

**Memorandum Summarizing Procedures With Respect
To Withdrawal Of The Reference Of Bankruptcy
Matters From The United States Bankruptcy Court
To The United States District Court In Maryland**

Prepared by:

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MEMORANDUM

SUBJECT: Handling of Bankruptcy Matters Involving Withdrawal of Reference

Introduction

This Memorandum is intended to be a useful guide to the procedures and practice involved in withdrawal of the reference of bankruptcy matters from the United States Bankruptcy Court to the United States District Court in Maryland. It is, however, not intended to be an exhaustive treatment of the subject and should not be used as a substitute for attorneys doing their own research and reviewing carefully all applicable statutes, rules and case law.

Background

Congress vested all original jurisdiction over bankruptcy cases in the United States District Court. 28 U.S.C. § 1334(a). Congress further provided that the District Court could refer all cases in bankruptcy and any and all proceedings arising under, in, or related to cases in bankruptcy, to the Bankruptcy Court. 28 U.S.C. § 157(a). The United States District Court for the District of Maryland has referred all cases under the Bankruptcy Code and all proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code to the United States Bankruptcy Court. See Maryland U.S. District Court Standing Order 2012-05 dated July 24, 2012, amending Rule 402, Rules of the United States District Court (Maryland) (hereinafter referred to as "District Court Local Rule"). Accordingly, until and unless the reference of jurisdiction to the Bankruptcy Court is withdrawn by an Order of the District Court, all jurisdiction over bankruptcy matters resides with the Bankruptcy Court.

Statutory and Rule Provisions With Respect to Withdrawal of Reference

28 U.S.C. § 157(d) provides as follows:

- (d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that

resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

As set forth in § 157(d), the District Court has the authority to withdraw the entire bankruptcy case, or any part thereof, or any proceeding in the bankruptcy case or part thereof. The District Court can exercise its authority to withdraw cases or proceedings on its own motion or on timely motion of any party, for cause shown. This authority is sometimes referred to as discretionary withdrawal of the reference.

28 U.S.C. § 157(d) also provides for what is often called mandatory withdrawal of the reference. Pursuant to the second sentence of § 157(d), the District Court shall, on timely motion of a party, withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both the Bankruptcy Code and other federal laws regulating organizations or activities affecting interstate commerce. Note that the mandatory withdrawal of reference is only applicable to proceedings in the bankruptcy case and only on timely motion of a party, not on the District Court's own motion.

Bankruptcy Rule 5011 ("Withdrawal and Abstention from Hearing a Proceeding") provides in pertinent part as follows:

- (a) *Withdrawal.* A motion for withdrawal of a case or proceeding shall be heard by a district judge.

...

- (c) *Effect of Filing of Motion for Withdrawal or Abstention.* The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. §1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district judge shall be on such terms and conditions as the judge deems proper.

District Court Local Rule 405 ("Rules of procedure for withdrawal of reference") provides as follows:

1. **General rule.** When a case or proceeding has been referred by this Court to the Bankruptcy Court, all documents and pleadings in or related to such case or proceeding shall be filed with the Clerk in the Bankruptcy Court.

2. **Withdrawal of reference of bankruptcy case or proceeding.**

a. Filing of motion for withdrawal of reference with bankruptcy clerk. A motion pursuant to 28 U.S.C. § 157(d) and Bankruptcy Rule 5011 to withdraw the reference of any bankruptcy case, contested matter or adversary proceeding referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and Local Rule 402 shall be filed with the Clerk in the Bankruptcy Court. If the motion requests withdrawal of only a portion of the case, a contested matter, or a portion of an adversary proceeding, the motion shall be accompanied by the filing of a designation of the documents and pleadings filed in the case or proceeding to which the motion relates.

b. Withdrawal of reference of bankruptcy cases. A motion to withdraw the reference of a case to the Bankruptcy Court must be timely filed, and in any event, before the case is closed.

c. Withdrawal of reference of adversary proceeding or contested matter. A motion to withdraw an adversary proceeding or a contested matter in a case which has been referred to the Bankruptcy Court must be filed by the earlier of fourteen (14) days before the date scheduled for the first hearing on the merits; and

i. in the case of an adversary proceeding, within twenty-one (21) days after the last pleading is permitted to be filed pursuant to Bankruptcy Rule 7012; or

ii. in the case of a contested matter, within twenty-one (21) days after the last responsive pleading or memorandum in opposition is permitted to be filed pursuant to Local Bankruptcy Rule 9013-1(b)(3).

3. Filing of pleadings after reference withdrawn.

a. If the reference of an entire case has been withdrawn from the Bankruptcy Court to the District Court, all pleadings and documents in or related to such case shall be thereafter filed with the Clerk in the District Court.

b. Where the reference of only a portion of an entire case has been withdrawn, pleadings and documents with respect to the case (including any parts thereof that have been withdrawn or transferred) shall continue to be filed with the Clerk in the Bankruptcy Court. Any pleadings and documents which relate to any parts of the case which have been withdrawn or transferred to the District Court shall also be filed with the Clerk of the District Court. The Clerk of the Bankruptcy Court shall keep a separate docket sheet of those pleadings and documents filed in the portion of the case that has been transferred to the District Court.

c. Upon withdrawal or transfer of any complaint to the District Court, the plaintiff may forward to the defendant a notice and request to waive service of summons or the Clerk shall issue a District Court summons pursuant to Fed. R. Civ. 4(d) unless either of the aforementioned has already occurred pursuant to the Bankruptcy Rules.

d. This subsection (d) governs personal injury tort and wrongful death claims which must be tried in the District Court pursuant to 28 U.S.C. § 157(b)(5). Except for the procedures contained within this subsection, personal injury tort and wrongful death proceedings shall be filed with the Clerk in the Bankruptcy Court. However, beneath the bankruptcy number, the pleading or other document shall designate the pleading or document as a "SECTION 157(b)(5) MATTER." When filing a complaint a completed District Court civil cover sheet (A.O. Form JS-44c) should be submitted beneath the Bankruptcy Court cover sheet required by Local Bankruptcy Rule 7003-1. No summons shall be issued until the proceeding is transferred to the District Court. Upon filing the complaint, the Clerk in the Bankruptcy Court shall immediately transfer the proceeding to the District Court and plaintiff may send to the defendant(s) a notice and request to waive service of summons pursuant to Fed. R. Civ. P. 4(d) or the Clerk of the District Court shall issue a summons.

4. **Motions concerning venue in bankruptcy cases and proceedings.** All motions concerning venue in cases arising under Title 11 or arising in or related to cases under Title 11 shall be determined by the Bankruptcy Court, except in those cases to be tried in the District Court pursuant to 28 U.S.C. § 157(b)(5).

See also Local Bankruptcy Rule 5011-2, which provides in pertinent part as follows:

A motion for withdrawal of reference is governed by Local Rule 405.2 of the United States District Court for the District of Maryland.

Filing of Pleadings Before Withdrawal of Reference

In accordance with District Court Local Rules 402 and 405.1, all papers and pleadings in, or related to a bankruptcy case or proceeding, shall be filed with the Clerk of the Bankruptcy Court. Until an Order is entered by the District Court removing the reference from the Bankruptcy Court for all or part of a matter, the Clerk of the District Court will not accept the filing of any pleadings or papers in any bankruptcy-related matter. Unless the party filing a paper or pleading in the Bankruptcy Court is exempt from electronic filing,¹ all papers and pleadings should be filed in the Bankruptcy Court electronically through the CM/ECF system.

Filing of a Motion to Withdraw Reference

A party on timely motion or the District Court upon its own motion may withdraw, in whole or in part, any case or proceeding pending in the Bankruptcy Court for cause shown. The party's motion to withdraw the reference must be filed in the Bankruptcy Court. If the motion requests withdrawal of only a portion of the case, contested matter or adversary proceeding, the motion shall be accompanied by the filing of a designation of the documents and pleadings filed in the case or proceeding to which the motion relates. After the filing of a response or the expiration of the response time period, if no response is filed, the Bankruptcy Clerk shall transmit the motion to the District Clerk's office. The transmittal shall include copies of the motion and any response thereto and the transmittal form for a motion

¹ Parties who are representing themselves (*pro se*), other than those who are members of the Bar of the Bankruptcy Court, are exempt from the electronic filing requirements and should file their papers and pleadings with the Clerk of the Bankruptcy Court in paper format.

for withdrawal of reference. As set forth in Bankruptcy Rule 5011(a), the motion for withdrawal of reference will be decided by the District Court.

Unless and until the motion for withdrawal of reference is granted by Order of the District Court, the only matter over which the District Court will exercise jurisdiction is the motion for withdrawal of reference. Until the reference is actually withdrawn, the original referral of jurisdiction (District Court Local Rule 402) remains in place. Accordingly, while the motion for withdrawal of reference is pending, pleadings and papers in or related to the bankruptcy case shall continue to be filed with the Bankruptcy Court. After the motion to withdraw reference has been transmitted to the District Clerk, the Bankruptcy Clerk shall send copies of any additional filings concerning the motion to withdraw reference to the District Clerk. Until the reference is withdrawn, the Bankruptcy Court shall continue to handle all matters in the bankruptcy case including adversary proceedings and contested matters in such case.

Timeliness of Motion to Withdraw Reference

As set forth in 28 U.S.C. §157(d) and District Court Local Rule 405.2.b, a party's motion to withdraw the reference must be timely filed. "Timeliness is the first inquiry in evaluating a motion to withdraw reference under 28 U.S.C. § 157(d)." Roberson v. Ford Motor Credit Company, LLC, 2011 WL 1740534, 2011 U.S. Dist. LEXIS 46665, n.2 (D. Md. 2011) (denying motion to withdraw reference as untimely). With respect to motions to withdraw the reference of the bankruptcy case itself, the District Court Local Rule further provides that the motion must be filed before the case is closed. With respect to motions to withdraw the reference of adversary proceedings or contested matters, District Court Local Rule 405.2.c provides that such motion must be filed by the earlier of fourteen (14) days before the date scheduled for the first hearing on the merits and, in the case of an adversary proceeding, within twenty-one (21) days after the last pleading is permitted to be filed pursuant to Bankruptcy Rule 7012, or, in the case of a contested matter, within twenty-one (21) days after the last responsive pleading or memorandum in opposition is permitted to be filed pursuant to Local Bankruptcy Rule 9013-1(b)(3).

Mandatory and Discretionary Withdrawal of Reference

As noted above, pursuant to 28 U.S.C. § 157(d), the authority for a District Court to withdraw the reference is divided into two parts, mandatory withdrawal of the reference ("if the court determines that resolution of the proceeding requires consideration of both title 11 [the Bankruptcy Code] and other laws of the United States regulating organizations or activities

affecting interstate commerce”) and discretionary withdrawal of the reference (“for cause shown”).

With respect to mandatory withdrawal of the reference, the statutory language appears to be quite broad. Nevertheless, it has been observed that “[t]he great weight of the case law interpreting § 157(d) holds that this seemingly broad language concerning mandatory withdrawal should be narrowly read. . . . The fact that resolution of the matters in question calls merely for consideration or application of both bankruptcy law and other federal laws is plainly insufficient, in that mandatory withdrawal should only be made where substantial and material consideration of non-bankruptcy statutes is necessary in the case.” In re Merryweather Importers, Inc., 179 B.R. 61, 62 (D. Md. 1995). Thus, mandatory withdrawal has been denied in cases involving “straightforward application of federal statutes to a particular set of facts. . . . By contrast, cases involving federal questions that are complex or are of first impression must be withdrawn from reference.” Id. at 62.

With respect to discretionary withdrawal of the reference (sometimes called permissive withdrawal), the statutory test is “for cause shown.” Cases have recognized that the District Court has broad discretion in deciding whether the reference should be withdrawn for cause shown. See In re Millennium Studios, Inc., 286 B.R. 300, 303 (D. Md. 2002). Among the factors to be considered by the court is whether the matter at issue between the parties is “core” within the meaning of 28 U.S.C. § 157(b)(2) and the constitutional constraints identified by the U.S. Supreme Court in Stern v. Marshall, 564 U.S. ___, 131 S. Ct. 2594 (2011).² Other factors to consider are

² As the Supreme Court ruled in Stern v. Marshall, a proceeding may be “core” within the meaning of the statute (in Stern v. Marshall, § 157(b)(2)(C)), but the Bankruptcy Court may not have the power to enter a final order or judgment in such proceeding under the Constitution. If a party raises a question concerning the jurisdiction of the Bankruptcy Court to enter final orders or judgments as a basis for seeking withdrawal of the reference, this would be a factor for the District Court to consider in deciding the withdrawal motion.

With respect to the power of a Maryland bankruptcy judge to enter a final order or judgment and review by the District Court of orders or judgments entered by the Bankruptcy Court, see Maryland U.S. District Court Standing Order 2012-05 dated July 24, 2012, which provides in pertinent part as follows:

If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this Order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any ruling of the bankruptcy court as proposed findings of fact or conclusions of law in the event the district court concludes that the bankruptcy judge could not have

“the uniformity of bankruptcy administration, forum shopping and confusion of fora, conservation of creditor and debtor resources, expediency of the bankruptcy proceeding, and the fact that only equitable issues are posed, not requiring a jury trial but falling within the traditional equitable powers of the bankruptcy judge as chancellor.” In re Millennium Studios, Inc., 286 B.R. at 303; In re EquiMed, Inc., 259 B.R. 269, 273 (D. Md. 2001); In re Merryweather Importers, Inc., 179 B.R. at 63; Roberson v. Ford Motor Credit Company, LLC, *supra*. Additional factors identified also include whether withdrawal “would promote judicial economy and the economic use of the parties’ resources.” In re EquiMed, Inc., 254 B.R. 347, 351 (D. Md. 2000). Finally, it has been stated that it is the movant’s burden to show cause for discretionary withdrawal of the reference. See In re Millennium Studios, Inc., 286 B.R. at 303-304.

Procedure in the Event that Entire Matter is Withdrawn

If the District Court grants the motion for withdrawal of reference, it shall enter an order providing for the same. A copy of said order shall immediately be transmitted to the Clerk of the Bankruptcy Court. If the reference of jurisdiction for the entire bankruptcy case or adversary proceeding is withdrawn by the District Court’s Order, all pleadings and papers in or related to such case or adversary proceeding shall thereafter be filed exclusively with the Clerk of the District Court. District Court Local Rule 405.3.a.

Procedure in the Event that Part of a Matter is Withdrawn

If the Order of the District Court withdraws the reference for less than the entire case or less than an entire adversary proceeding (for example, resolution of a contested matter), all pleadings and papers with respect to that bankruptcy case or adversary proceeding (specifically including those pleadings relating to the withdrawn matter) must continue to be filed with the Clerk of the Bankruptcy Court. In addition, counsel shall electronically file copies of all pleadings and documents relating to any parts of the case which have been withdrawn with the Clerk of the District Court through the CM/ECF system.³ Local District Court Rule 405.3.b.

entered a final order or judgment consistent with Article III of the United States Constitution.

³ The District Court also requires counsel to submit a paper courtesy copy of any document which, including attachments, is fifteen pages or longer.

Personal Injury and Wrongful Death Claims

Any personal injury or wrongful death claim filed in a bankruptcy case, or related to a bankruptcy case, shall be filed in the Bankruptcy Court. Local District Court Rule 405.3.d. The pleading shall contain a designation: "SECTION 157(b)(5) MATTER" and, if such pleading is a complaint, shall be accompanied by both a Bankruptcy Cover Sheet and a District Court Civil Cover Sheet. After docketing the initial pleading, the Clerk of the Bankruptcy Court shall forthwith transmit the matter to the Clerk of the District Court including a copy of the pleading, the District Court Civil Cover Sheet and a transmittal form. The Clerk of the District Court shall issue any necessary summons and the matter shall thereafter proceed in the District Court.

Final Orders of the District Court

If the District Court denies the motion to withdraw the reference, the Clerk of the District Court shall docket such order and forthwith transmit a copy of the docketed order to the Clerk of the Bankruptcy Court, after which the District Court file shall be closed. The Clerk of the Bankruptcy Court shall docket the order upon receipt from the Clerk of the District Court in the bankruptcy case or adversary proceeding in which the motion was filed.

With respect to a matter where reference has been withdrawn by the District Court, at such time as the District Court by final order decides such matter, the Clerk of the District Court shall docket the order of the District Court and forthwith transmit a copy of the docketed order to the Clerk of the Bankruptcy Court. The Clerk of the Bankruptcy Court shall docket the order in the case or adversary proceeding in which the motion to withdraw reference was filed.

Jury Adversary Proceedings That Must be Tried by the District Court

With respect to jury trials, 28 U.S.C. § 157(e) provides as follows:

(e) if the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

In addition, 28 U.S.C. § 1411 (Jury trials) provides as follows:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

A discussion of the circumstances in which a right to a jury trial exists in a particular adversary proceeding or other matter is beyond the scope of this Memorandum.

With respect to the procedure applicable to jury trials, Bankruptcy Rule 9015(b) provides as follows:

(b) *Consent to Have Trial Conducted by Bankruptcy Judge.* If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F.R.Civ. P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.

Local Bankruptcy Rule 9015-1 provides as follows:

A statement of consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) must be filed before the conclusion of the initial pretrial conference.

With respect to the procedure for requesting a jury trial in a bankruptcy proceeding, Local District Court Rule 406 (Jury trial) provides as follows:

1. **Demand.** In any bankruptcy proceeding any party may demand a trial by jury of any issue triable of right by jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than fourteen

(14) days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Bankruptcy Rule 9015. Such demand may be indorsed upon a pleading of the party. If the adversary proceeding is one that has been removed from another court, any demand previously made under the rules of that court shall constitute a demand for trial by jury under this rule.

2. Specification of issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within fourteen (14) days after service of the demand or such lesser time as the Court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

3. Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

4. Consent to jury trial before the United States Bankruptcy Judge. Pursuant to 28 U.S.C. § 157(e), with the consent of the parties, a District Judge may designate a Bankruptcy Judge to conduct a jury trial.

A. No Motion to Withdraw Filed.

When an adversary proceeding is filed in which a party rightfully claims a right to trial by jury and the bankruptcy judge is not designated, or the parties have not consented to have the jury trial conducted by the Bankruptcy Judge, unless the complaint is accompanied by a motion to withdraw the reference, all jurisdiction over the adversary proceeding remains with the Bankruptcy Court until the reference is later withdrawn. Accordingly, all pleadings must continue to be filed with the Clerk of the Bankruptcy Court and all matters to be resolved within the adversary proceeding, short of trial, remain before the Bankruptcy Judge. Included in such matters to be resolved by the Bankruptcy Court, are disputes between the parties as to the right to trial by jury.

B. Motion to Withdraw Reference Filed, but Denied at Outset of Adversary Proceeding.

If the complaint or answer is accompanied by a timely filed motion to withdraw reference under District Court Local Rule 405.2.c, the procedures discussed above shall be followed for the disposition of the motion to withdraw reference. An early motion to withdraw the reference may be denied without prejudice to refile the motion when the case is trial ready. See In re Stansbury Poplar Place, Inc., 13 F.3d 122 (4th Cir. 1993); Furniture Rentors of America v. NYNex Information Resources Co., 162 B.R. 728 (D. Md. 1994). If the motion for withdrawal of the reference is denied at an early stage in the adversary proceeding and therefore the adversary proceeding remains for pre-trial purposes with the Bankruptcy Court, jurisdiction over the adversary proceeding remains with the Bankruptcy Court until a motion is granted withdrawing the reference of the adversary proceeding.

C. Pre-Trial Phase.

The pre-trial phase of the adversary proceeding shall encompass the period of time allowed for discovery and the filing of and decision on all dispositive motions. At the time that discovery has been completed, any dispositive motions ruled upon, and the adversary proceeding is otherwise ready to be scheduled for trial, the pre-trial phase of the adversary proceeding is completed.

D. Withdrawal of Reference for Trial

If the reference has not been withdrawn by Order of the District Court prior to the completion of the pre-trial phase of the adversary proceeding, at the end of the pre-trial phase of the adversary proceeding the Bankruptcy Court shall issue a summary report and recommendation to the District Court, recommending that the reference be withdrawn so that the trial by jury may go forward in the District Court. This report and recommendation shall be docketed in the adversary proceeding by the Clerk of the Bankruptcy Court and a copy transmitted to the Clerk of the District Court for action by the District Court upon the report and recommendation. If the District Court agrees that the reference should be withdrawn at that time, the District Court will enter an Order withdrawing the reference and transmit a copy of the Order to the Clerk of the Bankruptcy Court. Upon entry of an Order withdrawing the reference, all jurisdiction over the adversary proceeding shall be in the District Court and the Bankruptcy Court shall have no further authority to act in the adversary proceeding. All pleadings thereafter shall be filed with the Clerk of the District Court.

Miscellaneous

The transmission of a motion for withdrawal of the reference should not be delayed by the Clerk of the Bankruptcy Court pending the issuance of any report and recommendation by the Bankruptcy Court. Where it deems it appropriate, the Bankruptcy Court may provide such a report and recommendation to the District Court, or the District Court may request such a report and recommendation from the Bankruptcy Court, for any motion for withdrawal of the reference.