Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
September 21, 2021

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	Case No.: 19-14796-MKN
	Chapter 11
GYPSUM RESOURCES MATERIALS, LLC,	
	Jointly Administered with
☐ Affects Gypsum Resources Materials, LLC	Case No.: 19-14799-MKN
☒ Affects Gypsum Resources, LLC	
☐ Affects All Debtors	
Debtor.	
GYPSUM RESOURCES, LLC, a Nevada limited liability company,	Adv. Proc. No. 19-01105-MKN
Plaintiff,	Date: August 18, 2021
	Time: 9:30 a.m.
vs.	
CLARK COUNTY, a political subdivision of the State of Nevada; and CLARK COUNTY BOARD OF COMMISSIONERS,	
Defendants.	
CLARK COUNTY, a political subdivision of the State of Nevada; and CLARK COUNTY BOARD OF COMMISSIONERS,	
Counter-Claimants,	
vs.	
GYPSUM RESOURCES, LLC, a Nevada limited liability company,	
Counter-Defendant.	

ORDER ON MOTION (1) FOR DETERMINATION THAT THE CLAIMS AT ISSUE ARE NOT CORE MATTERS FOR WHICH THE BANKRUPTCY COURT MAY ISSUE FINAL RELIEF; (2) FOR DETERMINATION OF RIGHT TO JURY TRIAL ON DEFENDANTS' COUNTERCLAIM; AND (3) TO RETURN THE CASE TO DISTRICT COURT FOR FINAL ADJUDICATION[1]

On August 18, 2021, the court heard the Motion (1) for Determination That The Claims at Issue Are Not Core Matters For Which The Bankruptcy Court May Issue Final Relief; (2) for Determination of Right to Jury Trial on Defendants' Counterclaim; and (3) to Return The Case to District Court For Final Adjudication ("Motion"). The Motion was filed by the Defendants and Counterclaimants in the above-captioned adversary proceeding and opposed by the Plaintiffs and Counterdefendants. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[2]

On May 17, 2019, Gypsum Resources, LLC ("Debtor") filed a civil complaint against Clark County ("County") and the Clark County Board of Commissioners ("Board"), collectively referred to as the "Defendants." The face of the civil complaint as well as the prayer included a jury demand. The Complaint was filed in the United States District Court for the District of Nevada ("USDC") and denominated Case No. 2:19-cv-00850-GMN-EJY ("USDC Case").[3] (Dkt. 1; AECF No. 1).[4]

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[1] In this Order, all references to "AECF" are to the numbers assigned to the documents filed in the above-captioned adversary proceeding. All references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "Local Rule" are to the Local Rules of Bankruptcy Practice for the District of Nevada. All references to "FRE" are to the Federal Rules of Evidence.

[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the dockets in the above-captioned adversary proceeding and Case No. 2:19-cv-00850-GMN-EJY filed in the United States District Court for the District of Nevada. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Lawson v. Klondex Mines Ltd., 2020 WL 1557468, at *5 (D. Nev. March 31, 2020); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

[3] All references to "Dkt." are to the documents filed in the USDC Case.

On July 26, 2019, Debtor filed a voluntary Chapter 11 petition in this bankruptcy court. (ECF No. 1).[5]

On August 26, 2019, Debtor filed its schedules of assets and liabilities ("Schedules") as well as its statement of financial affairs ("SOFA"). (ECF Nos. 106 and 107). The pending USDC Case was listed by the Debtor in Part 11 of its property Schedule "A/B" and in Part 3 of the SOFA.

On September 4, 2019, Debtor filed a motion in the USDC asking that the USDC Case be referred to this bankruptcy court ("Referral Motion"). (Dkt. 17; AECF No. 1).[6]

On October 22, 2019, Debtor and the County filed a stipulated joint discovery plan ("First Stipulated Discovery Plan"). (AECF No. 8). The First Stipulated Discovery Plan stated, *inter alia*, that a demand for jury trial had been made and that the Debtor does not consent to a jury trial before the bankruptcy judge under 28 U.S.C. § 157(e).

On November 7, 2019, the USDC entered an order granting in part and denying in part the Referral Motion ("USDC Referral Order"). (Dkt. 28; AECF Nos. 1 and 11). The USDC determined that the claims alleged in the USDC Case were at least "related to" this Chapter 11 proceeding and therefore referred it to this bankruptcy court.[7] The USDC also dismissed as moot

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[4] Neither the pleadings filed in connection with this action, nor the representations of any parties or their counsel, have suggested that the Debtor seeks damages or other relief against any individuals.

[5] A related Chapter 11 proceeding was commenced by Gypsum Resources Materials, LLC, denominated Case No. 19-14796-MKN. The two proceedings are jointly administered with the latter proceeding designated as the lead case.

[6] In this adversary proceeding, Debtor filed a "Notice of Reference to U.S. Bankruptcy Court" with respect to the USDC Case. (AECF No. 1). That notice described the USDC Case as the "removed Action" and asserted that the USDC Case is a core proceeding under, *inter alia*, 28 U.S.C. §157(b)(B). That provision, however, encompasses the allowance or disallowance of claims against the bankruptcy estate rather than claims by the bankruptcy estate against non-bankruptcy parties.

[7] Referral of the USDC Case to the bankruptcy court was made pursuant to 28 U.S.C. §1334(b). See USDC Referral Order at 1:19-21. Unlike removals of civil actions under 28 U.S.C. §1446(a), the 30-day remand deadline under 28 U.S.C. §1447(c) does not apply in this case.

the pending motions filed by the County and the Board. The USDC also concluded that it is for the bankruptcy court[8] to decide whether the claims are core or non-core matters within the meaning of 28 U.S.C. § 157(a),[9] citing Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 33 (2014).[10] See USDC Referral Order at 1:17-19.[11]

On February 10, 2020, Defendants filed in the bankruptcy court a motion seeking a judgment on the pleadings under Civil Rule 12(c) ("12(c) Motion"). (AECF No. 20).

On June 19, 2020, an order was entered by the bankruptcy court denying the 12(c) Motion ("12(c) Order"). (AECF No. 48).

On July 6, 2020, Debtor filed a Second Amended Complaint for Damages; Petition for Writ of Mandamus, and Damages ("SAC"), including a jury demand. (AECF No. 61).[12] A copy

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[8] While the magistrate judge concluded that the USDC Case involved core matters, the USDC rejected the conclusion as it is a determination to be made by the bankruptcy court.

[9] 28 U.S.C. §157(b)(2) provides a non-exclusive list of sixteen items that are core proceedings. The two broadest items are under subsection (A) "matters concerning the administration of the [bankruptcy] estate" and subsection (O) "other proceedings affecting the liquidation of assets of the [bankruptcy] estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims." In this Order, these provisions will be referenced as "Subsection (A)" and "Subsection (O)."

[10] The importance of the distinction was observed by the USDC: "The ultimate decision about a claim being 'core' or 'non-core' is crucial, because it establishes which claims the bankruptcy court can enter final judgment. *See Executive Benefits Ins. Agency*, 573 U.S. at 34…" USDC Referral Order at 1 n.1.

[11] According to a civil minute entry on November 16, 2019, the USDC Case has been stayed subject to periodic status reports. (Dkt. 29).

[12] The SAC asserts claims based on the eight legal theories alleged in the preceding complaint, but addresses the deficiencies raised in the 12(c) Order with respect to the equal protection and injunctive relief theories. The eight claims asserted by the Debtor now consist of: (1) Petition for Writ of Mandamus, (2) Equal Protection Violation, (3) Violation of 42 U.S.C. §1983, (4) Injunctive Relief, (5) Breach of Contract, (6) Breach of the Implied Covenant of Good Faith and Fair Dealing, (7) Inverse Condemnation, and (8) Pre-Condemnation Damages. The claims for breach of contract and breach of good faith and fair dealing are based on an alleged breach of a prior Stipulation and Settlement Agreement Pursuant to Court Ordered Settlement Conference ("Settlement Agreement"). The Settlement Agreement itself arose from a prior lawsuit commenced in the USDC on May 10, 2005, entitled Gypsum Resources, LLC v. Masto, et al., denominated Case No. CV-S-05-0583-RCJ-LRL ("2005 Federal Lawsuit"). A copy of the

of the prior Settlement Agreement is attached to the SAC. As discussed in note 12, supra, Debtor seeks mandamus, declaratory and injunctive relief, as well as various forms of damages, interest, attorneys' fees, and costs, arising from the Settlement Agreement.

On July 20, 2020, Defendants filed an answer to the SAC, which included a jury demand following the prayer. (AECF No. 64).

On August 10, 2020, Defendants filed a motion for leave to file a counterclaim. (AECF No. 66).

On September 18, 2020, an order was entered approving a second revised stipulated discovery plan and scheduling order ("Second Stipulated Scheduling Order"). (AECF No. 88). The revised discovery plan stated, *inter alia*, that a demand for jury trial had been made and that the Debtor does not consent to a jury trial before the bankruptcy judge under 28 U.S.C. §157(e). It further stated that all parties do not consent to the bankruptcy court entering a final judgment.[13] Additionally, it stated that the case should be ready for trial by approximately September 2021 and the trial should take approximately ten days.

On October 5, 2020, a Stipulated Confidentiality and Protective Order was entered. (AECF No. 89).

On November 23, 2020, an order was entered granting on an unopposed basis the Defendant's motion for leave to file a counterclaim.[14] (AECF No. 90).

Settlement Agreement is attached as Exhibit "1" to the SAC. An order approving the Settlement Agreement was entered by the USDC on May 18, 2010.

[13] As of the date of the Second Stipulated Scheduling Order, it is not clear whether the Debtor or the Defendants had complied with Local Rule 7012 in this adversary proceeding. That rule requires a party's first responsive pleading, motion, or paper to include a statement that the pleader does or does not consent to the bankruptcy judge entering a final judgment in a non-core matter. Although none of the parties apparently had filed a statement specifically addressing their consent or non-consent, they apparently stipulated that consent had not be given by all of them.

[14] Because the filing of a counterclaim was specifically requested and granted by the bankruptcy court, relief from the automatic stay was not required.

On November 30, 2020, Defendants filed a Counter-Claim Against Plaintiff Gypsum Resources, LLC ("Counterclaim"). (AECF No. 93).[15]

On December 23, 2020, Debtor filed an answer to the Counterclaim. (AECF No. 105).[16]

On April 15, 2021, an order was entered approving a stipulation to extend discovery deadlines, setting a bar date of August 19, 2021, for discovery to be completed, a bar date of September 20, 2021 for dispositive motions to be filed, and October 20, 2021 for a proposed pretrial order to be submitted. (AECF No. 109).

On April 23, 2021, Debtor filed a Motion to Compel Production of Documents Improperly Withheld for Privilege ("Compel Motion") (AECF No. 114).

On May 7, 2021, Defendants filed an opposition that included a countermotion seeking a protective order from the discovery sought by the Debtor ("Protective Motion"). (AECF No. 120).

On June 24, 2021, a hearing was conducted on both the Compel Motion and the Protective Motion.

On June 30, 2021, a memorandum decision was entered addressing both the Compel Motion and the Protective Motion ("Combined Decision").[17] (AECF No. 190).

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[15] The prayer of the Counterclaim seeks an award of compensatory and special damages, pre-judgment and post-judgment interest, other legal expenses, attorneys' fees and costs of suit. Defendants' general factual allegations are set forth in paragraphs 5 through 120 of their Counterclaim. Paragraphs 12 through 67 sets forth the Defendants' description of the Settlement Agreement between the parties. Based on the various additional allegations, Defendants assert two claims against the Debtor: breach of contract and breach of implied covenant of good faith and fair dealing with respect to the same Settlement Agreement. In other words, Defendants' claims based on their interpretation of the facts underlying Debtor's claims, and assert the same legal theories.

[16] As of December 23, 2020, Defendants had filed an answer to the SAC, and Debtor had filed an answer to the Counterclaim. As a result, the parties vigorously contest the merits of the claims and defenses alleged in both pleadings, but apparently no longer dispute the sufficiency of the pleadings. The breach of contract and breach of implied covenant of good faith and fair dealing claims alleged in the Counterclaim continue to be based on the same Settlement Agreement alleged in the SAC.

[17] The Combined Decision includes a more detailed discussion of the procedural history of the USDC Case as it has progressed through this adversary proceeding. Equally or perhaps

On July 15, 2021, Defendants filed the instant Motion. (AECF No. 202).

On August 4, 2021, Debtor filed an opposition to the instant Motion ("Opposition"). (AECF No. 208).

On August 11, 2021, Defendants filed their reply ("Reply"), along with a Declaration of Thomas D. Dillard, Jr. ("Dillard, Jr. Declaration"). (AECF No. 210).[18]

On August 12, 2021, Debtor filed a separate, amended motion under Civil Rule 45 to compel a significant, non-party witness in the USDC Case to provide further responses to a subpoena. (AECF No. 218).

DISCUSSION

As its title suggests, the instant Motion seeks two determinations, both of which affect whether the claims encompassed by this adversary proceeding should be referred back to the USDC. The first determination involves whether the claims in this proceeding are core matters. The second determination asks whether the Defendants have a right to jury trial on their Counterclaims. Local Rule 9015(e) provides that "Unless the assigned judge orders otherwise, all proceedings will continue in the bankruptcy court until the matter is ready for trial."

I. The Claims Asserted in the USDC Case Are Not Core Proceedings.

As to the first determination, it is not disputed that none of the claims alleged in the SAC or the Counterclaim arise under bankruptcy law nor do they arise in the Chapter 11 case. The USDC Case was commenced before the Debtor even sought bankruptcy relief and the claims

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more important, the Combined Decision and resulting orders addresses the bankruptcy court's ruling with respect to discovery and testimony for which Defendants have asserted a limitation under the legislative immunity doctrine. Separate orders based on the Combined Decision were entered contemporaneously. (AECF Nos. 191 and 192). The Combined Decision is incorporated by reference in the instant Order.

[18] On the same date, Debtor filed its Disclosure Statement in Connection with Second Amended Joint Chapter 11 Plan of Reorganization Dated August 11, 2021 ("Chapter 11 Disclosure Statement"). (ECF No. 1525). Debtor alleges that the value of its claims in the USDC Case ranges from $1,006,885,310.00 to $2,006,000,000.00, with an average value of $1,506,442,655.00. Based on this value as well as other assets, Debtor asserts that there will be net proceeds of $1,874,259,535.00 available to the Debtor after all claims are paid. See Chapter 11 Disclosure Statement at 29:20-22 and Liquidation Analysis attached as Exhibit "D."

alleged by the Debtor do not arise under bankruptcy law. Compare, e.g., In re Andrade-Garcia, 627 B.R. 158, 162 (Bankr. D. Nev. 2021)(core jurisdiction exists for claim objections arising under Section 502). Likewise, the counterclaims alleged by the Defendants arise out of the same transaction or occurrence as the Debtor's claims. As a result, Defendants' claims were compulsory counterclaims under Civil Rule 13(a) that had to be asserted in the USDC Case or they would be barred. See Combined Decision at 26:1-13. Under Bankruptcy Rule 7013, however, Defendants were not required to assert the counterclaims in this adversary proceeding, but they voluntarily chose to do so. See Combined Decision at 26:14-20. Under these circumstances, the counterclaims also do not arise in the Chapter 11 case even though Defendants filed the counterclaims after the Chapter 11 case was commenced. Compare, e.g., In re Aquino, 2021 WL 2144356, at *27 (Bankr. D. Nev. May 25, 2021)(core jurisdiction exists for Chapter 13 plan confirmation request, plan confirmation objection, and motion to dismiss that arise in the bankruptcy case).

As the USDC acknowledged, the claims alleged by the Debtor are related to the bankruptcy case. The same conclusion would apply to the claims alleged in the Counterclaim as they are based on the same transaction or occurrence. That the claims alleged are related to the bankruptcy case, however, does not dictate whether they are core or non-core matters within the meaning of 28 U.S.C. §157(b)(2). Debtor's claim for breach of contract as well as its claim for breach of implied covenant of good faith and fair dealing plainly arise under Nevada law. See 12(c) Order at 13:7 to 15:12. Defendants' counterclaims for breach of contract and breach of implied covenant of good faith and fair dealing, see note 15, supra, also arise under Nevada law. Debtor's remaining claims implicate rights asserted under non-bankruptcy federal law. See 12(c) Order at 9:15 to 13:6 and 15:13 to 23:25. All of the claims by the parties exist outside of bankruptcy and none of them implicate the fresh start and reorganization policies underlying bankruptcy relief.

All of the claims by the parties arguably implicate the catch-all descriptions of core matters described in Subsection (A) and Subsection (O). See note 9, supra.[19] But that is not enough. The Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") addressed the application of these provisions in Certain Underwriters at Lloyds, etc. v. GACN, Inc. (In re GACN, Inc.), 555 B.R. 684 (B.A.P. 9th Cir. 2016). In GACN, the Chapter 11 debtor in possession commenced an action against its insurer in state court alleging that the insurer had improperly failed to settle a wrongful termination claim. Id. at 688-89. Thereafter, the Chapter 11 debtor in possession filed an adversary proceeding against the insurer in the bankruptcy court seeking declaratory relief with respect to the same insurance policy. Id. at 689-90. When the insurer sought an order of abstention in the adversary proceeding, the bankruptcy court declined both mandatory and discretionary abstention on a finding that the post-petition declaratory relief action commenced in bankruptcy court was a core proceeding. Id. at 690. The BAP reversed.

Examining the guidance provided by prior decisions of the Ninth Circuit,[20] the BAP primarily considered whether the claims at issue arose from pre-bankruptcy conduct or post-bankruptcy conduct of the parties. Id. at 694-98.[21] Concluding that the Chapter 11 debtor's post-petition declaratory relief action was not a core proceeding, the BAP observed:

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[19] The magistrate judge's determination of core status was based solely on Subsection (A) and Subsection (O) and made no reference to the caselaw applying these provisions because the Debtor cited no caselaw in its motion. In its response to the instant Motion, Debtor again merely relies on Subsection (A) and Subsection (O) without discussion of the caselaw relevant to their application. See Opposition at 5:6 to 6:2. The USDC did not adopt the magistrate judge's determination. See note 8, supra. It is not entirely clear why the Debtor refers to the magistrate judge's report and recommendation as persuasive authority at all in response to the instant Motion. See Opposition at 3:1-13 & n.1.

[20] See GACN, 555 B.R. at 694, citing Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124 (9th Cir. 2010); Harris v. Wittman (In re Harris), 590 F.3d 730 (9th Cir. 2009); Maitland v. Mitchell (In re Harris Pine Mills), 44 F.3d 1431 (9th Cir. 1995); Piombo Corp. v. Castlerock Props. (In re Castlerock Props.), 781 F.2d 159 (9th Cir. 1986). Only the Castlerock Props. decision is even mentioned, albeit indirectly, in connection with the instant Motion. See Reply at 7 n.2.

[21] The claims at issue in GACN involved the parties' rights and obligations arising from an insurance policy governed by state law. 555 B.R. at 688-89. As required by 28 U.S.C. § 157(b)(3), the BAP's determination of core status was not made solely on the basis of state law.

> The underlying dispute solely concerns the parties' rights and liabilities under a prepetition insurance contract, which was entered into pursuant to state law rather than as a part of a bankruptcy case. Additionally, the insurer has not attempted to assert against GACN any sort of affirmative claim for relief challenging any aspect of GACN's performance of its statutory duties as a debtor in possession or other implicating core bankruptcy claims.

Id. at 698 (emphasis added). Harmonizing its conclusion with the catch-all implications of Subsection (A) and Subsection (O), the BAP further explained:

> We recognize and appreciate the major impact the declaratory relief action is having and will continue to have on GACN's bankruptcy case. It is not an exaggeration to say that GACN's prospects of a successful consensual reorganization depend on prevailing in that action. Nor are we disregarding the fact that the insurer's litigation position (that GACN forfeited it rights under the insurance contract by negotiating a postpetition settlement with the wrongful termination plaintiffs) challenges GACN's conduct as debtor in possession in administering the bankruptcy estate and impedes GACN from making further progress towards confirming a consensual chapter 11 plan.
>
> The catch is that none of these facts translate into core bankruptcy jurisdiction. The criteria for core jurisdiction…have been strictly construed by the Ninth Circuit in order to avoid a future Marathon-like constitutional problem. The facts of this case simply do not satisfy the Ninth Circuit's strict standards for core jurisdiction.

Id. (emphasis added).[22]

In the instant adversary proceeding, the USDC Case embodies claims based on federal and state law, but none of them are based on bankruptcy law. The Counterclaim was filed by the Defendants after commencement of the Chapter 11 proceeding, but all of the state law claims therein arose, if at all, prior to commencement of this bankruptcy case. Moreover, at the heart of the claims of both the Debtor and the Defendants is a Settlement Agreement reached in the 2005

In the present case, this court's conclusion also is not based solely on the presence or absence of state law claims raised by both the Debtor and the Defendants.

[22] The reference to a "Marathon-like constitutional problem" refers to the U.S. Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) where the Court addressed the constitutional authority of bankruptcy judges appointed under Article I of the Constitution to exercise judicial power conferred to judges appointed under Article III. To avoid constitutional limitations, Congress subsequently authorized Article I bankruptcy judges to enter final orders only in core matters described in 28 U.S.C. § 157(b)(2), and to recommend proposed findings of fact and conclusions of law to Article III district judges in non-core matters pursuant to 28 U.S.C. § 157(c)(1).

Federal Lawsuit and approved by the USDC in 2010. None of the claims asserted in the 2005 Federal Lawsuit were based on bankruptcy law and fourteen years later nothing has changed: none of the claims asserted in the SAC or the Counterclaim is based on bankruptcy law. Defendants have not filed a proof of claim seeking payment from the bankruptcy estate nor have the Defendants suggested that its Counterclaim should be treated as a proof of claim for purposes of a distribution to creditors. See Combined Decision at 26 n.37. In short, there is no suggestion in connection with the USDC Case, at any time, that the Debtor (or the Defendants for that matter) has engaged in post-petition conduct "implicating core bankruptcy claims."

As the BAP recognized in GACN, the outcome of litigation in another forum may well have significant impact in a Chapter 11 proceeding. In this case, the Debtor's most recent disclosures in support of a proposed Chapter 11 plan of reorganization assert that the estate's claims in the USDC Case have an "average value" of $1,506,442,655.00. See discussion at 7 n.18, supra. No one suggests that such a value, if realized, would not significantly impact the distributions on allowed claims in any proposed Chapter 11 plan of reorganization. But the prospect of such an impact is not a sufficient basis to treat this protracted litigation as a core proceeding absent some material relationship to bankruptcy law.

For these reasons, the court concludes that the claims presented in the USDC Case are not core matters within the meaning of Subsection (A) or Subsection (O), nor any other provision of 28 U.S.C. §157(b)(2). For the same reasons, the court concludes that the claims are not core matters based on items or circumstances not expressly included in 28 U.S.C. §157(b)(2).

Debtor alternatively argues that both the Debtor and the Defendants have consented to the bankruptcy court's entry of a final judgment regardless of whether core matters are involved. See Opposition at 6:5 to 7:26. The record indicates, however, that as of September 18, 2020, all of the parties may not have consented to the bankruptcy judge's entry of a final judgment. See Second Stipulated Scheduling Order at 3:25 ("All parties do not consent to this Court entering final judgment."). Until the Debtor filed its opposition to the instant Motion on August 4, 2021, the court is unaware of any assertion that any party has consented to entry of a final judgment. Only now, Debtor expressly represents that "Gypsum also has consented to the Bankruptcy

Court entering final orders or judgments in this action" Opposition at 7 n.3. Defendants maintain that they were unaware of Debtor's consent and more important, that Defendants never intended such consent. See Dillard, Jr. Declaration at ¶3. Based on the record, the court cannot conclude that express consent by the Defendants has occurred.

On the other hand, implied consent may be found based on the conduct of a party during a case. See Wellness Intern. Network, Ltd. v. Sharif, 135 S.Ct. 1932, 1947-48 (2015), citing Roell v. Withrow, 123 S.Ct. 1696 (2003). Any consent to a bankruptcy judge's entry of a final decision in non-core matters, however, must be knowing and voluntary. See Wellness Intern., 135 S.Ct. at 1948 n.13; Roell, 123 S.Ct. at 1703. Implying consent based on the conduct of the parties is intended to check "the risk of gamesmanship by depriving the parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." Roell, 123 S.Ct. at 1703 (emphasis added). Implied consent is dubious when the party is not a creditor of the bankruptcy estate. See Haase v. Rainsdon (In re Pringle), 495 B.R. 447, 459-60 (B.A.P. 9th Cir. 2013).

In the instant case, gamesmanship describes the conduct of the Debtor more than the Defendants: after stipulating that all parties have not consented to the entry of a final judgment, Debtor waited to withdraw its objection to the bankruptcy judge's authority until after it obtained a favorable discovery ruling on the Compel Motion and Protective Motion. Moreover, Debtor also has not previously consented to the bankruptcy judge presiding over a jury trial, see Second Stipulated Scheduling Order at 3:4-6 ("A demand for a jury trial has been made pursuant to Federal Rule of Civil Procedure 38(b), and in conformity with LR 9015, but plaintiff does not consent to a jury trial pursuant to 28 U.S.C. §157(e)."), until now. See Opposition at 2:17-19 and 8:14-15.[23] Defendants are not creditors in this bankruptcy proceeding and have not filed a proof of claim.[24] Under these circumstances, the court concludes that Defendants' objection is

[23] Remarkably, Debtor suggests that its own conduct impliedly waiving any objection to a jury trial in the bankruptcy court somehow should be imputed to the Defendants. See Opposition at 8:11-14.

[24] Debtor did not list the Defendants as creditors in its Schedules. In order to obtain a distribution from the Chapter 11 estate, Defendants are required to file a proof of claim. See 11

timely because the necessity to raise the objection did not arise until Debtor filed its opposition. More important, the only evidence currently before the court negates any inference of intentional relinquishment or abandonment of the right to object, and also overcomes any evidentiary presumption of consent that otherwise might apply.[25]

Thus, the court concludes that the claims raised by the parties are non-core matters for which consent by all parties to entry of a final judgment by the bankruptcy court is not present.

II. The Claims Asserted in the Counterclaim Are Subject to Jury Trial if Properly Demanded.

U.S.C. §501(a); Fed.R.Bankr.P. 3003(c)(2). There are no proofs of claim by the Defendants in the record. See Combined Decision at 26 n.37. If Defendants had filed a proof of claim, they might have consented to resolution of their claim as a core matter under 28 U.S.C. §157(b)(2)(B), and possibly may have waived a right to a jury trial in certain matters. See Langenkamp v. Culp, 498 U.S. 42, 44-45 (1990)(waiver of jury trial in preference action through the filing of a proof of claim). Because Defendants have not filed a proof of claim, implied consent to the bankruptcy court entering a final judgment on their counterclaims should not be found absent clear proof of knowing and voluntary consent.

[25] In adversary proceedings, Bankruptcy Rule 7008 requires that the complaint or counterclaim "contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court." Bankruptcy Rule 7012(b) also provides that a responsive pleading "shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court." Neither rule specifies a consequence to a party of a failure to comply. In Nevada, however, Local Rule 7008 and Local Rule 7012 both specify a consequence that is not included in the national rules: "Failure to do so constitutes consent to the matter being heard and final orders or judgment being entered by the bankruptcy court." It is not entirely clear that a local rule can supplant the inquiry required to avoid a constitutional issue: do all parties to the adversary proceeding knowingly and voluntarily consent to a non-Article III bankruptcy judge entering a final order or judgment in a non-core matter? This may be particularly true when Bankruptcy Rule 9029(b) requires that actual notice of a local rule requirement must exist before a sanction or other disadvantage may be imposed for noncompliance. In this case, it appears that both the Debtor and the Defendants may not have complied with the national or local bankruptcy rules. See note 13, supra. Local Rule 7016(c)(1) now addresses this situation: "Should any party fail to consent to the entry of final orders or judgments by the bankruptcy judge, then the bankruptcy court will, on motion of one of the parties or on the court's own motion, determine and enter an order on whether the proceeding is not subject to entry of final orders or judgments by the bankruptcy court, unless the district court withdraws the reference first." See also Motion at 5:15-19. Local Rule 7016(c) applies because this adversary proceeding was pending on January 1, 2021. See Local Rule 1001(b)(5). Thus, the language in the final sentences appearing in Local Rule 7008 and Local Rule 7012 are not dispositive of whether binding consent has been given.

No one disputes that the Debtor properly demanded a jury trial. In connection with the Compel Motion and the Protective Motion, the court previously expressed its view that the parties' respective damage claims based on contract, condemnation, and constitutional violation theories typically are determined by jury. See Combined Decision at 11 n.25. The court also expressed that the Debtor's claims for writ of mandamus as well as an injunction seek equitable relief which typically are determined by the presiding judge. Id.

The record reflects that a jury demand was made by the Debtor in the USDC Case before it was referred to the bankruptcy court. See discussion at 2, supra. A similar demand was made in the SAC. See Combined Decision at 4:5-7, 5:7-8, 6:4-5, and 6:15-17. The record also reflects that Defendants did include a jury demand in its answer to the SAC, but did not include a jury demand on the face or prayer of its Counterclaim. Additionally, the record reflects that the Debtor included a jury demand in its answer to the Counterclaim. In its response to the instant Motion, Debtor notes Defendants' failure to request a jury trial on the face of the Counterclaim, see Opposition at 8:1-10,[26] while Defendants assert that a jury trial can be requested under Civil Rule 39(b) on "any issue for which a jury might have been demanded." See Reply at 4:16-18.[27] Additionally, Debtor argues that the Defendants previously consented to a jury trial being conducted by the bankruptcy court and that the Debtor now specifically consents to a jury trial being conducted by the bankruptcy judge. See Opposition at 8:11-20.

As an initial matter, the court concludes that the Defendants have a right to jury trial on its contract-based counterclaims. Those claims assert legal rights to monetary damages rather

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[26] Debtor maintains that under Local Rule 9015(c), a jury demand "must appear immediately following the title of the complaint or answer containing the demand, or in another document as may be permitted by Fed.R.Civ. P. 38." Bankruptcy Rule 9015(a) provides that Civil Rule 38 and Civil Rule 39 apply in bankruptcy cases and proceedings. Civil Rule 38(b)(1) requires that the party demanding a jury trial must serve "the other parties with a written demand – which may be included in a pleading – no later than 14 days after the last pleading directed to the issue is served…" (emphasis added). Nothing in Bankruptcy Rule 9015(a) nor Civil Rule 38 requires a jury demand to be included on face of a complaint or answer.

[27] Regardless of whether the Defendants request a jury on the Counterclaim under Civil Rule 39(b), it appears that the Debtor and the Defendants have demanded a jury in connection with the SAC, and that at least the Debtor demanded a jury trial on the Counterclaim.

than equitable rights, and historically are within the province of a jury. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989). The court would reach the same conclusion with respect to the Debtor's contract claims. In fact, Debtor itself maintains that it has a right to jury trial on its claims, apparently including its contract claims. See Opposition at 8:1-22. More important, the court is not inclined to find a waiver of the Seventh Amendment right to jury trial in civil matters, absent a knowing and voluntary waiver. See In re County of Orange, 784 F.3d 520, 523 (9th Cir. 2015), citing Palmer v. Valdez, 560 F.3d 965, 968 (9th Cir. 2009); see also Migliore v. Dental Fix Rx, LLC, 2016 WL 7655768, at *3 (C.D. Cal. July 22, 2016)("[C]ourts 'must indulge every reasonable presumption against the waiver of the jury trial.'").

Despite their failure to include a jury demand on the face of their Counterclaim or the prayer, Defendants may be able to file a fully noticed motion for a jury trial under Civil Rule 39(b). At such time, Debtor can raise any appropriate objection and may assert any argument asserting a waiver. For purposes of the instant Motion, however, the court only concludes that the Counterclaim alleges claims for which the Defendants have a right to jury trial.

As a practical matter, the parties' diverging positions may be much ado about nothing. Apparently, Debtor intends to go to trial on its contract-based legal claims while the Defendants also will proceed on their similar theories. Given that the contract-based claims of both sides depend on the same Settlement Agreement, it is not entirely clear how the common evidence would be presented separately and the facts determined separately by a jury and a judge without risking inconsistent results. Unless the Debtor abandons its contract claims that are based on the Settlement Agreement, the admission of the same evidence is likely to occur and the competing allegations of breach are likely to be made. Counsel are encouraged to resolve this aspect of their contentious litigation.

III. The USDC Case Should Proceed Before the USDC.

In connection with the Compel Motion and the Protective Motion, the court previously questioned why the Debtor sought to have the USDC Case referred to the bankruptcy court. See Combined Decision at 7 n.13. No satisfactory answer is apparent.

No one suggests that any of the claims raised by any of the parties cannot be tried before the USDC. No one suggests that all of the claims would not have been tried before the USDC absent the requested referral to the bankruptcy court. No one suggests that the outcome of the USDC Case, given the types of relief and amount of the monetary relief sought, as well as the sixteen year litigation history between the parties, is not likely to be appealed. No one suggests that the core and non-core distinction would even be material if the asserted claims are tried before the USDC. No one suggests that the right to a jury trial of the legal claims, or the use of an advisory jury for other claims, would be a material concern if all of the claims are tried before the USDC.

The court is deeply concerned that the Debtor filed its motion seeking to refer the USDC Case as a core matter under Subsection (A) and Subsection (O) without ever citing the applicable caselaw to the magistrate judge or the district judge. The court also is concerned that both parties shift their litigation positions regardless of whether it implicates unnecessary constitutional issues that only multiply the prospects of appeal. These concerns would not exist if the USDC Case had remained with the USDC.

Under Local Rule 9015(e), the court concludes that further proceedings in the bankruptcy court should be abated to allow the USDC to determine whether to vacate the USDC Referral Order.[28] Defendants cite no authority, however, for a bankruptcy court to disregard a referral from a district court. Nor have Defendants cited authority for a bankruptcy court to simply return a referred matter back to a district court as if it was a hot potato. While bankruptcy court can enter proposed findings of fact and conclusions of law in appropriate circumstances in non-core matters, see 28 U.S.C. §157(c)(1), the process functions raised by the instant Motion are not such matters.

[28] Local Rule 9015(e) also provides that upon the bankruptcy court's certification of a party's timely demand and right to a jury trial, and if all parties have not consented to a jury trial in the bankruptcy court, the district court will open a new civil matter and assign a date for trial. Because the USDC Case was commenced before the bankruptcy petitions were filed, it does not appear that a new civil matter needs to be opened. At the appropriate time, a separate certification order can be entered.

Under these circumstances, the court concludes that a stay of further proceedings is appropriate to permit the Defendants to seek relief from the USDC to have the instant civil action return to that forum. To the extent that relief from the automatic stay is required for the Defendants to do so, such relief will be granted. In the event the USDC concludes that further proceedings in this civil action should take place before the bankruptcy court, such proceedings will be rescheduled.

IT IS THEREFORE ORDERED that the Motion (1) for Determination That The Claims at Issue Are Not Core Matters For Which The Bankruptcy Court May Issue Final Relief; (2) for Determination of Right to Jury Trial on Defendants' Counterclaim; and (3) to Return The Case to District Court For Final Adjudication, Adversary Docket No. 202, be, and the same hereby is, **GRANTED in part and DENIED in part as provided below**.

IT IS FURTHER ORDERED AND DETERMINED that the claims alleged by the Plaintiff and Defendants in the above-captioned proceedings are non-core matters within the meaning of 28 U.S.C. §157(b) and that consent to have the bankruptcy court enter a final judgment on such claims has not been given.

IT IS FURTHER ORDERED AND DETERMINED that the right to jury trial applies to the counterclaims alleged by the Defendants without prejudice to further determination of whether Defendants have properly asserted such right.

IT IS FURTHER ORDERED that except with respect to the court's disposition of the Debtor's amended motion to compel, etc., filed as Adversary Docket No. 218, all other matters in this adversary proceeding shall be stayed for a period not to exceed 60 days to permit Defendants to seek an order from the United States District Court for the District of Nevada in Case No. 2:19-cv-00850-GMN-EJY, to withdraw or modify its prior order referring the matter to the bankruptcy court. To the extent necessary, relief from stay is granted for cause under 11 U.S.C. §362(d)(1) to permit Defendants to seek such an order.

IT IS FURTHER ORDERED that a telephonic status conference in this adversary proceeding shall be held on **November 24, 2021, at 9:30 a.m.** Prior to the status conference, the parties **shall file a joint status report** regarding any relief sought or obtained from the United

States District Court for the District of Nevada. In the event the United States District Court determines that this matter should remain before the bankruptcy court, counsel must be prepared to discuss the appropriate dates for any currently pending matters to be rescheduled for hearing.

IT IS SO ORDERED.

Copy sent via CM/ECF ELECTRONIC FILING

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