



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
March 27, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

8 In re:) 9 LAKE AT LAS VEGAS JOINT) VENTURE, LLC,) 10 Affects this Debtor.) 11 _____) LLV -1, LLC,) Affects this Debtor.) 12 _____) LLV HOLDCO, LLC,) 13 Affects this Debtor.) 14 _____) LAKE LAS VEGAS PROPERTIES, L.L.C.,) Affects this Debtor.) 15 _____) LLV FOUR CORNERS, LLC,) 16 Affects this Debtor.) 17 _____) NORTSHORE GOLF CLUB, L.L.C.,) Affects this Debtor.) 18 _____) P-3 AT MONTELAGO VILLAGE, LLC,) 19 Affects this Debtor.) 20 _____) THE GOLF CLUB AT LAKE LAS) VEGAS, LLC, Affects this Debtor.) 21 _____) MARINA INVESTORS, L.L.C.,) 22 Affects this Debtor.) 23 _____) THE VINEYARD AT LAKE LAS VEGAS,) L.L.C., Affects this Debtor.) 24 _____) LLV VHI, L.L.C.,) 25 Affects this Debtor.) 26 _____) TCH DEVELOPMENT, L.L.C.,) Affects this Debtor.) 27 _____) 28 _____)	Case No.: 08-17814-MKN (Lead) Chapter 11 Jointly Administered Under Case No.: 08-17815-MKN Case No.: 08-17817-MKN Case No.: 08-17820-MKN Case No.: 08-17822-MKN Case No.: 08-17825-MKN Case No.: 08-17827-MKN Case No.: 08-17830-MKN Case No.: 08-17832-MKN Case No.: 08-17835-MKN Case No.: 08-17837-MKN Case No.: 08-17841-MKN Case No.: 08-17842-MKN Case No.: 08-17844-MKN Case No.: 08-17845-MKN Date: March 21, 2018 Time: 11:00 a.m.
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1 TC TECHNOLOGIES, L.L.C.,)
 Affects this Debtor.)
 2 _____)
 3 SOUTHSORE GOLF CLUB, L.L.C.,)
 Affects this Debtor.)
 _____)
 4 NEVA HOLDINGS, L.L.C.,)
 Affects this Debtor.)
 5 _____)
 6 **AFFECTS ALL DEBTORS.**)
 _____)

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 8 **ORDER ON PLAINTIFF DEBTORS’ MOTION TO
 ABSTAIN FROM HEARING CONTEMPT MOTION¹**

9 On March 21, 2018, the court heard Plaintiff Debtors’ Motion to Abstain From Hearing
 10 Contempt Motion (“Abstention Motion”). The appearances of counsel were noted on the record.
 11 After arguments were presented, the matter was taken under submission.

12 **BACKGROUND**

13 On July 17, 2008, Lake at Las Vegas Joint Venture, LLC filed a voluntary Chapter 11
 14 petition. (ECF No. 1). Separate Chapter 11 petitions were filed by fourteen affiliated entities.
 15 On July 28, 2008, an order was entered for joint administration of the fifteen proceedings, with
 16 the Lake at Las Vegas Joint Venture, LLC proceeding serving as the lead case (collectively, the
 17 entities will be referred to as the “Debtors”). (ECF No. 121).

18 On July 30, 2008, notice was filed of the appointment of members of an Official
 19 Committee of Unsecured Creditors (“UCC”). (ECF No. 150).

20 On March 26, 2010, Debtors, along with the UCC, filed a joint Third Amended Plan of
 21 Reorganization (“Plan”). (ECF No. 2097). On the same date, a Third Amended Disclosure
 22 Statement (“Disclosure Statement”) describing the Plan was filed. (ECF No. 2098).

23 On March 30, 2010, an order was entered approving the Disclosure Statement. (ECF No.
 24 2116). On the same date, an order was entered approving a notice setting a hearing on

25 _____
 26 ¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents
 27 filed in the above-captioned bankruptcy case as they appear on the docket maintained by the
 28 clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11
 U.S.C. § 101, et seq. All references to “Local Rule” are to the bankruptcy provisions of the
 Local Rules of Practice of the United States District Court for the District of Nevada.

1 confirmation of the Plan for June 21, 2010, and also approving various procedures, including
2 solicitation of ballots, for plan confirmation. (ECF No. 2118).

3 On June 21, 2010, the plan confirmation hearing was conducted at which the court
4 confirmed the Plan, including additional modifications, and directed counsel to submit proposed
5 findings of fact and conclusions of law, along with a proposed order.

6 On June 25, 2010, a final version of the Plan as approved at the confirmation hearing,
7 including all attached exhibits, was filed. (ECF No. 2475).

8 On July 1, 2010, findings of fact and conclusions of law (“Plan Confirmation Findings”)
9 (ECF No. 2501), along with an order confirming the Plan, as modified (“Plan Confirmation
10 Order”) (ECF No. 2502), were entered.² Among other things, the Plan Confirmation Order
11 requires the Debtors (thereafter “Reorganized Debtors”) “to execute . . . all of the Plan . . .” and
12 to “perform each and all . . . obligations thereunder, . . . without further notice to or order of this
13 Court . . .” Id. at 6:11-25.³

14 On January 7, 2015, the jointly administered cases were reassigned to Chief Bankruptcy
15 Judge Bruce Beesley after the retirement of Bankruptcy Judge Linda Riegle. (ECF No. 3265).

16 On February 17, 2015, the jointly administered cases were again reassigned to the current
17 bankruptcy judge. (ECF No. 3299).

18 On February 9, 2018, an Amended Motion for Order Finding Debtors Lake at Las Vegas
19 Joint Venture, LLC, LLV-1, LLC, LLV Holdco, LLC, and the Vineyard at Lake Las Vegas,
20

21 ² Section IV, A., of the Plan provides for the assets, claims and affairs of the various
22 debtor entities’ bankruptcy estates to be substantively consolidated as of the effective date. See
23 Plan at 49.

24 ³ The Atalon Group, LLC (“Atalon”) was the equity holder of the debtor entities that
25 commenced the Chapter 11 proceeding, and Atalon was independently owned and operated by
26 Frederick Chin (“Chin”) and James Coyne (“Coyne”). See Disclosure Statement, Article I.A.2.
27 The involvement of Chin and Coyne in the above-captioned Chapter 11 proceeding was further
28 described in connection with plan confirmation. Id. See also Disclosure Statement, Articles
I.B., IX.D.3, and IX D.5. Atalon was authorized to act as the asset manager for the Reorganized
Debtors pursuant to a certain management agreement. See Disclosure Statement, Article X.E .1.;
Plan Confirmation Findings at 13:10-14; Plan Confirmation Order at ¶ 16. The management
agreement between Atalon and the Reorganized Debtor (“Management Agreement”) was
included as Exhibit “O” to the Plan.

1 LLC, in Contempt for Violation of the Confirmation Order (“Contempt Motion”), was filed by
2 Chin and Coyne. (ECF No. 3735). They maintain that certain provisions of the Plan
3 Confirmation Order were violated by certain Reorganized Debtors. In particular, Chin and
4 Coyne maintain that on January 6, 2017, those Reorganized Debtors (“Plaintiff Debtors”)
5 violated the Plan Confirmation Order by commencing an action against them in the Eighth
6 Judicial District Court, Clark County, Nevada (“State Court”), entitled LLV Holdco, LLC, et al.
7 v. Atalon Management Group, LLC, et al., Case No. A-17-749387-B (“State Court Action”).⁴ In
8 the State Court Action, damages were sought from Atalon, Chin, Coyne, and certain related
9 entities, based on a variety of legal theories.⁵

10 The Contempt Motion alleges that Chin and Coyne demanded, pursuant to the terms of
11 the Plan Confirmation Order, that the Plaintiff Debtors provide indemnification with respect to
12 all of the claims and that the Plaintiff Debtors advance all costs and expenses incurred in the
13 State Court Action. Because the Plaintiff Debtors refused such demands, Chin and Coyne allege
14 that the Plan Confirmation Order has been violated and that sanctions are appropriate. In
15 addition to a finding of contempt, they seek entry of an order requiring the Plaintiff Debtors “to
16 advance all of Chin’s and Coyne’s costs and expenses incurred in defending the State Court
17 Action, including attorneys’ fees there and those incurred in this Motion ‘establishing or
18 enforcing a right to indemnification.’” Contempt Motion at 15:20-22 (emphasis added). See
19 also Contempt Motion at 4:1-3 (directing Plaintiff Entities “to advance all costs and expenses
20

21 ⁴ The Plaintiff Debtors that commenced the State Court Action are Lake at Las Vegas
22 Joint Venture, LLC, LLV-1, LLC, LLV Holdco, LLC, and The Vineyard at Lake Las Vegas,
23 L.L.C.

24 ⁵ A copy of the First Amended Complaint is attached as an exhibit to a declaration of
25 counsel accompanying the Contempt Motion. (ECF No. 3735-1). Those legal theories are set
26 forth in ten separately enumerated causes of action, including fraud (Atalon, Chin, Coyne),
27 breach of contract (Atalon), breach of duty of good faith and fair dealing (Atalon), tortious
28 breach of the implied covenant of good faith and fair dealing (Atalon), breach of fiduciary and/or
confidential relationship (Atalon, Chin, Coyne), wrongful interference with prospective
economic advantage (Atalon, Chin, Coyne, etc.), unjust enrichment (Atalon, Chin, Coyne, etc.),
constructive trust (Atalon, Chin, Coyne, etc.), aiding and abetting breach of fiduciary duties
(other), and quiet title (other).

1 incurred to date by Chin and Coyne in the State Court Action and to advance fees as incurred
2 going forward.”).

3 The Contempt Motion was properly noticed to be heard on March 21, 2018, with a
4 deadline of March 7, 2018, for the Plaintiff Debtors to respond. (ECF No. 3736).

5 On March 1, 2018, the Plaintiff Debtors filed the instant Abstention Motion (ECF No.
6 3738) requesting that this court abstain from determining the issues raised by the Contempt
7 Motion. Instead, the Plaintiff Debtors argue that the demands for indemnification and
8 advancement of legal expenses are matters governed by state law that should be resolved in the
9 State Court Action.⁶

10 On March 5, 2018, an order was entered shortening time so that the instant Abstention
11 Motion could be heard on March 21, 2018. (ECF No. 3741). That order also suspended further
12 briefing on the Contempt Motion.

13 On March 15, 2018, Chin and Coyne filed opposition to the Abstention Motion
14 (“Opposition”). (ECF No. 3754).

15 On March 19, 2018, the Plaintiff Debtors filed a reply. (ECF No. 3756).

16 DISCUSSION

17 The court having considered the written and oral arguments of counsel, along with the
18 materials presented, concludes that the Abstention Motion should be granted. This conclusion,
19 of course, is based on the issues raised by Chin and Coyne in their Contempt Motion.

20 The Contempt Motion asserts that the Plaintiff Debtors violated the Plan Confirmation
21 Order by failing to comply with a specific indemnification provision of the Plan. The entirety of
22 that provision consists of four paragraphs, the actual wording and sequence of which is
23 significant. The full language of that provision (“Indemnification Provision”) is as follows:

24
25
26 _____
27 ⁶ On October 31, 2017, the State Court entered a scheduling order providing for a jury
28 trial, on a five-week stack calendar, beginning on August 14, 2018. The State Court also
approved a stipulation amongst the parties for an April 11, 2018, discovery cut-off, and a May
11, 2018, dispositive motion deadline. Additionally, the stipulation included a January 15, 2018,
deadline for amendments to any pleadings and the addition of any parties.

1 D. Indemnification of Present Management.

2 The Reorganized Debtors **shall indemnify** Present Management to the
3 fullest extent permitted **by applicable state law** if Present Management is a party
4 to or threatened to be made a party to or otherwise involved **in any threatened,
5 pending, or completed action, suit**, arbitration, alternate dispute resolution
6 mechanism, investigation, inquiry, administrative hearing or any other actual,
7 threatened or completed proceeding, **whether brought in the right of the
8 Debtors, the Estates, the Reorganized Debtors or otherwise and whether of a
9 civil, criminal, administrative or investigative nature**, whether formal or informal
10 in any case, **and whether the events upon which liability is alleged occurred
11 prior to, during or following the Debtors' bankruptcy cases, in which Present
12 Management was, is or will be involved as a party or otherwise by reason of:
13 (i) the fact that Present Management is or was a director or officer of the
14 Debtors; (ii) any action or inaction taken or failed to be taken by Present
15 Management while acting as director, officer, employee or agent of the
16 Debtors; or (iii) the fact that Present Management is or was serving at the request
17 of the Debtors as a director, officer, employee or agent of another corporation,
18 partnership, joint venture, trust, association, common-interest organization,
19 employee benefit plan or other enterprise (including the MPOA), and in any such
20 case described above, whether or not serving in any such capacity at the time any
21 liability or expense is incurred for which indemnification, reimbursement, or
22 advancement of expenses may be provided. **The Reorganized Debtors shall
23 indemnify Present Management for any and all direct and indirect costs of
24 any type or nature whatsoever (including all attorneys', witness, or other
25 professional fees and related disbursements, and other out-of-pocket costs of
26 whatever nature), actually and reasonably incurred by Present Management
27 in connection with the investigation, defense or appeal of such a proceeding
28 or one establishing or enforcing a right to indemnification**, and amounts paid
in settlement by or on behalf of Present Management, but shall not include any
judgments, fines or penalties actually levied against Present Management for such
individual's violations of law.**

To the extent not prohibited by law, the Reorganized Debtors **shall
advance** the direct and indirect **costs incurred by Present Management in
connection with any such proceeding**, and such advancement shall be made
within ten (10) days after the receipt by the Reorganized Debtors of a statement or
statements requesting such advances (which shall include invoices received by
Present Management in connection with such expenses but, in the case of
invoices in connection with legal services, any references to legal work performed
or to expenditures made that would cause Present Management to waive any
privilege accorded by applicable law shall not be included with the invoice).
Advances shall be unsecured, interest free and without regard to Present
Management's ability to repay the expenses. Advances shall include any and all
direct and indirect costs actually and reasonably incurred by Present Management
pursuing an action to enforce Present Management's right to indemnification
pursuant to the Plan or otherwise. **Present Management shall repay the
advance if and to the extent that it is ultimately determined** by a court of
competent jurisdiction in a final judgment, not subject to appeal, **that Present
Management is not entitled to be indemnified by the Reorganized Debtors.**
The right to advances under this section shall continue until final disposition of
any proceeding, including any appeal therein.

**Notwithstanding the foregoing, the Reorganized Debtors shall not be
obligated to indemnify Present Management on account of any proceeding
with respect to:** (i) remuneration paid to Present Management if it is determined
by final judgment or other final adjudication that such remuneration was in
violation of law; (ii) a final judgment rendered against Present Management for

1 an accounting, disgorgement or repayment of profits made from the purchase or
 2 sale by Present Management of securities of the Debtors or in connection with a
 3 settlement by or on behalf of Present Management to the extent it is
 4 acknowledged by Present Management and the Debtors that such amount paid in
 5 settlement resulted from Present Management's conduct from which Present
 6 Management received monetary personal profit, pursuant to the provisions of
 7 Section 16(b) of the Securities Exchange Act of 1934, as amended, or other
 8 provisions of any federal, state or local statute or rules and regulations thereunder;
 9 **(iii) a final judgment or other final adjudication that Present Management's**
 10 **conduct was in bad faith, knowingly fraudulent or deliberately dishonest or**
 11 **constituted willful misconduct (but only to the extent of such specific**
 12 **determination); or (iv) on account of conduct that is established by a final**
 13 **judgment as constituting a breach of Present Management's duty of loyalty**
 14 **to the Debtors or resulting in any personal profit or advantage to which**
 15 **Present Management is not legally entitled.**

16 Present Management's rights under this section shall continue after Present
 17 Management has ceased acting as an agent of the Debtors and shall inure to the
 18 benefit of the heirs, executors, administrators and assigns of Present Management.
 19 The obligations and duties of the Reorganized Debtors to Present Management
 20 under this Agreement shall be binding on the Reorganized Debtors and their
 21 successors and assigns. The Reorganized Debtors shall require any successor
 22 (whether direct or indirect, by purchase, merger, consolidation or otherwise) to all
 23 or substantially all of the business or assets of the Reorganized Debtors, expressly
 24 to assume and agree to indemnify Present Management and advance their direct
 25 and indirect costs **in the same manner and to the same extent** that the
 26 Reorganized Debtors would be required to perform if no such succession had
 27 taken place.

28 Plan, Article VI.D. (Emphasis added).⁷

1 The Contempt Motion asserts that the State Court Action falls under the first paragraph
 2 of the Indemnification Provision, see Contempt Motion at 4:20 to 5:17, and that the Plaintiff
 3 Debtors violated the Plan by refusing the indemnification demand from Chin and Coyne. Id. at
 4 8:1-8. The Contempt Motion further asserts that under the second paragraph of the
 5 Indemnification Provision, id. at 5:22 to 6:4, the Plaintiff Debtors are required to advance to
 6 Chin and Coyne the costs they incur in connection with “any such proceeding,” but that the
 7 Plaintiff Debtors also violated the Plan by refusing the advancement demand. See Contempt
 8 Motion at 8:1-8. Finally, the Contempt Motion asserts that the second paragraph requires Chin
 9 and Coyne to repay any advances made in the event it is later determined that they are not
 10 entitled to indemnification. Id. at 12:2-21.

11 ⁷ The approved disclosure statement on which acceptance of the Plan was solicited
 12 included identical language for indemnification of present management. See Disclosure
 13 Statement at Article VI.D.

1 The Contempt Motion, however, minimizes the importance of the third and fourth
2 paragraphs of the Indemnification Provision. The third paragraph relieves the Plaintiff Debtors
3 from any obligation to indemnify present management “on account of any proceeding with
4 respect to . . . a final judgment . . . that Present Management’s conduct was in bad faith,
5 knowingly fraudulent or deliberately dishonest or constituted willful misconduct . . . or on
6 account of conduct . . . constituting a breach of Present Management’s duty of loyalty to the
7 Debtors or resulting in any personal profit or advantage to which Present Management is not
8 legally entitled.” (Emphasis added). The fourth and final paragraph of the Indemnification
9 Provision preserves the obligations and duties under the prior three paragraphs in the event
10 Present Management departs, but does not include any provision requiring the Plaintiff Debtors
11 to advance legal costs incurred by Chin and Coyne in connection with a proceeding referenced in
12 the third paragraph.

13 Whatever may be the scope of the indemnification provided by the first paragraph, it
14 appears that the advancement obligation in the second paragraph applies only to “such
15 proceeding,” i.e., a proceeding described in the prior paragraph. The exclusion from
16 indemnification provided by the third paragraph, however, appears to encompass the legal
17 theories included in the State Court Action, see note 5, supra, and there is no language in the
18 fourth paragraph requiring the Plaintiff Debtors to advance the costs incurred by Present
19 Management in connection with the proceedings encompassed by the third paragraph. Reading
20 the first and second paragraphs in isolation from the third and fourth paragraphs therefore
21 appears to make little sense in the context of the State Court Action. Moreover, such a reading
22 also appears to be contrary to the “American Rule” governing attorneys’ fees in litigation: “Each
23 litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides
24 otherwise.” See Baker Botts L.L.P. v. ASARCO LLC, 135 S.Ct. 2158, 2164 (2015). Applying
25 the advancement requirement to proceedings brought under the third paragraph leads to the
26 somewhat absurd result of one party to a contract having to pay the legal cost of litigating
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28

1 against itself in order to recover from the other party to the contract.⁸ Whether this result is
2 permissible under state law, see Majkowski v. Am. Imaging Mgmt. Servs., LLC, 913 A.2d 572,
3 586-593 (Del.Ch. 2006),⁹ may ultimately have to be addressed.

4 This observation regarding the Indemnification Provision of the Plan, however, is not,
5 nor is it intended to be, dispositive of the issues underlying the Contempt Motion. Instead, it
6 illustrates that there are no unique considerations of bankruptcy law that must be applied to
7 resolve the indemnification theory asserted by Chin and Coyne.¹⁰ Indeed, the first paragraph of
8 the Indemnification Provision entitles Chin and Coyne to indemnification “to the fullest extent
9

10 ⁸ The Plan and the Plan Confirmation Order do not appear to include an attorneys’ fees
11 provision for actions to enforce their terms, nor does the Bankruptcy Code appear to supply a
12 basis for such recovery. The separate Management Agreement contains both an indemnification
13 provision and a general attorneys’ fees provision. The indemnification provision apparently
14 requires the Reorganized Debtors to indemnify, defend, and hold Atalon harmless, as well as its
15 directors and officers, against any claims and losses arising from its performance of the
16 agreement. See Management Agreement, Article VIII. A. That indemnification excludes,
17 however, any losses directly caused by Atalon’s breach of any material provision of the
18 agreement. The agreement further provides that “in no event” shall indemnification “ever be
19 made” where Atalon is found liable for fraud in connection with its performance under the
20 agreement, or losses attributable to gross negligence or intentional misconduct in performance
21 under the agreement. Id., Article VIII.B. The attorneys’ fees provision allows the prevailing
22 party in a contract enforcement action to recover all reasonable attorneys’ fees and costs. Id.,
23 Article IX.G. Neither the indemnification nor the attorneys’ fees provision of the Management
24 Agreement requires an opposing party to advance legal expenses during the course of litigation.

25 ⁹ Chin and Coyne cite the Delaware Chancery Court decision in Majkowski in support of
26 their request for advancement of legal costs before their indemnity claim is determined. See
27 Contempt Motion at 12:24. The agreements at issue in Majkowski, however, did not include an
28 advancement provision. 913 A.2d at 580. The Chancery Court therefore did not examine any
specific contractual language governing the indemnification and advancement dispute between
the parties. Thus, while the advancement requirement during litigation of a claim may be
separate from the final determination of the indemnification rights, 913 A.2d at 586, only an
examination of the parties’ agreement will determine if there is any advancement right at all.
Given that the advancement language in the second paragraph of the Indemnification Provision
only refers to the proceedings encompassed by the first paragraph, any reliance on the
Majkowski decision would be misplaced.

¹⁰ Breach of the Management Agreement by Atalon is alleged in at least the second, third
and fourth causes of action asserted in the State Court Action. See note 5, supra. Interpretation
of the Management Agreement is governed by Nevada law. See Management Agreement,
Article IX. D.

1 permitted by applicable state law” rather than bankruptcy law. More important, this observation
2 informs the determination of whether the relief requested by the Abstention Motion is
3 appropriate.¹¹

4 As a threshold matter, the court rejects the surprising suggestion by Chin and Coyne that
5 this court has no jurisdiction to decide the Abstention Motion. See Opposition at 3:24 to 5:3.
6 The predicate for the filing of the instant motion was the commencement of a contested matter
7 by Chin and Coyne seeking affirmative relief from this court in the form of an order requiring
8 the Plaintiff Debtors to advance funds allegedly required by the Indemnification Provision. By
9 contrast, the Abstention Motion does not seek affirmative relief against Chin and Coyne, but
10 merely requests the court to exercise its discretion in determining the appropriate forum in which
11 an actual controversy should be decided. As the Plaintiff Debtors do not seek an advisory
12 opinion on a matter that is not before this bankruptcy court, jurisdiction has been established for
13 the court to decide the Abstention Motion. See Krasnoff v. Marshack (In re Gen. Carriers
14 Corp.), 258 B.R. 181, 190 (B.A.P. 9th Cir. 2001) (determination of abstention request invalid
15 where dispute arising from pending state court action was not placed before the bankruptcy court
16 by removal).

17 As to the merits of the Plaintiff Debtors’ request for permissive abstention under 28
18 U.S.C. § 1334(c)(1), the court has considered the relevant factors discussed by the Ninth Circuit
19 in Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162 (9th Cir. 1990):
20

21 ¹¹ In addition to the relationship between the Reorganized Debtors and its management,
22 the Plan created other relationships that gave rise to at least one dispute involving
23 indemnification claims made in connection with nonbankruptcy litigation (“Credit Suisse
24 Dispute”). See Memorandum Decision on Motion of Suisse AG, Cayman Islands Branch for
25 Order Directing Distribution of Pre-Petition Lender Net Litigation Proceeds for Application to
26 Indemnification Obligations, entered March 30, 2017 (ECF No. 3639); Supplemental Order and
27 Decision on Motion of Suisse AG, Cayman Islands Branch for Order Directing Distribution of
28 Pre-Petition Lender Net Litigation Proceeds for Application to Indemnification Obligations and
Setting Status Hearing, entered June 7, 2017 (ECF No. 3657). The indemnification provision at
issue in that dispute was governed by New York law, and resolution of that dispute did not
require an application of bankruptcy law or bankruptcy policy. None of the parties to the Credit
Suisse Dispute sought permissive abstention in order to allow indemnification claims to be
pursued in nonbankruptcy proceedings.

1
2 (1) the effect or lack thereof on the efficient administration of the estate if a Court
3 recommends abstention, (2) the extent to which state law issues predominate over
4 bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4)
5 the presence of a related proceeding commenced in state court or other
6 nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §
7 1334, (6) the degree of relatedness or remoteness of the proceeding to the main
8 bankruptcy case, (7) the substance rather than form of an asserted “core”
9 proceeding, (8) the feasibility of severing state law claims from core bankruptcy
10 matters to allow judgments to be entered in state court with enforcement left to
11 the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the
12 likelihood that the commencement of the proceeding in bankruptcy court involves
13 forum shopping by one of the parties, (11) the existence of a right to a jury trial,
14 and (12) the presence in the proceeding of nondebtor parties.

9 912 F.2d at 1167, citing Republic Reader’s Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re
10 Republic Reader’s Serv. Bureau, Inc.), 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987) (Mahoney, J.).
11 Compare CM Reed Almeda 1-3062, LLC v. Harris Cnty. (In re CM Reed Almeda 1-3062, LLC),
12 2017 WL 1505215, at 6-7 (B.A.P. 9th Cir. Apr. 26, 2017) (applying same factors to abstention
13 requested under Section 505).¹²

14 In this instance, the first and ninth factors do not appear to be significant inasmuch as this
15 Chapter 11 proceeding has been pending before this court for close to ten years. The Credit
16 Suisse Dispute remains on appeal, and the status of settlement efforts is not known. Abstention
17 in connection with the Contempt Motion may or may not affect when this lengthy Chapter 11
18 proceeding will finally close. Moreover, the Contempt Motion does not appear to require an
19 evidentiary hearing to determine whether the Indemnification Provision applies to the causes of
20 action pursued in the State Court Action. These two factors are neutral at best.

21 The second and third factors favor abstention because the interpretation of the
22 Indemnification Provision of the Plan would not require application of complex principals of
23 bankruptcy law but instead looks only to applicable state law.

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26 ¹² None of the factors are entitled to more weight than another, and the choice to abstain
27 is not based simply on the number of factors allocated to each side. Some courts do, however,
28 place greater emphasis on factors 1, 2 and 7. See, e.g., DHP Holdings II Corp. v. Peter Skop
Indus., Inc., (In re DHP Holdings II Corp.), 435 B.R. 220, 224 (Bankr. D. Del. 2010). Balancing
of the factors lies in the trial court’s discretion. See Eastport Assoc. v. City of Los Angeles (In
re Eastport Assoc.), 935 F.2d 1071, 1079 (9th Cir. 1991).

1 The fourth and sixth factors favor abstention because the parties currently are proceeding
2 in State Court and state law will determine the entitlement to indemnification, if at all. The fifth
3 and seventh factors are opposite sides of the same coin because no one disputes that the State
4 Court has at least concurrent jurisdiction to address the indemnification and advancement
5 theories underlying the Contempt Motion. The eighth factor favors abstention inasmuch as any
6 judgment rendered in the State Court Action would not require enforcement by the bankruptcy
7 court.

8 The tenth factor might be present inasmuch as the bar date for amending the pleadings in
9 the State Court Action expired on January 15, 2018. See note 6, supra. The State Court Action
10 was commenced on January 6, 2017, and both Chin and Coyne answered the complaint in June
11 2017. Apparently, Coyne filed a counterclaim while Chin did not. Neither of them asserted a
12 counterclaim for indemnification or an advance of litigation costs based on the Indemnification
13 Provision of the Plan. Now that the pleading deadline has expired in the State Court Action,
14 Chin and Coyne arguably are “shopping” for a forum where they might not be timed barred. It
15 also appears, however, that the Plaintiff Debtors will not oppose the late filing of a counterclaim
16 in the State Court Action, but would oppose an extension of the April 11, 2018 discovery cutoff.
17 See id.¹³ The State Court is more capable than this court to address the appropriateness of relief
18 from the deadlines imposed in the State Court Action. Under these circumstances, the tenth
19 factor slightly weighs in favor of abstention.

20 The eleventh factor dovetails with the tenth factor. If Chin and Coyne are permitted to
21 assert a counterclaim for indemnification in the State Court Action, then the State Court will
22 determine if the counterclaim is subject to trial by jury.¹⁴ If so, then the eleventh factor weighs

24 ¹³ At the hearing on the Abstention Motion, the Plaintiff Debtors represented, through
25 counsel, that they would not object to the filing of a counterclaim for indemnification as long as
the current discovery bar date is not disturbed.

26 ¹⁴ If there is an express, contractual cause of action arising from the Indemnity Provision,
27 then a jury trial likely is available on an action in law. Even if an equitable indemnity action is
28 asserted seeking to recover monetary damages, a jury trial may also be available. See, e.g.,
Martin v. Cnty. of Los Angeles, 51 Cal. App. 4th 688, 697-98 (Cal. Ct. App. 1997)
 (“Consequently, we conclude that a cause of action for equitable indemnity is a legal action

1 in favor of abstention because a jury trial typically is not available in bankruptcy. See, e.g., La
2 Roche Indus., Inc. v. Orica Nitrogen LLC (In re LaRoche Indus., Inc.), 312 B.R. 249, 255
3 (Bankr. D. Del. 2004).¹⁵

4 The twelfth factor appears to be neutral because the Contempt Motion seeks relief against
5 the Plaintiff Debtors rather than nondebtor parties. Additionally, any counterclaims for
6 indemnification pursued in the State Court Action would be against the Reorganized Debtors
7 that already are plaintiffs in that proceeding. No suggestion has been made that such a claim, if
8 any, could include nondebtor parties.

9 Finally, although the twelve factors discussed above arguably should not be the exclusive
10 considerations governing permissive abstention under 28 U.S.C. § 1334(c)(1),¹⁶ none of the
11 parties have suggested any additional factors that should be entertained. On balance, the court
12 concludes that these factors weigh in favor of the relief requested by the Abstention Motion. A
13 separate order will be entered denying the Contempt Motion without prejudice.

14 **IT IS THEREFORE ORDERED** that the Plaintiff Debtors' Motion to Abstain From
15 Hearing Contempt Motion, Docket No. 3738, be, and the same hereby is, **GRANTED**.

16
17 Copies sent to all parties via CM/ECF ELECTRONIC FILING

18 Copies sent via BNC to:
19 G. David Dean, Esq.
20 500 Delaware Ave., Suite 1410
21 Wilmington, DE 19801

22 Barbara W. Balliete, Esq.
23 Reid Collins Tsai
24 1301 S. Capital of Texas Hwy.
25 Building C, Suite 300
26 Austin, TX 78746

27
28 seeking legal relief. As such, the County was entitled to a jury trial.”).

¹⁵ For matters in which a jury trial is permitted, a jury trial can take place in bankruptcy court, but only upon the consent of all parties. See 28 U.S.C. § 157(e); Local Rule 9015(a).

¹⁶ One court characterized the list of factors as providing merely an “intellectual matrix to guide the judge who considers [discretionary] abstention” Fidelity Nat’l. Title Ins. Co. v. Franklin (In re Franklin), 179 B.R. 913, 928 (Bankr. E.D. Cal. 1995).

1 Anjuli B. Woods, Esq.
Enterprise Counsel Group, ALC
2 Three Park Plaza, Suite 1400
Irvine, CA 92614

3
4 Steven B. Scow, Esq.
KOCH & SCOW, LLC
11500 S. Eastern Ave., Suite 210
5 Henderson, NV 89052

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