**United Stated Bankruptcy Court, Northern District of Illinois**

| Name of Assigned Judge | Susan Pierson Sonderby | Case No. | 02 B 02474 |
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| **DATE** | APR 25 2012 | **ADVERSARY NO.** | |
| **CASE TITLE** | Kmart Corporation. | | |
| **TITLE OF ORDER** | Order Denying Motion to Reopen Chapter 11 Case for Limited Purpose of seeking Declaratory Relief on Effect of Plan of Reorganization on Claims Held by Kmart Corporation Against LBBS | | |

**DOCKET ENTRY TEXT**

The Motion of Kmart Corporation to Reopen Chapter 11 Case for Limited Purpose of seeking Declaratory Relief on Effect of Plan of Reorganization on Claims Held by Kmart Corporation Against LBBS (docket no. 32206) is denied.
**[For further details see text below.]**

**STATEMENT**

This cause comes to be heard on the Motion of Kmart Corporation to Reopen Chapter 11 Case for the Limited Purpose of Seeking Declaratory Relief on Effect of Plan on Claims Held by Kmart Corporation Against LBBS (the "Motion"). The facts necessary to resolve the Motion are undisputed.

On January 22, 2002 (the "Petition Date"), Kmart Corporation ("Kmart") and 37 of its affiliates filed voluntary petitions for reorganization under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). An order providing for the joint administration of the cases was entered on the Petition Date. On January 24, 2003, Kmart and the affiliates filed their Joint Plan of Reorganization, which was later amended and modified (the "Plan"). On April 25, 2003, this court entered Findings of Fact, Conclusions of Law and Order Confirming the First Amended Joint Plan of Reorganization of Kmart Corporation and its Affiliated Debtors and Debtors-in-Possession, as Modified (the "Confirmation Order"). A final decree closing Kmart's bankruptcy case was entered on March 3, 2010.

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Kmart brings the Motion pursuant to section 350 of the Bankruptcy Code to reopen its bankruptcy case in order to file an adversary complaint to obtain from this court "declaratory relief as to the effect of the confirmation of the [Plan] on claims Kmart now asserts against" Lewis Brisbois Bisgaard & Smith, LLP ("LBBS"). (Motion, ¶ 7) More specifically, Kmart wants the bankruptcy case reopened so this court can declare in the context of an adversary proceeding that Kmart's claims against LBBS, which are currently being litigated in a pending California state court lawsuit, were adequately disclosed by Kmart in the bankruptcy case and retained in the Plan for enforcement by Kmart after confirmation. Such a declaration would defeat at least three of LBBS's forty-nine affirmative defenses to the claims raised in the California lawsuit. Although Kmart wants this court to resolve the three defenses, it apparently plans to simultaneously litigate the claims and the other defenses in the California state court. (*See* Transcript of November 21, 2011 Proceeding before the Honorable Michael Johnson, Judge of the Superior Court for the County of Los Angeles, California, ("Transcript") pp. 38-39)

As noted, Kmart's proposed adversary complaint concerns claims that Kmart has against LBBS, a law firm. In 1994, Stanley Kolodziey and Richard Luczak sued Kmart in a Los Angeles, California state court for personal injury damages. A $26.5 million judgment was entered against Kmart. Kmart appealed to the California Court of Appeals, which affirmed the judgment in October of 2001. The California Supreme Court subsequently denied Kmart's petition for review.

LBBS represented Kmart in the appellate proceedings. Kmart believed that LBBS's fees and other appellate costs were covered by an insurance policy issued by National Union Fire Insurance Company of Pittsburgh, P.A. ("National Union"). On April 15, 2002, however, National Union filed a complaint against Kmart in a California state court seeking a declaration of noncoverage. It turns out that LBBS also represented National Union in that lawsuit.

Considering LBBS's representation of National Union to be inappropriate, Kmart filed a separate complaint against LBBS in April 2003 in a California state court alleging malpractice, breach of fiduciary duty, and breach of contract under California law (the "Claims"). That lawsuit was dismissed. Kmart filed a second complaint asserting the Claims against LBBS in the United States District Court for the Central District of California, but that lawsuit was dismissed for lack of diversity jurisdiction. On January 16, 2008, Kmart filed a third complaint asserting the Claims against LBBS in the Superior Court for the State of California for the County of Los Angeles, Central District (the "State Court"). LBBS filed a motion to dismiss the complaint in February 2008 based, in part, on the purported failure of Kmart to disclose the existence of the Claims in the bankruptcy case. The State Court granted the motion without prejudice. Kmart then filed an amended complaint (the "Amended Complaint") which was met by another motion to dismiss. This time the State Court granted the dismissal motion with prejudice. After reconsidering its ruling at Kmart's request, however, the State Court reinstated the lawsuit without prejudice to LBBS's defenses.

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On November 30, 2010, LBBS answered the Amended Complaint and asserted forty-nine affirmative defenses to the Claims. The twelfth, thirty-first and twenty-eighth defenses are based on judicial estoppel, claim preclusion (res judicata) and lack of standing, respectively (collectively the "Defenses"). The Defenses involve events that occurred in the bankruptcy case and the effect of orders entered by this court. First, LBBS contends that Kmart is judicially estopped from asserting the Claims because they were not disclosed during the bankruptcy case and particularly because the lack of disclosure was purportedly fraudulent. LBBS further contends that Kmart should not be able to recover on the Claims because they were not adequately retained by Kmart in the Plan for postconfirmation enforcement. According to LBBS, because the Claims were not adequately retained, their prosecution is barred by the *res judicata* effect of the Confirmation Order. *See generally,* D & K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 112 F.3d 257 (7th Cir. 1997)(Court held that the *res judicata* effect of a confirmation order barred the postconfirmation prosecution of claims that were not sufficiently shielded from that effect by an express retention provision). Finally, LBBS contends that because the Claims were not adequately reserved, Kmart does not have standing to assert the Claims. *See generally,* Matter of P.A. Bergner & Co., 140 F.3d 1111 (7th Cir. 1998)(Court held that because claims were sufficiently preserved in the plan for postconfirmation prosecution, the debtor had standing to assert them).

On September 23, 2011, LBBS filed a motion with the State Court for summary judgment on the Defenses. The State Court judge set a January 27, 2012 ruling date on the motion. Before that date, however, Kmart filed this motion to reopen on November 14, 2011, so it can file an adversary complaint for this court to essentially decide the issues raised in the summary judgment motion. The State Court judge has apparently deferred ruling on the summary judgment motion pending this court's decision on the Motion. For the reasons that follow, this court will enter an order denying the Motion.

Section 350 of the Bankruptcy Code authorizes the reopening of a closed bankruptcy case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). Reopening a bankruptcy case is within the broad discretion of the bankruptcy court. Redmond v. Fifth Third Bank, 624 F.3d 793, 798 (7th Cir. 2010). In determining whether to reopen, the "bankruptcy judge may consider a number of nonexclusive factors . . . including (1) the length of time that the case has been closed; (2) whether the debtor would be entitled to relief if the case were reopened; and (3) the availability of nonbankruptcy courts, such as state courts, to entertain the claims." Id. The court may also consider the futility of the reopening and waste of judicial resources. Id. at 803; *see, e.g.,* In re Mendiola, 99 B.R. 864, 869 (Bankr. N.D. Ill. 1989).

As for the timing factor, the mere passage of time between the closing of the case and the filing of a motion to reopen is not necessarily dispositive unless it is shown prejudice resulted from the delay. Matter of Bianucci, 4 F.3d 526, 528-29 (7th Cir. 1993). Incurring costs during the delay can constitute prejudice. Id. In Bianucci, five months after its closing, the debtors filed a motion to reopen his bankruptcy case so they could file a request to avoid a judicial lien. Id. The Court

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concluded that the bankruptcy judge had "ample reason" to deny the motion because the lien holder showed prejudice. Id. at 529. Specifically, despite actually knowing the lien was not avoided, the debtors took no action in the five-month period between the closing of the case and the filing of the motion to reopen. During that time, the lien holder paid to revive the judgment on which the lien was based. Id.

In gauging the futility factor, the court may generally consider the issues posed by the adversary complaint or other request for relief proposed to be filed after the reopening. In re Smith, 400 B.R. 370, 376 (Bankr. E.D.N.Y. 2009) *aff'd* In re Smith, 645 F.3d 186 (2d Cir. 2011)(*citing* Arleaux v. Arleaux, 210 B.R. 148, 149 (8th Cir. BAP 1997)); In re Hardy, 209 B.R. 371, 380 (Bankr. E.D. Va. 1997). Where it is shown that the proposed relief is not likely to be sustained, the reopening of the bankruptcy case is futile and a waste of judicial resources. Hardy, 209 B.R. at 380.

Here, the nonexclusive factors set out in Redmond favor denying the Motion and Kmart has not otherwise convinced the court to reopen its bankruptcy case. First, the timing of the Motion does not favor Kmart. It has been nine years since confirmation of the Plan and two years since the bankruptcy case was closed. These parties have been involved in litigation in California courts for approximately eight years, six of which were during the pendency of Kmart's bankruptcy case. Most important, more than three and one half years passed from when LBBS first defended against the Claims with arguments based on events occurring in the bankruptcy case to when Kmart filed the Motion. And Kmart does not dispute that during that time, LBBS incurred expenses litigating in State Court, including expenses preparing the summary judgment motion.

Second, it is unlikely that Kmart will be entitled to the declaratory relief it seeks from this court after the bankruptcy case is reopened. This is not to say Kmart will not prevail in defeating the Defenses. Rather, Kmart will not be entitled to that relief from this court because, as will be discussed, it is doubtful that this court will have subject matter jurisdiction over the proposed adversary proceeding. Moreover, assuming it does have jurisdiction, it is likely the court will be required to abstain or will choose to abstain from exercising it.

Subject matter jurisdiction is generally defined as "the court's authority to hear a given type of case." U.S. v. Morton, 467 U.S. 822, 104 S.Ct. 2769, 2773, 81 L.Ed.2d 680 (1984). "The jurisdiction of bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." Celotex Corp. v. Edwards, 514 U.S. 300, 115 S.Ct. 1493, 1498, 131 L.Ed.2d 403 (1995). Section 1334(b) of title 28 of the United States Code is the source of bankruptcy jurisdiction over civil proceedings. Id. That section gives district courts original, but not exclusive, jurisdiction of all civil proceedings arising under title 11 (*i.e.*, the Bankruptcy Code), or arising in or related to cases under title 11. 11 U.S.C. § 1334(b). The district courts may, as they have in this district, refer those proceedings to bankruptcy judges. 28 U.S.C. § 157(a).

A proceeding "arises under" the Bankruptcy Code if it involves an action created or

determined by the Bankruptcy Code. *See* In re UAL Corp., 336 B.R. 370, 371-72 (Bankr. N.D. Ill. 2006)(*citation omitted*). Proceedings "arising in" a bankruptcy case are "generally defined as 'administrative matters that arise *only* in bankruptcy cases.'" In re Ortiz, 665 F.3d 906, 911 (7th Cir. 2011)(*quoting* In re Repository Techs., Inc., 601 F.3d 710, 719 (7th Cir. 2010))(emphasis in original)). A proceeding is "related to" a bankruptcy case if although it can exist outside of bankruptcy, its resolution "affects the amount of property available for distribution or the allocation of property among creditors." Matter of Xonics, 813 F.2d 127, 131 (7th Cir. 1987).

"The Seventh Circuit has repeatedly emphasized that the bankruptcy court should interpret its jurisdiction narrowly." In re Import & Mini Car Parts, Ltd., Inc., 200 B.R. 857, 860 (Bankr. N.D. Ill. 1996)(*citing* Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994); Home Ins. Co., 889 F.2d at 749)). That already narrowly-interpreted jurisdiction is "sharply reduced" after confirmation. In re Schwinn Bicycle Co., 210 B.R. 747, 754 (Bankr. N.D. Ill. 1997). The Seventh Circuit in Zerand-Bernal, observed that while the language of section 1334(b) is broad enough to encompass matters such as the postconfirmation injunction sought in that case, the section should not be read so broadly. 23 F.2d. at 161. Rather, it should be construed in light of the purposes of its enactment. Id. The purpose of a bankruptcy reorganization, dealing efficiently and expeditiously with all matters connected with the bankruptcy estate, is certainly diminished after confirmation. *See* Id.

However, "[w]hether emanating from the general power of courts to enforce their decrees . . . or from specific bankruptcy code sections . . . there exists a residue, albeit limited, of court authority over a confirmed plan chapter 11 case." In re Kewanee Boiler Corp., 198 B.R. 519, 525 (Bankr. N.D. Ill. 1996)(*quoting* In re Cinderella Clothing Indus. Inc., 93 B.R. 373 (Bankr. E.D. Pa. 1988)). There are a number of possible sources for this residual authority. *See* Id. One possible source of statutory power that survives confirmation is found at section 1142(b) of the Bankruptcy Code. That section empowers a court, *inter alia*, to direct the debtor and any other necessary party to perform acts "necessary for the consummation of the plan." 11 U.S.C. § 1142(b).

Accordingly, after confirmation of the plan, bankruptcy judges usually only invoke the powers given to them to "ensure that reorganization plans are implemented, . . . and to protect estate assets devoted to implement the confirmed Plan." Schwinn Bicycle, 210 B.R. at 755. Indeed, a bankruptcy judge's powers are limited to take only those actions that aid its jurisdiction, which as noted before, is sharply reduced postconfirmation. *See* In re Kewanee Boiler Corp., 270 B.R. 912, 921 (Bankr. N.D. Ill. 2002)("Bankruptcy judges are not ombudsmen licensed to adjudicate every post confirmation problem affecting a debtor or its creditors, but can only decide matters after confirmation within their more narrow jurisdiction.").

Here, Kmart acknowledges that the Defenses that it seeks declaratory relief on in the proposed adversary proceeding "concern[] state law cause[s] of action." Indeed, as noted, the Claims are for breach of contract, malpractice, and breach of fiduciary duty; the types of claims litigated daily in state courts. Although it recognizes that the Claims are premised on state law, Kmart nonetheless contends that the proposed adversary proceeding is one "arising under" sections

1125 and 1129 of the Bankruptcy Code. The court disagrees. Section 1125 concerns approval of the adequacy of a disclosure statement and section 1129 concerns confirmation of a plan. Although those sections may play a part in the analysis of whether the Defenses will defeat the Claims, that analysis will not concern approval of a disclosure or confirmation of a plan. Rather, the declaration of the efficacy of the Defenses will involve examining principles of claim preclusion, estoppel, and standing. As observed by the Seventh Circuit, the fact that a Bankruptcy Code section is consulted to resolve a defense, does not mean that the dispute is created or determined by the Bankruptcy Code within the meaning of section 1334(b). Pettibone Corp. v. Easley, 935 F.2d 120, 123-24 (7th Cir. 1991). Accordingly, the proposed adversary proceeding will likely not fall within this court's "arising under" jurisdiction.

Kmart does not appear to make an argument for "arising in" jurisdiction. Even so, this court will have an independent obligation to ensure its subject matter jurisdiction over the proposed adversary proceeding. Repository Techs., 601 F.3d at 719 (*citation omitted*).

"A proceeding 'arises in' bankruptcy only if it has 'no existence outside of the bankruptcy.'" Id. (*quoting* Stoe v. Flaherty, 436 F.3d 209, 216 (3d Cir. 2006)). "[C]laims 'arising in' bankruptcy include 'such things as administrative matters, orders to turn over property of the estate and determinations of the validity, extent, or priority of liens.'" Id. (*quoting* 1 Collier on Bankruptcy ¶ 3.01[4][c][iv] at 3-27 (15th ed. rev. 2008)). In Repository, a proceeding asserting claims against a chapter 11 debtor's lawyers based on state law theories of civil conspiracy and tortious interference was held to be within the bankruptcy court's "arising in" jurisdiction. Debtor's counsel was accused of assisting the debtor to breach its fiduciary duties by filing the bankruptcy petition and a frivolous plan of reorganization. Counsel purportedly knew that the bankruptcy filing would enrich certain shareholders at the debtor's expense. The district court concluded that because the claim of "a fraudulent or abusive bankruptcy filing . . . can only occur in the context of the bankruptcy case," there was 'arising in' jurisdiction" over the proceeding. Id. at 720. Agreeing with that conclusion, the Seventh Circuit noted that the claim was predicated on counsel's purportedly abusive participation in the bankruptcy case. Id. The Court further observed that the damages caused by the purported abuse of the bankruptcy process included the legal fees that debtor's counsel was awarded by the bankruptcy judge. Id. The Court remarked that the claim against the debtor's counsel therefore "resembles a claim that the [debtor] compensated its counsel without the requisite approval from the bankruptcy court." Id. Such claims concerning the propriety of an award of compensation to debtor's counsel constitute administrative matters decided in the bankruptcy case. Accordingly, the Seventh Circuit held that "[b]ecause such claims could not 'have been the subject of a lawsuit absent the filing of a bankruptcy case,' the district court correctly recognized its "arising in" jurisdiction." Id. (*citation omitted*).

One might argue here that the Defenses would not be implicated in the lawsuit asserting the Claims absent the bankruptcy case; in other words the Defenses may "arise in" the bankruptcy case. In a broad sense that is true. The Seventh Circuit instructs, however, that "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." Appert v. Morgan Stanley Dean Witter, Inc., 673 F.3d 609, * 9 (7th Cir. 2012)(*citing* Dolan v. U.S. Postal Serv., 546 U.S. 481, 486,

126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006)). "Rather, interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." Id.

Here, the focus of "arising in" jurisdiction is not so much on the fact that something that happened during the bankruptcy case precipitated the dispute raised in a later civil proceeding. Rather, the gist of "arising in" jurisdiction is on the administration of the bankruptcy estate. This observation is illustrated by comparing the Defenses here with the claims in Repository. Unlike the claims asserted in the proceeding in Repository, the Defenses do not directly concern the administration of the bankruptcy case like debtor counsel's compensation award which, as noted by the Seventh Circuit, would not exist absent the bankruptcy case. Moreover, when declaratory relief is sought on defenses to claims, the court looks to the nature of the claims, not the defenses when examining the existence of jurisdiction. In re Conseco, Inc., 330 B.R. 673, 680 (Bankr. N.D. Ill. 2005)(*citing* Nuclear Engineering Co. v. Scott, 660 F.2d 241, 254 (7th Cir. 1981)). Here, the Claims Kmart has against LBBS would exist had there been no bankruptcy case. In summary, the proposed adversary proceeding will likely not fall within this court's "arising in" jurisdiction.

Kmart concedes that this court will not have "related to" jurisdiction over the proposed adversary proceeding. Kmart does not dispute LBBS's assertion that Kmart's successor has reported that both the distribution and allocation of Kmart estate's property have been completed. Kmart has not shown and probably cannot show how it will demonstrate that the resolution of the adversary proceeding will affect the amount of property of the estate distributed to the creditors of Kmart's bankruptcy estate or the allocation of that property among them.

A final point on jurisdiction requires discussion because of the involvement of a prior order of this court, namely, the Confirmation Order. Bankruptcy courts have jurisdiction to interpret or clarify its orders. *See* Travelers Indemnity Co. v. Bailey, 557 U.S. 137, 129 S.Ct. 2195, 2205, 174 L.Ed.2d 99 (2009). Kmart conceded at oral argument that it is not asking the court to interpret the Plan or Confirmation Order. That concession, however, conflicts with statements in the Motion. There, Kmart avers that "because the proposed [adversary complaint] invokes this Court's jurisdiction to interpret the Plan and its orders, this Court should reopen the Kmart chapter 11 case." (Motion, ¶ 22). Although a bankruptcy court has jurisdiction to interpret or clarify its orders, the Seventh Circuit instructs that the court is not to engage in interpreting its order when there is no "bankruptcy purpose" to do so. Matter of FedPak Systems, Inc., 80 F.3d 207, 214 (7th Cir.1996).

As noted, the resolution of the proposed adversary proceeding will not impact the estate. In addition, an interpretation or clarification of the Confirmation Order does not seem necessary to ensure the implementation of the Plan or protect estate assets devoted to the Plan. *Compare*, Travelers, 129 S.Ct.at 2205 (Supreme Court noted that no one disputed that the bankruptcy court had subject matter jurisdiction to enter an order clarifying a prior injunction order that was integral part of the confirmed plan); *see also* In re Kmart Corp., 307 B.R. 586, 595-96 (Bankr. E.D. Mich. 2004)(court observed that bankruptcy court orders can be interpreted by state courts like contracts and if there is a need to do so to resolve a state law defense, the underlying claim is not converted

into a core matter).

And as recognized by Kmart, the proposed adversary proceeding at bottom will not really involve the interpretation or clarification of an order. Rather, it will involve examining the preclusive effect of the Confirmation Order on the Claims based on the order's terms. As noted, Kmart acknowledges in the Motion that its dispute with LBBS concerns a state law cause of action. Causes of action are often met by defendants with preclusion or estoppel defenses. By bringing these defenses, the defendant argues that it escapes liability for the claim asserted by the plaintiff because the plaintiff is precluded from bringing it. Whether a plaintiff is precluded from recovering on a claim is typically decided by the judge presiding over the lawsuit the claim is asserted in. *See* Pettibone, 935 F.2d at 123-24 ("Disputes about the effect of a decision in one case on the prosecution of another are for the judge presiding in the second case. In the law of preclusion the second court normally determines the effects of the first judge's order.").

In Pettibone terminology, this court is the "first judge" and the order at issue is the Confirmation Order. The effect of the Confirmation Order on the Claims at issue in the State Court Case (the second case) is for the State Court judge who is presiding over the second case to decide. State court judges are no strangers to claim preclusion defenses premised on plan confirmation orders. *See, e.g.*, O'Halloran v. PricewaterhouseCoopers LLP, 969 So.2d 1039 (Fla. App. 2nd Dist. 2007). There is certainly no contention here that the State Court cannot decide the Defenses. The same observation holds true for the standing defense, which will share a similar analytical framework with the claim preclusion defense. Indeed, Kmart's counsel told the State Court judge that he is "obviously . . . fully capable of adjudicating the [motion for summary judgment]." (Transcript, page 47)

Similarly, a defense premised on judicial estoppel based on events occurring in the bankruptcy case is also often for the "second judge" to decide. *See* Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988). Kmart urges, however, that it is more practical for this court to rule on judicial estoppel and this court is "best qualified" because LBBS's argument for judicial estoppel concerns purported fraudulent nondisclosure that occurred in the midst of the bankruptcy case. Kmart points out that the litigation of the Defenses will require items from the record of the bankruptcy case and the testimony of counsel and others involved in the case. That may be true, but "attractive and convincing considerations of judicial economy cannot confer subject matter jurisdiction on a Bankruptcy Court if it does not otherwise exist." Globaleyes Telecommunications, Inc. v. Verizon North, Inc., 425 B.R. 481, 498 (Bankr. S.D. Ill. 2010).

In summary, there are serious doubts about whether this court will have jurisdiction over the proposed adversary proceeding. Even if this court were to have jurisdiction, however, the court would be required to abstain from exercising it or would choose not to exercise it.

Abstention is mandatory pursuant to 11 U.S.C. § 1334(c)(2) where all of the following criteria are satisfied: "(1) the case is based on a state law cause of action that, although related to a case under title 11, does not arise under title 11 or arise in a case under title 11; (2) there is no

separate basis for federal jurisdiction apart from the bankruptcy; (3) an action has already been commenced in state court; and (4) the case could be timely adjudicated in state court." In re Bill Cullen Elec. Contracting Co., 160 B.R. 581, 585 (Bankr. N.D. Ill. 1993). If Kmart were able to successfully convince this court that it will have "related to" jurisdiction over the proposed adversary proceeding, the mandatory abstention criteria would apply and be satisfied. The proceeding would be based on a state law cause of action, there would be no separate nonbankruptcy federal jurisdiction, and there is an existing lawsuit which can be timely adjudicated in the State Court. Because there is likely no evidence that allowing the State Court to proceed will unfavorably affect the pending bankruptcy case, *see* J.D. Marshall International, Inc. v. Redstart, Inc., 74 B.R. 651, 655 (N.D. Ill. 1987), the Defenses can be timely adjudicated in the State Court.

Abstention is discretionary pursuant to 11 U.S.C. § 1334(c)(1) and the following factors may be considered in exercising that discretion:

"(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. § 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 [on 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 nondebtor parties."

Matter of Chicago, Milwaukee, St. Paul & Pacific, R.R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993)(*citation omitted*). The factors are to be applied "flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." Id.

If Kmart were able to successfully convince this court that it has "arising under" or "arising in" jurisdiction over the proposed adversary proceeding, analysis of the relevant factors in the circumstances of the proceeding would likely favor permissive abstention. Foremost among the relevant factors in the proposed proceeding concerns the lack of effect on administration of Kmart's bankruptcy case at this stage. The administration of the estate is over. Consequently, the resolution of the proceeding is significantly remote from the bankruptcy case. The issues in the proposed proceeding have been raised in the pending State Court lawsuit, and severing them from that lawsuit makes little sense, where estate administration is unaffected. The proceeding will involve the nonbankruptcy principles of judicial estoppel, claim preclusion, and standing. Although, the events in the bankruptcy case will be involved, it cannot be said they will predominate the proceeding. There is no argument that the difficulty of the applicable law is beyond the State Court judge's capabilities. Rather, the difficulty raised by Kmart relates to convenience, and it is likely neither

party will be more inconvenienced than the other. Finally, Kmart contends that this court has experience with deciding the claim preclusion and standing issues and should therefore decide the Defenses. The court cannot help but see the specter of forum-shopping in that argument. In summary, consideration of the factors will likely favor permissive abstention.

Accordingly, this court either will have no jurisdiction over the proposed adversary proceeding or would decline to exercise whatever jurisdiction it does have, assuming it would not have to abstain. Consequently, it is remote that Kmart will be entitled to the relief it intends to seek from this court if the bankruptcy case were reopened.

As for the third Redmond factor, clearly the State Court is available to entertain the Defenses raised in the summary judgment motion pending before it. The assessment of the next factors, futility and potential for wasted judicial resources, is also clear. The probable lack of jurisdiction over the adversary proceeding and certainly the likely abstention if jurisdiction is present, demonstrates the futility in reopening the case. Engaging in that futile act will be a waste of judicial resources.

In summary, as noted, an examination of the nonexclusive factors set out in Redmond favor the denial of the Motion and Kmart has not otherwise convinced the court to reopen its bankruptcy case. The court therefore denies the Motion of Kmart Corporation to Reopen Chapter 11 Case for the Limited Purpose of Seeking Declaratory Relief on Effect of Plan on Claims Held by Kmart Corporation Against LBBS.

ENTER:

SUSAN PIERSON SONDERBY
United States Bankruptcy Judge