S.C. § 1452(b), which provides, "The court to which [a] claim or cause of action [subject to jurisdiction under § 1334] is removed may remand such claim or cause of action on any equitable ground." Generally, courts in the Sixth and other Circuits look to the permissive and mandatory abstention factors listed above as the framework for finding equitable grounds for remand. "'The presence of factors suggesting discretionary abstention pursuant to 1334(c)(1) and factors requiring mandatory abstention under 1334(c)(2) provides ample equitable ground for remand of the lawsuit to state court.'" *Premier Hotel*, 270 B.R. at 258 (quoting *Roddam v. Metro Loans, Inc. (In re Roddam)*, 193 B.R. 971, 981 (Bankr. N.D. Ala. 1996)); *accord Best Reception*, 220 B.R. at 958 ("the same considerations that are relevant to the issue of abstention also bear upon the issue of remand."); *see also Beasley v. Personal Fin. Corp.*, 279 B.R. 523, 533-34 (S.D. Miss. 2002) (equitably remanding case based on permissive abstention factors).

"This 'any equitable ground' remand standard is an unusually broad grant of authority[,]" *McCarthy v. Prince (In re McCarthy*, 230 B.R. 414, 417 (B.A.P. 9th Cir. 1999), and "subsumes both the usual considerations of fairness, economy, and common sense and … the procedural and jurisdictional grounds for granting a motion to remand." *Chambers v. Marathon Home Loans (In re Marathon Home Loans)*, 96 B.R. 296, 300 (E.D. Cal. 1988).

> In exercising this "broad grant" of discretion, courts have traditionally looked to a number of factors to determine whether remand would be equitable in a given case. These factors … include[], among other things, judicial economy, comity and respect for state law decision-making capabilities, the impact that remand would have upon the orderly administration of the debtor's bankruptcy case, the effect of bifurcating claims and parties to an action and the possibilities of inconsistent results, the predominance of state law issues and nondebtor parties, and the extent of any prejudice to nondebtor parties.

Tig Ins. Co. v. Smolker (In re Tig Ins. Co.), 264 B.R. 661, 665-66 (Bankr. C.D. Cal. 2001).

The circumstances of this case, when viewed in the light of these factors and the overall considerations of fairness, economy and common sense clearly dictate that this case should be remanded to state court on equitable grounds. This conclusion is supported by numerous decisions in other cases where the courts have remanded similar actions under similar circumstances.

For example, in *Fibreboard Corp. v. R.J. Reynolds Tobacco Co.*, 2000 U.S. Dist. LEXIS 15931 (N.D. Cal. 2000), and *Pope v. Mitchell*, 1998 U.S. Dist. LEXIS 8874 (N.D. Cal. 1998), the district court found that remand was appropriate because the actions did not raise any bankruptcy issues, but instead involved only state-law claims. In *Walsh v. Brush (In re Walsh)*, 79 B.R. 28 (D. Nev. 1987), a sister district court observed that since only state-law issues were involved, "comity is a consideration weighing in favor of remand[,] … [and] if the case is remanded there is no danger of prejudice to the parties, no danger of adverse effects upon the administration of the bankruptcy estate, and no danger of inconsistent results." 79 B.R. at 29-30. All of these factors also weigh heavily in favor of remand in this case.

Finally, another very important factor weighing heavily in favor of remanding this case is the problem of federal court congestion, *see Van Horn v. Western Elec. Co.*, 424 F. Supp. 920, 923 (E.D. Mich. 1977), and as the *Fibreboard* court also noted, the parties' "right to a jury trial favors remand, as bankruptcy judges are not authorized to preside over jury trials." 2000 U.S. Dist. LEXIS 15931, at *4.

III. Conclusion

For the reasons set forth above, this case should be remanded because JPMorgan's removal of this case is both procedurally and substantively invalid. Not all properly served defendants joined in the removal and there is no federal subject-matter jurisdiction because this case is not related to the NCFE bankruptcy proceedings. In the alternative, under Sixth Circuit law, mandatory or permissive abstention applies, or equitable factors warrant remand. Therefore, Parrett requests that this Court remand this case to the Maricopa County Superior Court where it was commenced, and that under 28 U.S.C. § 1447(c), JPMorgan be ordered to pay Parrett her costs and expenses, including attorney fees, incurred herein.

DATED: January 5, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel who have registered as CM/ECF participants, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants as indicated on the service list below.

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