UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS DIVISION

JPMORGAN CHASE BANK, N.A.,	)	CASE NO: 2:11-CV-1364-PMP-CWH
	)	
Plaintiff,	)	CIVIL
	)	
vs.	)	Las Vegas, Nevada
	)	
MERITAGE HOMES CORP, ET AL,	)	Tuesday, October 18, 2011
	)	
Defendants.	)	(1:24 p.m. to 2:14 p.m.)

HEARING ON DEFENDANTS' [13],

MOTION FOR STAY OF PROCEEDINGS
UNDER THE COLORADO RIVER DOCTRINE

BEFORE THE HONORABLE CARL W. HOFFMAN,
UNITED STATES MAGISTRATE JUDGE

Appearances: See next page

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APPEARANCES:

For Plaintiff:	ROB CHARLES, ESQ. Lewis & Roca, LLP 3993 Howard Hughes Pkwy., Suite 600 Las Vegas, NV 89169
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Las Vegas, Nevada; Tuesday, October 18, 2011; 1:24 p.m.

(Call to Order)

THE CLERK: All rise.

THE COURT: Good afternoon. Please be seated.

THE CLERK: This is the time set for *JPMorgan Chase Bank, N.A. versus Meritage Homes Corporation, et al.*, Case Number 2:11-cv-1364-PMP-CWH.

Counsel, please enter your appearances for the record.

MR. CHARLES: Good morning -- or good afternoon, your Honor. Rob Charles of Lewis and Roca. We represent JPMorgan Chase Bank, N.A.

THE COURT: Mr. Charles.

MR. NORTHUP: Good afternoon, your Honor. I'm Doug Northup. I have my partner, Craig Dunlap, here with me; Scott Shelly (phonetic), who is vice president and litigation counsel for Meritage; and Tim White, who is executive vice president and general counsel, is here as well.

THE COURT: Good afternoon. Thank you for being here.

This is Meritage's motion for stay under the Colorado River Doctrine. And I've read your pleadings, and I think I understand the issues. There are some factual questions that I want to see if there's any update on, and I would offer these to both sides, but I understand there's a pending motion for

summary judgment.

MR. NORTHUP: That is correct, your Honor. We'll be filing a response on that next week, and -- that's accurate.

THE COURT: So, that -- and, yeah, I see the reply is due, what, not until November 14th at the end of the --

MR. NORTHUP: Yeah, counsel was kind enough to give us an extension because we also got involved with some bankruptcy issues that were alluded to in the briefing as well.

THE COURT: What is the impact of that motion if plaintiff's motion is granted? That's the end of the case.

MR. NORTHUP: No. It's not.

THE COURT: Okay.

MR. NORTHUP: Actually, one of the points that we had raised is we asserted claims in the Ohio action against JPMorgan that related to breaches of contract, violation of covenant, of good faith and fair dealing that caused damage to Meritage over and above repayment guarantee. There is one count for declaratory judgment on the repayment guarantee action, which then JPMorgan's complaint here in Arizona is a mirror image of, and, in fact, they filed a counterclaim in the Ohio action that I think is word for word verbatim. But the Ohio action against JPMorgan will proceed regardless of the summary judgment, and I'm also -- I just want to answer your questions right now, but I'm also happy to explain why that summary judgment is, we think, not remotely going to be

granted.

THE COURT: Why don't I -- I'll save my questions. You'll probably hit my -- give me some answers as you go along. Please proceed.

MR. NORTHUP: Your Honor, the bottom line is that this was a suit that Meritage pursued in August of this year. It was not reactive or a race to the courthouse or anything of the kind. The only demand that was made on the repayment guarantee was back in June. And what had happened was there was a bankruptcy plan that had been proposed, and it was obvious to Meritage that that plan was aimed at Meritage, was intended in our view to harm Meritage, and we made the decision, because it's a simple -- the breach -- all of our claims that are the breach of contract, breach of covenant, and good faith and fair dealing are all state law claims; the guarantee claim is straightforward. We went ahead and filed the lawsuit, and we filed it in Ohio.

And part of the reason -- there are obviously strategic decisions, some of which I don't think I'm -- probably privity -- allowed to get into with privilege issues, but I can tell you it has been urged by JPMorgan that there is what they call a "waiver provision" in the repayment guarantee. Now, we are going to establish at the appropriate time in Ohio, or here, if we have to go both places, that that waiver provision doesn't even apply. But one of the important points

is it does not apply under any circumstances to claims. It talks about counterclaims, defenses, and setoffs. So, it was determined, even though we don't believe it applies at all, that we needed to assert these claims.

There is another issue, too, and that is JPMorgan is urging that, because the repayment guarantee bars counterclaims, we believe it was very deliberate on their part to file a lawsuit, even though they had already been sued by Meritage days earlier in Ohio, to try to force Meritage to assert what they would have to assert as compulsory counterclaims, and then they can say, aha, sorry, counterclaims are barred. Now, again, that provision doesn't even apply by its terms, but we wanted the ability to make sure and say, even if it did, not let procedural maneuvering take those away from us.

A really key fact here, your Honor; the Ohio case isn't going away. It was removed to the bankruptcy court, which is procedurally immediately flawed, but that case isn't going away. And if you grant this motion, there will be one case going forward against the parties under which full relief can be obtained on both sides in JPMorgan's home state of Ohio. If the motion is denied, there will unquestionably be two actions that go forward, and then you get into the proverbial rush to judgment.

We respectfully submit the motion for summary

1 judgment in this case was filed before Meritage had even had an
2 opportunity to answer the complaint. And we believe it was
3 very tactically and carefully done saying, look, we could get
4 rid of this whole case right away. And, as I mentioned, that's
5 not what happened.
6 I talked a little bit about the timeline, your Honor,
7 but I wanted to touch on it, because we have been accused of
8 rushing to the courthouse to try to avoid a lawsuit, and that's
9 not remotely the case. December, 2010, JPMorgan joined with
10 two other lenders and initiated an involuntary bankruptcy of
11 South Edge, the debtor under the note, with the sole purpose of
12 attempting to trigger repayment guarantees of various members.
13 Judge Markell denied motions to dismiss the bankruptcy in
14 February of 2011; then four months later, on June 6th, 2011,
15 JPMorgan sends a letter to Meritage demanding payment on its
16 repayment guarantee. And we believe, and I think it will be
17 borne out, there was no other member of South Edge that ever
18 received such a demand.
19 And what had happened was JPMorgan and some of the
20 other builders, who were in an entirely different situation
21 than Meritage, because Meritage had actually attempted its
22 second and final takedown in April of 2008 and had been not
23 allowed to complete that because JPMorgan refused to accept its
24 money and release its lien, the other members, who weren't in
25 that same position, started negotiating with JPMorgan toward

settlement. That has now resulted in yesterday there was bankruptcy confirmation hearings that occurred on a plan.

And one of our major points is, under that plan, JPMorgan and all of the lenders in the lending syndicate are going to be fully paid on the principal of their debt, and they have agreed to take a set amount of money for a deficiency and relinquish their position. They are going to have been fully paid under the South Edge loan. And what's left is that the settling builders, who are paying what JPMorgan demanded as what was being called Meritage's share under its repayment guarantee, they're paying that and have stated on the record numerous times, including yesterday, the risk of collection is entirely on the settling builders. They're not in bankruptcy; neither is our client. So, at the end of the day, if that plan gets confirmed, JPMorgan is no longer the real party in interest.

You may hear about this maneuvering that was done with putting the $12.6 million that was purportedly Meritage's share being put into an escrow and being pursued by a subagent of JPMorgan. But the reality of that is those lenders got paid, and according to the words of Bill Austin, who is one of the executives at JPMorgan, the lenders are, quote, "done with the case." So, that's another reason, although it's not Colorado River Doctrine, that we think that this case should be stayed; because if that bankruptcy proceeding is confirmed,

it's going to be a whole different ballgame.

We sued on August 19th, 2011, in Ohio state court. That is JPMorgan's state of domicile. I have mentioned the claims that were asserted, substantive claims, in addition to declaratory judgment. It's unusual, in my experience, for a defendant not to rejoice at being sued in their own back yard, but instead they came out here and filed the lawsuit four days later. They were the ones that acted reactively. It was not Meritage. It had been months, and, frankly, I don't know that they had any intention of filing a lawsuit in light of the fact that they were hoping to get paid if this plan got confirmed.

JPM, JPMorgan, they've had to file an answer and counterclaim in the Ohio court because it's compulsory, and that's one of the factors in the case, as we cited, that weigh in favor of a stay. And it is, I believe, word for word identical to the one-count complaint for breach of the repayment guarantee.

The motion to stay, your Honor, we believe that all of the relevant factors favor Meritage. You've seen them. There are -- some of them are from Colorado River, and there have been others developed. But as I mentioned, the overarching fact is, if stay is not granted, there will be two cases proceeding. If stay is granted, there is only one.

The one standard that you have seen cited talks about exceptional circumstances and how high the burdens are on a

motion to stay. But I wanted to point out what Judge Hunt ruled just last June in the *Southwest Circle Group versus Perini Builders* case that we cited. And this is the Court on page three of that decision:

"While abstention under Colorado River limits abstention to exceptional circumstances, the Court notes that such a limitation only relates to cases which involve questions of federal law. Here the issues are brought to this Court only on diversity jurisdiction."

That's exactly the situation we're dealing with here. There is no federal question. It's diversity all the way.

The cases have talked about comity concerns. Some cases say it's not comity, it's a matter of judicial efficiency. But the bottom line is, as we -- the *Merrill Lynch versus Hayden* (phonetic) case from the Ninth Circuit we cited, they recognize there is a real concern over friction between state and federal courts.

Quoting on page 1173:

"The continued vitality and independence of concurrent judicial systems require our sensitive consideration of ongoing proceedings in state courts, and federalism concerns require that a federal court tread lightly when a state court" -- "or a state proceeding is already under way."

We cited the cases, such as the Merrill Lynch case again, that says that the first filed rule, although really a doctrine of federal jurisprudence, does apply in a state versus federal situation. And, as I think we all know, if the lawsuit that we had filed had been in federal court in Ohio, the first filed rule absolutely would apply and, as I understand it, would be a bar toward a second lawsuit or nearly a virtual bar where we are asserting substantive claims.

Question that gets asked and has to be analyzed: Are the proceedings parallel? And I don't think there is any argument here that they're not. This lawsuit that we filed as it relates to the repayment guarantee, their claim here in Nevada is a mirror image of that.

As has been noted in, for example, the *Baseline Sports versus Third Base Sports* case we cited, the concern over duplicative and piecemeal litigation have been called the most important of the Colorado River factors. And, as I've already mentioned, we're going to be looking at two different courts, two different cases; none of them -- neither one has proceeded beyond the preliminary stage.

Like I say, there is a motion for summary judgment filed. We're not here to argue that today. But that is not going to be remotely dispositive, in our view, and that, I think, was done simply to try to get something on the record. We're still wrangling over the procedural issues in Ohio, but I

1 think those will be resolved shortly.
2 The next factor: Relevance, convenient -- relative
3 convenience of the two forums. This is something that we
4 addressed in our reply, but I think it's an important point.
5 JPMorgan makes much out of the fact that in December, 2008,
6 when initially JPMorgan sued the South Edge members, that they
7 collectively opposed the lawsuits that were filed in New York,
8 and ultimately the cases were transferred out. And they said,
9 well, Meritage joined in the argument that the property is here
10 and all of the witnesses and all that's here. But I can tell
11 you it's an entirely different situation now, in this case, and
12 that's when it should be measured, we respectfully assert.
13 And that is, in 2008, Inspirata was still an ongoing
14 project. Meritage still had significant ongoing operations;
15 the real estate market was in a state of significant decline,
16 but nowhere near where it is now; and at this point in time
17 Meritage has very few, if any, employees left in the state; I
18 believe it has a skeleton office. But the people now that are
19 relevant to this lawsuit and would be talking about at least
20 the guarantee case are in Arizona.
21 JPMorgan doesn't say that the witnesses or the
22 evidence are in Nevada. I think the suggestion is that they --
23 well, maybe they're not in Ohio, but they're in New York. But,
24 again, I think it's hard to say it's more inconvenient for
25 JPMorgan to have to travel to New York as opposed to Nevada,

but I think, you know, at most, that factor is a wash, but it certainly doesn't favor JPMorgan.

The order in which jurisdiction is obtained is another one of the factors. There is no question here that Meritage sued first. And, as I say, there were months that had gone by, and I think when the lawsuit came in, it was just an immediate: Let's get something else on file. But jurisdiction, unquestionably, was obtained first in the Ohio case.

Whether state or federal law controls. This is another one of the important consideration. This is purely a state law case. The Court's --

THE COURT: It's New York law, isn't it? Is it New York law?

MR. NORTHUP: Probably. That's what the repayment guarantee provides. And I haven't done a full analysis where I'm willing to stipulate on the record that it's New York, but it is going to be almost certainly New York law and not Nevada law.

And the *Moses Cone*, for example, the U.S. Supreme Court noted -- and, in fact, many of the decisions, if you analyze them, where a motion to stay that we're bringing is not granted, is a circumstance where an issue of federal law is involved. Maybe not entirely, but where there is an issue of federal law; that's not the case at all.

1 Whether the state court proceedings are adequate to
2 protect the parties' rights. There is no argument being made
3 here that the Ohio court cannot fully adjudicate all of the
4 rights and claims. And, again, as the *Moses Cone* case noted,
5 that's another factor that's often cited. If for some reason
6 under state law or in a state proceeding it can't afford all
7 the relief to all of the parties -- again, not the case here --
8 that favors the state.
9 Whether the granting or denying the stay would
10 encourage forum shopping. Parties have both accused each other
11 of forum shopping here. The bottom line, though, when you're
12 faced with having to litigate with an adversary, making a
13 decision to go to their home state and sue them there, I guess
14 if that's forum shopping, I guess it is. But it's certainly no
15 different to come out to another forum where you think maybe
16 you've had some good luck and to file there; and we also take
17 serious issue with the argument that, oh, these decisions have
18 already been made, and this case has already been decided by
19 Judge Pro.
20 The cases that have been pending, even though it's
21 for a significant period of time, have gone nowhere beyond
22 basic document production. There have been no depositions
23 taken, and the only rulings that are referred to were on
24 preliminary motions to amend answers and counterclaims. Those
25 are not remotely final proceedings to which collateral estoppel

1 would apply. These issues are going to get litigated, and at
2 the end of the day, as I mentioned, I think we will show
3 compelling reasons, numerous reasons, why not only did JPMorgan
4 breach duties contractual and otherwise and cause damages, but
5 why the repayment guarantee is no longer collectable, even
6 though, if this plan gets confirmed, we're going to be
7 litigating against the settling builders, because JPMorgan will
8 now have been paid.
9 Another factor, whether the state proceedings will
10 resolve all issues in the federal action. Absolutely they
11 will. But, as I mentioned before, the J. Morgan count against
12 Meritage does not resolve all of the actions.
13 So, we respectfully submit that, of the relevant
14 factors, they all are -- favor Meritage or are, at worst,
15 neutral. This is one of those situations where I don't think
16 it should be encouraged to allow somebody to sit back and when
17 the adversary goes and sues them in their home state to do a
18 knee-jerk reaction and try to beat them to the punch and then
19 say, "Oh, by the way, you have to bring your other case and
20 we're going to go through the maneuvers of removal and
21 transfers and all of that kind of stuff," on a case that's not
22 related to jurisdiction; that's going to be in the Ohio State
23 Court. It's just a matter of time.
24 As I mentioned, the confirmation of the plan would
25 make this case, certainly, unless and until the parties are

realigned (indiscernible). We would ask that you, again, let us have one case; the parties can go fight it out there; not two.

We'd ask you to grant the motion. And if I have not addressed any of your Honor's questions, I'm happy to answer them now.

THE COURT: Is there a state case pending today in Ohio, or has it been removed?

MR. NORTHUP: It's been stayed because of the removal. It hasn't been dismissed, but the removal by federal law stays any further proceedings. I believe that the briefing on that is in issue, and, as I mentioned, and your Honor is probably aware, you can't remove directly to the bankruptcy court. It's going to get remanded for that reason alone, not to mention, I don't purport to be a bankruptcy expert, but my understanding is the "related to" jurisdiction remotely doesn't apply to this situation because, for one thing, neither JPMorgan nor Meritage is in bankruptcy.

THE COURT: So, the briefing is not done on that issue.

MR. NORTHUP: I think it's actually at issue, but it hasn't been decided yet.

THE COURT: Okay.

In this case, without disclosing your strategy, what sorts of discovery are you looking at? The reason for the

1 question is it seems to me that this is primarily a paper case
2 to determine the validity of the claims that are being made by
3 the plaintiff. And if that's true, that is relevant to me on
4 the question of which forum is more convenient. And the idea
5 is, at least some of the papers describe the situation that the
6 witnesses and the property, whatever, you know, the paperwork,
7 is here in Nevada since the project lives here.
8 **MR. NORTHUP:** Actually, that's not going to be the
9 case here, because what we're litigating about, at least as to
10 JPMorgan's claims, is the repayment guarantee. That financing
11 was done, I believe, out of their New York office. The
12 gentleman I mentioned, Bill Austin, who was here testifying
13 yesterday, and another gentleman named John McDonough
14 (phonetic), who is now retired, reside in New York, as I
15 understand it. So, the paperwork really is the lending
16 paperwork. It's not project paperwork. And that's why this is
17 completely different from, like, the UCC cases that were filed
18 in Nevada back in 2008, because there JPMorgan was asserting
19 rights under Nevada law as a secured creditor under Article 9
20 of the Uniform Commercial Code. So, the types of discovery, I
21 mean, there will be discovery of the people who were involved
22 in negotiating the repayment guarantees.
23 One of the big issues in our case is the lenders,
24 they file a lawsuit, they don't get the relief they want. They
25 joined with another member of Focus and funded an arbitration

1 proceeding where one of our other members was trying to compel
2 specific performance of all of the land takedowns, which would
3 have gotten JPMorgan paid. That wasn't successful.
4 Yesterday Mr. Austin testified JPMorgan hadn't gotten
5 the relief that it wanted, so then they sat around and said,
6 "Let's throw this into an involuntary bankruptcy," because
7 we've cited to you that a bankruptcy defendant -- event, as
8 it's defined, could trigger the repayment guarantees. But that
9 is akin to somebody starting a fire and collecting the
10 insurance proceeds. And that was certainly not the deal that
11 our client negotiated to say involuntary bankruptcy means you
12 can trigger it, because if that's the case, your Honor -- it's
13 undisputed this was recourse financing as to the borrower,
14 South Edge, LLC. It is undisputed that this was non-recourse
15 financing as to the members.
16 **THE COURT:** As to the members. Yeah.
17 **MR. NORTHUP:** And giving a limited guarantee; there
18 were three very limited guarantees. But if the lenders really
19 upon a default of South Edge could join three of them together,
20 throw South Edge into an involuntary bankruptcy and trigger the
21 repayment guarantees, what is that? That's recourse financing.
22 That -- again, I'm not asking you to decide that, but there
23 will be significant discovery on those issues and the people
24 who negotiated repayment guarantees, and that was -- none of
25 those people are in Arizona. The people -- or, excuse me --

THE COURT: In Nevada.

MR. NORTHUP: -- in Nevada. And the people who negotiated on our side of the table are in Arizona, significantly, Meritage's chief financial officer, Larry Seay.

So, it's really not like there's just papers here. It was a transaction, and the negotiation of this was back in 2004, before the property was even purchased, ground had been broken, or anything like that. And that really is why it's different, why I don't think we're taking an inconsistent position.

And, by the way, JPMorgan argued vehemently in the motions to transfer that, no, they should be able to bring their completion guarantee cases -- not the UCC, which were filed here -- the completion guarantee cases, in New York, because that's where all of the witnesses and the parties were. This is much more akin to that case on another guarantee than it is under the UCC filings.

(Pause)

THE COURT: Thank you very much.

MR. NORTHUP: Thank you, your Honor.

THE COURT: Mr. Charles.

(Pause)

MR. CHARLES: If you distill the issues down from the narrative side of the conversation, the basic argument is: A state court case filed four days before a case here must be

stayed under the Colorado River Doctrine. That's all they're saying. Everything else is noise and distraction.

None of the cases that talk about the first filed doctrine in terms of federal court lawsuits suggest the proposition that they're asserting. So, if it were only that, if we were only talking about a lawsuit filed in Ohio and a lawsuit filed here, you'd have a balancing question: Do I consider this four-day delay and the other factors? But that's not the only thing that's going on. And I think it's fascinating that Meritage makes very little of what it needs to concede, because you can take judicial notice of this Court's -- not your personal files -- but this Court's files.

What do you know from your files? You know that when JPM sued the home builders, including Meritage, where was the suit filed? In New York. Where are those suits pending now? It's not one; there are suits pending now. Where are they pending now? They're pending in Nevada. Why are they pending in Nevada? We attached to the declaration of Mr. Hough, which is our document number 25 in this Court's record, as Exhibit B, the declaration of -- I'm sorry; Exhibit A --

THE COURT: Exhibit A?

MR. CHARLES: Exhibit A to that declaration is a declaration of Patrick Helfrich. Who is Patrick Helfrich? The vice president of acquisitions and forward planning of Meritage Homes of Nevada; f/k/a its name. He submits it on behalf of

both of the defendants here. What's he say?

"Here are all of the factors on a choice of venue analysis why the case should be in Nevada, not in New York."

JPM opposed that. What happened? The New York court transferred those actions here. Why? Because the defendants, including Meritage, asked him to and made representations under oath as to all of the bodies that were here that were relevant, and if not here, in Arizona, which is, obviously, adjacent to Nevada, as opposed to New York.

You're now told in argument, well, you should know, with no evidence and nothing in the record, that lots of that has changed over the last couple of years. Whatever else the notions of judicial estoppel, I think, are, one of the notions is, when you ask for something and you get it in a case, you don't get to change your mind later and say, "I really want something else that's inconsistent with the relief that I have requested." So, it's not simply a matter of two lawsuits pending within four days of each other; it's a matter of trying to avoid a forum where lawsuits between these parties on everything except the repayment guarantee are already at issue.

But if you had said, well, for example: What if those cases had just been transferred? So, it's just hit the Court's dockets; when you think about principles of judicial economy as comparing the two forums, if you said, well, those

1 other lawsuits that were transferred from Nevada, that no
2 judicial resources have been expended, again, would you
3 particularly care about this Nevada versus Ohio conversation?
4 But that's not our case either. Those cases have been pending
5 for years in front of Judge Pro.
6 You are told, well, they're in the preliminary
7 stages. Okay. I don't know exactly what he means by
8 "preliminary," but when you read those dockets, you see
9 substantial motion practice and substantial rulings. It's not
10 that the Court simply has created files; it's that judicial
11 officers here in Nevada have gone -- have torn into the facts
12 surrounding the South Edge financing, the agreements with the
13 builders, and in that litigation arguments about completion
14 guarantees and other kinds of guarantees.
15 This is a new thread. The thread in this lawsuit is
16 a repayment guarantee, but the notion that this Court hasn't
17 invested substantial time and effort understanding the
18 Inspirata project and the South Edge financing, a forbearance
19 agreement in which there is a release, and matters of that
20 sort, would just be nuts. And the counsel is not arguing this
21 Court hasn't invested substantial effort; he just doesn't want
22 to talk about that.
23 If you then ask yourself, well, what about this
24 notion that the plaintiff filed a lawsuit in Ohio, the
25 defendant is requesting that this action not be stayed; that

1 must be something evil and manipulative on behalf of the bank.
2 That seemed to me a strange proposition. I really didn't
3 understand the argument they were making with respect to their
4 choice of forum until I read their reply a little more
5 carefully. And the reply says that the Ohio case will be
6 pending because federal courts will not have jurisdiction.
7 Well, that's strange. The actions that were filed in New York
8 and transferred here are, obviously, pending with federal
9 jurisdiction.
10 Why is there an argument that there is no
11 jurisdiction in Ohio? Because you're told: All we're doing is
12 suing good old JPM in its state of incorporation -- or state of
13 organization; that's all that's going on. But that's not what
14 they're saying. What they're saying is: Ohio is the only
15 place in the country where, if we sue you in state court, there
16 isn't diversity jurisdiction; because JPM is a citizen of Ohio.
17 And if you doubt that, look at the pleadings which as to the
18 state allegations the defendants agree you are dealing with
19 residents of -- in terms of state of incorporation, I believe,
20 Maryland and Nevada: Meritage Homes incorporated in Maryland;
21 Meritage Homes of Nevada incorporated in Arizona; Meritage
22 Homes Corp. doing business in Arizona; Meritage Homes in Nevada
23 doing business in Nevada. So, you would have had diversity,
24 and that was the basis for federal jurisdiction in the New York
25 actions transferred here, anywhere except in Ohio.

1 So, to suggest that the bank has done something evil,
2 you should be offended and throw it out of the Court because of
3 a selection of forum, really flies in the face of what's going
4 on here. Both sides have forums. We're in Nevada why?
5 Because they asked for it to be and because this Court has
6 rendered rulings in those pending cases. And, by the way,
7 there is now a bankruptcy. We're in Ohio because of diversity.
8 And any other suggestion is not supported by the record, is
9 something that counsel told you in argument today.
10 Well, what about the argument that if you don't stay
11 this action there will somehow be this disconnect between the
12 two proceedings? Because that's the implication of the
13 argument that you're hearing is, if you don't stay this action,
14 something will happen in Ohio that is different than something
15 that will happen here, and the argument is: Look, JPM, your
16 complaint in Nevada is your counterclaim in Ohio.
17 There was a "but" that counsel should have told you,
18 I think, to give you the complete record, but he didn't. And
19 the "but" is that the complaint that they filed in Ohio is
20 their counterclaim here. It's not a paraphrase. It's not a
21 rewrite. It's word for word. How do you know that? Because
22 if you look at the complaint in Ohio, which is attached to
23 their motion to stay, and if you look at the answer and
24 counterclaim that they filed here, you can go paragraph by
25 paragraph, heading by heading. On a quick read, the only

1 change I saw was there are subparagraphs in Ohio that ask for
2 attorneys' fees, and that's only asked for once in the
3 counterclaim.
4 So, it is true that the JPM complaint here is
5 mirrored by JPM's counterclaim in Ohio. It is also true, but
6 some reason not mentioned, that the complaint in Ohio is the
7 counterclaim here. So, the hypothesis that these are two
8 different cases, that somehow if you don't stay this lawsuit,
9 that that state court case will have different issues in it, is
10 very strange to me when their counterclaim here is the mirror
11 of their complaint in Ohio.
12 The bankruptcy plan. You're told in the reply about
13 the bankruptcy plan. You're told in argument: Well, that's
14 really not a Colorado River factor, but we thought we'd tell
15 you anyway. And the argument is, as it's been articulated to
16 you, that when the plan is confirmed, this lawsuit will go
17 away; they'll win, because of their theory that somehow the
18 plan and the payment that's due under the plan will discharge
19 this debt. So, if you heard all that, you'd say, well, then,
20 of course, Meritage, you're supporting the plan; because when
21 the plan is confirmed, then your debt will be discharged by
22 this plan confirmation and payment.
23 Again, I would have heard a "but"; "but" we should
24 tell you, just to be candid, that Meritage is fighting like
25 heck and is, in fact, the only party in the bankruptcy case

1 opposing the confirmation of the plan. How do I know that?
2 Because we're all in front of Judge Markell yesterday and
3 tomorrow morning, and we're here today. And I can't -- I did
4 not bring you the Meritage objection to confirmation of the
5 plan. I apologize to you for that. But if you peek at the
6 docket in the bankruptcy case, you'll see that the objection to
7 confirmation that's currently being offered is by Meritage and
8 that the only party who is in the bankruptcy case is Meritage.
9 But then they say: Well, we're not really asking you
10 to rule on the bankruptcy plan as a defense -- which I think is
11 probably right, since that would be a motion for summary
12 judgment offered in a reply memo, and that would be improper.
13 But I think it's important to understand you're not getting the
14 information that you need to be able to apply the Colorado
15 River factors.
16 So, I guess I would then take you to the Colorado
17 River factors and ask you if you think that counsel is telling
18 you, in fact, the facts as they apply to the factors.
19 The first factor -- and this is citing out of Judge
20 Pro's decision in *Stewart Title of Nevada v Harnish* (phonetic),
21 which we cite in our papers. The first factor is the
22 inconvenience of the federal forum. Can anyone argue that --
23 can, particularly, Meritage argue -- that the Nevada forum is
24 inconvenient when they asked to have the other litigation
25 transferred here? No. And certainly not Meritage Homes of

Nevada.

Is there a possibility of piecemeal litigation? We've talked about that. The lawsuits are mirrors. There cannot be, by definition, when you have mirrored pleadings, the possibility of piecemeal litigation. Well, then the argument is made: Well, what if the state court -- what if the case that was removed to federal court -- there isn't a state court case pending now; it's been removed -- but what if that's remanded? What if that case proceeds? Then there could be inconsistent litigation. Perhaps, in theory.

I don't think you'll be surprised to learn that JPMorgan opposes the motion to remand, thinks that removing to bankruptcy court is perfectly appropriate in a district, like every district in the United States, that automatically refers bankruptcy matters to the bankruptcy court. If you wanted to get into bankruptcy jurisdiction, which you would not, you would find it tedious. The bankruptcy jurisdiction statute basically says the district courts have jurisdiction in bankruptcy cases. And, so, you might say, well, why is it that all those bankruptcy cases are filed across the street? Is it because we have a building? No; it's because every district -- this district, Ohio, every district in the country -- automatically refers all bankruptcy matters to the bankruptcy court.

So, there is an argument, you don't need to decide

that, but the suggestion that, you know, any clown would understand that that case is going to be remanded; we'll respectfully disagree with counsel. And the argument about jurisdiction that that case is related to the bankruptcy case, again, it's been briefed, but we'll disagree with counsel about that.

So, the notion of piecemeal jurisdiction, because you must assume that that lawsuit is being remanded to state court, to me that's a wild stretch. But even if you assume perhaps the Court -- the case is remanded to state court, must the state court judge prosecute? It will not surprise you to hear that we will argue to the state court judge: Excuse me, all this litigation is pending in Nevada; do you really want to learn all of this stuff that has been learned in Nevada cases? I doubt it. And, so, I don't think that the argument that you must assume the risk of piecemeal litigation in any way has a suggestion of strength.

Well, what about the argument that -- and, again, it has to do with the bankruptcy plan -- that this is -- there is something evil about this, and that when the involuntary bankruptcy petition was filed, that caused -- and not dismissed -- that caused liability under a payment guarantee, and, therefore, since it was argued in this argument, that must have something to do with the Colorado River argument. I don't get how it has anything to do with that. But, more

1 importantly, that's the argument that you make to Judge
2 Markell, and they did make collectively to Judge Markell.
3 Involuntary proceeding; bad. Bad faith, they said, because
4 it's being done to trick -- to trip, rather, the repayment
5 guarantee. Judge Markell said, involuntary proceeding, fine;
6 order for relief entered; no bad faith. What did they do?
7 They appealed to this court. What did Judge Pro do? He
8 dismissed that appeal. It's now pending in the Ninth Circuit.
9 So, why are you being told, having no access to that
10 record, that you should find that the involuntary was a bad
11 faith act, when that's not what Judge Markell found, and then
12 the appeal to this court was dismissed? I don't know why they
13 argued that to you. But, again, it has nothing to do with the
14 Colorado River factors, as far as I can tell.
15 The order in which jurisdiction was obtained. The
16 state court obtained jurisdiction four days earlier. No one is
17 denying that. And when you look at the cases, we submit,
18 having to do with the timing, you look at what's happened in
19 those courts. And the cases where the state court case has
20 been pending and things have been going on, so they have
21 invested resources, you would grant a stay. If you're talking
22 about four days of timing, that, in my view, would be a wash.
23 If you're talking about four days of timing in a forum where
24 litigation has been pending and active for years, I really
25 don't see credibly how you could day that the Ohio forum

1 somehow should be -- its jurisdiction should be respected by
2 spontaneously staying jurisdiction or proceedings before this
3 Court. True, that state law governs. And, again, if the case
4 has been pending for some significant period of time or if the
5 Court suggested this is really the determinative factor; but
6 it's not, and that's not what the cases say.
7 Can the state -- are the state court proceedings
8 inadequate to protect the federal litigant's rights? Probably
9 not really relevant here, because the proceedings mirror each
10 other.
11 The whether exercising jurisdiction would promote
12 forum shopping; I don't know how you can answer that question
13 in favor of Meritage's position unless you say, under Colorado
14 River, if you can file first somewhere, then you win. That's
15 really the guts of their argument. And if, instead, you
16 balance factors, you're going to say: Yeah, I think both sides
17 are arguing pretty vociferously for their forums. One, because
18 we're already here with plenty of litigation pending, and, by
19 the way, Nevada or Arizona witnesses; the other, I want to be
20 in Ohio for diversity reasons. I don't see how you say to one
21 side or the other: You're forum shopping and you're not. They
22 both have a clear interest in the forum that they're
23 advocating, and I don't think anyone would honestly tell you
24 otherwise.
25 And, last, whether there is substantial doubt whether

the state proceedings will resolve the federal action. The cases are mirrored, and, so, whichever one is resolved first, if the other one is not stayed, you would argue then those mirrored proceedings and that determination is determinative.

So, having worked through the factors, we just respectfully don't understand how Meritage gets to say: Come here; you must come here; you must sue us here; having been sued here and having had this court investing significant resources -- when you look at those two dockets, they're going to document as to the amount of effort that's already been undertaken by this Court -- but to say principles of judicial economy suggest you should stay this slice of the dispute in favor of an Ohio court, simply because the lawsuit was filed four days earlier.

I'm not sure if I answered your questions either.

THE COURT: I have one additional question. It may be tangential, but it goes to the question of whether or not there is issue preclusion in this case that results from the previous cases. I suspect your answer is, yes, there is.

MR. CHARLES: I wouldn't be surprised; but to me, on this question, it's really more a: Which is the logical forum to consider that? That Ohio court that doesn't know anything about this, or Judge Pro? I know if I were -- if I were -- and you can assume they've basically been losing in the district court. I don't know if you want to read the record; you'll see

the orders. Would I rather have Judge Pro decide if his decisions are preclusive, or an Ohio state court judge who's never heard of any of this? On balance, I think if I am them, I want to be in Ohio answering that question. And that, to me, is the -- that's the -- since this is just a question of a stay, we certainly will argue that. And we will argue it in whatever forum we're in.

Thank you very much.

THE COURT: Thank you very much.

MR. NORTHUP: May I briefly reply?

THE COURT: Yes, please.

MR. NORTHUP: First, on your question -- your Honor, issue preclusion requires that an issue is actually litigated and that a case is final and complete. Judge Pro's rulings -- and, no, we haven't been losing; those cases haven't gone anywhere besides procedurally -- those rulings are not law of the case. They are not issue preclusion. Period. That's black letter law.

In terms of -- what counsel wants you to do is say this repayment guarantee suit is just -- it's just the same as all of those other ones. And that's not true. Because think about when it was filed. At the time that those lawsuits were filed -- two years before JPMorgan and the other lenders took the action that they argue triggered the repayment guarantees; the repayment guarantees don't have anything to do with those

other cases. And, as I mentioned, one of them that was filed here dealt with rights under the Uniform Commercial Code under Nevada law and involved the property directly. The other cases were under a completion guarantee. That was the lender saying: You have to complete infrastructure on the property in order to protect our collateral. That involves getting down on the dirt in Nevada and arguing about that issue.

The case we're dealing with now is under the financing agreements, doesn't have anything to do with the dirt and the contractors and what work has to be done. It has to do with: Did this bankruptcy filing trigger the repayment guarantee; could it; are there defenses; are there acts on JPMorgan's part that breached the contracts or other law that terminated the guarantee? That's what we're talking about; and it's totally different. And the fact that -- essentially, I think what JPMorgan is saying is, if a party ever advocates for a particular forum, ever, it's now locked into that. You know, this was the same financing transaction; these are completely different cases.

Another point is part of the bankruptcy we've been talking about. If that is confirmed, the litigation against everybody except potentially Meritage goes away. They have already talked about releases. I'm not sure what they plan on doing with that one. But these are totally different.

I want to make a point clear. On the Ohio case, I

1 didn't quite understand counsel's argument. There would have
2 been diversity jurisdiction among the parties in Ohio.
3 Diversity exists. But we sued them in Ohio, and under 1441,
4 even though there is diversity, I call it that you can't remove
5 from your own backyard rule, and that's because the courts have
6 said the concerns that led to the removal in diversity cases in
7 the first place don't exist when you're on your home turf.
8 It's not like if you're in Texas, or whatever, and I think
9 everyone recognizes that the lay of the land has changed
10 significantly. But that's the reason that it was there.
11 There was some suggestion that, well, the Ohio court
12 really doesn't have to proceed, so you don't worry about the
13 risk of duplicative proceedings. There is no basis -- and I
14 believe it's the Younger Doctrine -- there is no basis for the
15 federal courts to have any authority to enjoin the Ohio
16 lawsuit, and there is no basis to go to the Court and say:
17 Judge, in Ohio, there is this federal proceeding pending, so
18 you shouldn't do anything. There is no -- the judge does not
19 have authority. They're going to go forward.
20 And I think counsel missed the point. Whenever you
21 have two cases -- and he concedes they're mirror image,
22 certainly as to their claim versus the repayment guarantee
23 portion of it -- whenever you have two cases proceeding in
24 different forums, there is a serious risk of inconsistent
25 rulings, differing interpretations, the same motions being

filed between two different judges, and the cases that we've cited show the mischief that can result from that. You can get different rulings on the same issues; there is no preclusive effect to the Ohio court here; and, as I admit-- and I don't think counsel even tries to argue -- if this case goes forward, there are two lawsuits that are going to be pending. It's just that stark.

The bankruptcy plan; I think counsel doesn't understand what our argument is as to this case. We're not saying -- we're not arguing that the bankruptcy confirmation necessarily results in a discharge of Meritage. We're saying that when the lender, the party who's bringing the case, JPMorgan, gets paid, it is no longer the real party in interest. The parties who are fronting the money -- because that's what the banks insisted upon -- who will be pursuing Meritage, you can do any kind of procedural maneuvering they want -- the real parties in interest are the other settling builders of Meritage who are not parties in bankruptcy. It's going to be a total dispute between those parties. But I respectfully assert there is not going to be any authority for saying a party who has been paid on their debt can in their own name maintain a lawsuit on a guarantee that's been discharged.

THE COURT: So, what happens to this case?

MR. NORTHUP: What happens to this case is, it goes away. Now, the settling builders are going to argue, for

various reasons, that, hey, we paid this $12 million, we think for you; we say, we didn't know it. But we'll fight it out with them. But it's not going to be in this case, because they're not parties to this case. And that's what we're saying. So, from JPMorgan's standpoint, you know, they're done. And that is a very significant component.

But that's the argument, is it's a real -- it's the real party in interest. We're not trying to get you to argue that the bankruptcy that you're not involved with is a discharge or anything of the kind. But I think it's pretty black letter law that if somebody owes me money, and they pay me, maybe I have assigned or in some other fashion given that cause of action to someone else, but I can't maintain it myself anymore.

THE COURT: Well, it seems to me, then, it sounds like this may be moot fairly shortly.

MR. NORTHUP: I absolutely agree, in terms of this case. If Judge Markell confirms a bankruptcy plan, these issues in this case are going to be moot, on the repayment guarantee versus JPMorgan.

THE COURT: Right.

MR. NORTHUP: It does not dispose of claims that we had filed against JPMorgan for breach of contract causing damages and all those things. But on their complaint against Meritage, that would be moot, because any party who is going to

pursue the repayment guarantee is going to be somebody besides the banks.

Let me see if -- then, the only other point is to counsel's last point, talking about these cases have been pending for years. These cases are one thing. They are not the same issues remotely. They certainly weren't brought at the same time or anything like that; so we would respectfully urge this is an entirely different situation. I think most -- counsel went through several of the factors; adequacy of the state's law remedies and no federal question. Absolutely those factors favor us. I think we might have dueled ourselves into a draw on forum shopping, but certainly in terms of the inefficiencies and all those factors, when you go through them and say, which ones favor Meritage versus which ones favor JPMorgan, I think we've met the showing, and it would be much more efficient to just let us go fight it out in Ohio, and we would respectfully urge that you grant our motion.

THE COURT: Thank you very much. And thank you, Counsel, on both sides for a very well structured and logical presentation. I will take this under advisement and issue an order shortly.

Thank you very much.

MR. NORTHUP: Thank you, your Honor.

THE CLERK: All rise.

THE COURT: Good afternoon.

MR. CHARLES: Thank you.

(This proceeding was adjourned at 2:14 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signed

October 20, 2011

Dated

TONI HUDSON, TRANSCRIBER