UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
GORDON PROPERTIES, LLC,	)	**Case No. 09-18086-RGM**
CONDOMINIUM SERVICES, INC.,	)	(Jointly Administered)
Debtors.	)	
HOWARD SOBOL, et al.,	)	
Plaintiffs,	)	
v.	)	**Adv. Pro. No. 12-1562-RGM**
BRYAN SELLS, et al.,	)	
Defendants.	)	

MOTION AND MEMORANDUM IN SUPPORT OF
MOTION TO REMAND AND/OR TO ABSTAIN

Plaintiffs Howard Sobol, Dewanda F. Cuadros, F.J. Pepper, Connie King, Steven Greenberg, Marietta Jones, Elizabeth Moore, Stephen Langone, Betty Gilliam, Evelyn Cantrell and Abdon Alexandre Zoghaib (collectively "Plaintiffs"), by counsel, individually, and derivatively on behalf of First Owners Association of Forty Six Hundred Condominium, Inc. ("FOA"), pursuant to 28 U.S.C. § 1334(c), 28 U.S.C. § 1452(b) and Federal Rules of Bankruptcy

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Procedure 9027(d), and in support of their Motion to Remand and/or to Abstain and to return this matter to the Circuit Court for the City of Alexandria (the "State Court"), state as follows.

INTRODUCTION

This proceeding was commenced by the removal from the State Court by Lindsay Wilson as "representative" of Gordon Properties, LLC ("Gordon Properties" or "Debtor") of the case known as *Howard Sobel, et al. v. Bryan Sells, et al.*, Case No. CL 12005183 (the "Removed Matter" or "State Court Action"), in which Bryan Sells, Elizabeth Greenwell and Lindsay Wilson are individually named as defendants ("Defendants"). Gordon Properties is not named as a defendant in the State Court Action. Instead, the focus of the State Court Action is the actions of Sells, Greenwell, and Wilson as members of FOA's Board of Directors participating in decisions in which they have a direct interest due to their status as 3 of the 4 members of Gordon Properties. Specifically, Plaintiffs challenge the validity of Sells', Wilson's and Greenwell's votes to replace the members of the Special Litigation Committee that has the authority to direct the litigation and claims against Gordon Properties and CSI and their votes to hire Condominium Services, Inc. ("CSI") as the managing agent for FOA. Without the votes of Sells, Wilson and Greenwell, the composition of the Special Litigation Committee would not have been changed and CSI would not have been hired as FOA's managing agent. Plaintiffs contend, as alleged in the State Court Action, that Sells, Wilson and Greenwell were prohibited as a matter of state law from voting on these matters and that the actions taken as a result of their votes were *ultra vires* and invalid. Plaintiffs filed a Motion for Preliminary Injunction to have these decisions – i.e. replacing the Special Litigation Committee and hiring CSI – declared invalid and to enjoin Sells, Wilson and Greenwell from voting on future matters that involve Gordon Properties and CSI. The State Court scheduled a hearing on the Motion for Preliminary Injunction for December 7,

2012 at 10:00 AM. Lindsay Wilson, as "representative" of Gordon Properties filed a Notice of Removal with the State Court at 3:32 PM on December 6, 2012.

As argued below, the removal of the State Court Action – in which neither Gordon Properties nor CSI are named defendants – was improper because that action involves pure issues of state law and does not address or attempt to address any issues previously decided or now pending before this Court in the Gordon Properties or CSI bankruptcy cases. Contrary to the baseless allegation in the Notice of Removal, Plaintiffs are not seeking to re-litigate this Court's denial of FOA's claim in the Gordon Properties' bankruptcy or any other matter relating to that proceeding. Rather, the issue in the State Court Action is the fiduciary obligation of Sells, Wilson and Greenwell as members of FOA's Board of Directors and whether they have violated those duties.[1] The removal of the State Court Action is without any basis as it involves no issues that would allow this court to divest the State Court of jurisdiction over purely state law issues regarding the proper conduct of members of a board of directors of a Virginia nonstock corporation under the Virginia Nonstock Corporation Act. Accordingly, this Court should forthwith remand this matter back to the State Court.

BACKGROUND

I. THE PARTIES

Plaintiffs are unit owners of the Forty Six Hundred Condominium (the "Condominium") and as such are members of FOA. FOA is a Virginia nonstock corporation that is the unit owners' association for the Condominium. Gordon Properties is a Virginia limited liability

[1] In Count I there is an inadvertent reference to the removal of Sells, Wilson and Greenwell as members of FOA's Board. It was and is not the intent of the Plaintiffs to seek their removal as this issue is pending before Judge Ellis. Plaintiffs will amend their Complaint to delete this request for relief as it was not Plaintiff's intent to ask the State Court to decide that issue.

company that owns approximately 38 units in the Condominium that commenced the underlying bankruptcy proceeding more than three years ago. Sells, Wilson and Greenwell are three of the four members of Gordon Properties with Mr. Sells acting as the managing member. CSI, a Virginia Corporation, is wholly owned by Gordon Properties and Mr. Sells is the chief executive officer of CSI. Mr. Sells is also currently the President of FOA, Ms. Greenwell is the Vice-President of FOA, and Ms. Wilson is the Treasurer of FOA.

II. THE DISPUTE

In June of this year, the Board of Directors of FOA ("Board") appointed a Special Litigation Committee ("First Special Litigation Committee") to oversee and direct FOA's disputes and litigation matters with and against Gordon Properties and CSI. The First Special Litigation Committee was comprised of Betty Gilliam, Jane Brungart and Alec Zoghaib. The First Special Litigation Committee hired independent counsel, John Donelan, and took steps to protect the interests of FOA by hiring counsel including Reed Smith and LeClairRyan. This committee was appointed by a majority of disinterested directors.

On October 3, 2012, FOA held its 2012 annual meeting at which three of the seven seats on the FOA Board were up for election. The seats of Sells, Greenwell and Wilson were not up for election since they were "elected" in 2011 to two year terms. Upon information and belief, in advance of the 2012 Annual Meeting, Gordon Properties purchased both votes and proxies and used its votes in order to elect candidates hand-picked by Gordon Properties: Martina Hernandez and William Reichenbach. Jonathan Halls – who has no connection to Gordon Properties – was also elected to the Board.

After the conclusion of the 2012 Annual Meeting, at or around 11:00 pm, Sells called an unplanned meeting of the newly-elected Board. No prior notice of this meeting was provided.

Therefore, two of the seven Board members, Lucia Hadley and Mr. Reichenbach, were not in attendance. Wasting no time in acting in their own self-interest, Sells, Greenwell, and Wilson voted to terminate the First Special Litigation Committee and to appoint a new committee comprised of Ms. Hernandez, Ms. Brungart and Mr. Reichenbach ("Second Special Litigation Committee"). Excluding the votes of Sells, Greenwell and Wilson, the vote on that motion was 1-1 with Ms. Hernandez immediately showing her loyalty to Gordon Properties by voting in favor of the motion. Mr. Halls voted against it. But for the votes of Sells, Wilson and Greenwell, the motion would not have passed. Thus, the Board members who are also members of Gordon Properties were able to select those who on behalf of FOA would make decisions concerning the claims against Gordon Properties and CSI.

The newly and improperly appointed Second Special Litigation Committee immediately showed its loyalty to Gordon Properties by terminating Reed Smith and LeClairRyan as counsel for FOA. This was done against the advice of counsel, Mr. Donelan, and left FOA without any representation in this matter and the matters that are currently on appeal before Judge Ellis and Judge Brinkema. Upon receiving notice from the newly constituted Second Special Litigation Committee that their services had been terminated, Reed Smith and LeClairRyan filed motions to withdraw as FOA's counsel in the appeals pending before the District Court and in the CSI and Gordon Properties Bankruptcies. The motions to withdraw are still pending before Judge Ellis. The motions were granted by Judge Brinkema and Reed Smith and LeClairRyan were permitted to withdraw as FOA's counsel in that litigation. However, the actions of the Gordon Properties/CSI appointed Second Special Litigation Committee did not go unnoticed by the Court. In granting these motions, the Honorable Leonie M. Brinkema stated that she was "terribly troubled by the manner in which this litigation is being conducted" by FOA's new

Board. Judge Brinkema explained that the new Board's decision to terminate Reed Smith and LeClairRyan is "extremely unfortunate…because any new counsel will need to spend a great deal of time to become familiar with the background and issues in this litigation. That process will impose additional, and in this Court's opinion, completely unnecessary costs on [FOA]." (Withdrawal Order, attached as Exhibit 1.)

At the same time that its newly-appointed Second Special Litigation Committee was terminating counsel for FOA, Gordon Properties requested this Court to order mediation between FOA and Gordon Properties, which the Court granted. The implications of this action are that the Gordon Properties/CSI appointed Second Special Litigation Committee has the authority to negotiate on behalf of FOA and ostensibly settle all claims against Gordon Properties. Thus, Sells, Wilson, and Greenwell used their position on FOA's Board to appoint those who will negotiate against companies that they own and control—CSI and Gordon Properties.

In addition to setting up the committee with which it will negotiate, the Gordon Properties/CSI-controlled Board also voted to rehire CSI as FOA's managing agent. This is the same CSI that stole money from FOA and that owes FOA over $450,000 based on the judgment entered against CSI and in favor of FOA. Of course, the vote was 5-2 with Sells, Greenwell, Wilson, Hernandez and Reichenbach voting in favor and the remaining two Board members, Lucia Hadley and Jonathan Halls, voting against it. But for the members of Gordon Properties – which owns CSI – voting in favor, the motion would have failed.

As members of FOA's Board, Sells, Wilson and Greenwell owe a "duty of care" and a "duty of loyalty" to FOA. The duty of care requires FOA's Board members to perform their duties in accordance with the best interests of FOA. The duty of loyalty prohibits FOA's Board members from using their positions to secure personal profit or other personal advantage at the

expense of FOA or its members. Sells, Greenwell and Wilson breached these duties when they used their positions on the Board to cause FOA to approve a series of self-dealing transactions, including the appointment of a Second Special Litigation Committee and the rehiring of CSI, designed to enrich themselves, Gordon Properties and CSI, all to the detriment of FOA and its other members.

Faced with the foregoing facts, Plaintiffs filed the State Court Action to ask the State Court to declare whether the actions of Sells, Wilson and Greenwell, in voting on the appointment of the Second Special Litigation Committee and the rehiring of CSI, were contrary to state law and *ultra vires*. The State Court Action also seeks a declaration as to whether Sells, Wilson and Greenwell can properly vote on future matters that come before the FOA Board that affect Gordon Properties and/or CSI. None of these issues provide a basis for this Court to displace the jurisdiction of the State Court.

III. THE REMOVED MATTER

On November 29, 2012, Plaintiff commenced a declaratory judgment action against Defendants in the State Court Action, Civil Action No. CL12005183, asking, among other things, the State Court to declare that (1) Sells, Wilson, and Greenwell be enjoined from voting on any matters involving any of the claims or disputes between FOA, CSI and Gordon Properties because they are interested Board members, (2) the Second Special Litigation Committee was improperly appointed and that the First Special Litigation Committee should be re-empaneled, and (3) the appointment of CSI as managing agent is *ultra vires* and void.

Plaintiffs also filed a Motion for a Preliminary Injunction with its complaint for declaratory judgment in an effort to ensure judicial guidance before the Second Special Litigation Committee could settle all claims between FOA and Gordon Properties and CSI. The

State Court set an expedited hearing on the Motion for Preliminary Injunction for December 7, 2012 at 10:00 AM. That Motion, the Notice of Hearing and the Complaint were served on the Defendants and were also provided via email to Michael Zupan, Esq. and Donald E. King, Esq., counsel to Gordon Properties in the Bankruptcy Court and in some of the state court actions.

ARGUMENT

I. STANDARD OF REVIEW

"On a motion to remand, it is well settled that the burden is on the removing party to establish that the requirements of removal are met." *Insight Holding Group, LLC v. Sitnasuak Native Corp.*, 685 F. Supp. 2d 582, 585 (E.D. Va. 2010). Thus, Lindsay Wilson, as the representative of Gordon Properties and as the removing party, bears the burden of proof that this Court has jurisdiction to hear the matter, among other requirements. Further, "[i]t is well-established that federal courts 'are obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated' and that 'if federal jurisdiction is doubtful, a remand to state court is necessary.'" *Lee v. CitiMortgage, Inc.*, 739 F.Supp. 2d 940, 942 (E.D. Va. Sept. 15, 2010) (citations omitted).

Under 28 U.S.C. § 1334(a), the district courts have jurisdiction of Title 11 cases, referred to as "core" proceedings. Under § 1334(b), district courts also have jurisdiction of civil proceedings "arising under," "arising in" and "related to" Title 11 cases. The Court may abstain from hearing cases otherwise falling within § 1334(a) and § 1334(b) "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1). The Court must abstain from hearing such cases if federal jurisdiction is predicated on § 1334 and the case can be timely adjudicated in state court. 28 U.S.C. § 1334(c)(2). Further, this Court may remand any removed claim or cause of action "on any equitable ground." 28 U.S.C. § 1452(b).

II. LINDSAY WILSON AND INDIRECTLY GORDON PROPERTIES DO NOT HAVE THE RIGHT TO REMOVE THE STATE COURT ACTION TO THIS COURT.

Under a plain reading of the applicable removal statute (28 U.S.C. § 1452), Wilson and indirectly Gordon Properties are *not* entitled to remove Plaintiffs' declaratory judgment action to this Court because Lindsay Wilson is *not* a party to any proceeding before the bankruptcy court and Gordon Properties is *not* a party to the State Court Action. Section 1452 provides in pertinent part that a "***party*** may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending if such district court has jurisdiction of the such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a) (emphasis added). Section 1334 grants this Court jurisdiction over only those proceedings brought pursuant to Chapter 11 of the Bankruptcy Code. At no time has Wilson (or Sells or Greenwell for that matter) filed for bankruptcy. As such, Wilson's reliance upon Section 1452 as the basis for her removal of the State Court Action is improper and this matter must be remanded.

Nor is there any authority to support Wilson's claim that she can remove this matter pursuant to Section 1452 as the representative of Gordon Properties. It is well settled in the Fourth Circuit that "[r]emoval statutes, in particular, must be strictly construed, inasmuch as the removal of cases from state to federal court raises significant federalism concerns." *Barbour v. Int'l Union*, 640 F.3d 599, 605 (4th Cir. 2011); *see also Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that *they scrupulously confine their own jurisdiction to the precise limits which the statute has defined*.") (Emphasis added). "Where federal jurisdiction is doubtful, a remand to state court has traditionally been considered the proper course of action." *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994).

Section 1452 is clear that only a "party" to the action can effectuate a removal. *See* 28 U.S.C. § 1452. The definition of the term "party" was narrowly construed in *In re John Tilley v. G&C Construction* Corp, 42 B.R. 827, 829 (E.D.Va. 1984), involving the analogous removal statute 28 U.S.C. § 1478 (repealed) which permitted a "party" to "remove any claim or cause of action in a civil action…to the bankruptcy court for the district court where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.").

In *Tilley*, the bankruptcy court was asked to abstain from hearing and to remand to state court two separate but related lawsuits that were filed against the debtor and a company owned by him. One of the lawsuits was filed against the Tilleys and the other suit was filed against the WAT Company—a company owned and operated by the Tilleys. The Tilleys removed the suit against the WAT Company on the basis that they were its representative, which—according to them—made them a party to that suit and provided a basis for removal. The court remanded the action filed against the WAT Company after finding that the Tilleys were not "parties" in the action brought against their company. In doing so, the Court explained:

> Although the Tilleys own and operate W.A.T. Company, this nexus is insufficient for purposes of removal jurisdiction under § 1478(a). A corporation is a separate and independent entity apart from those who may control the actual operations of the corporation. *See, Terry Yancy,* 344 F.2d 789 (4th Cir. 1965). Because the Tilleys were not parties to [the lawsuit against the W.A.T. Company] the Application for Removal filed with this Court had no effect in bringing that case before this Court. *See KFC Corporation v. Milton,* 27 B.R. 158 (E.D. Va. 1983). Thus, with respect to [the lawsuit against the W.A.T. Company], the Court concludes that it has not been removed and remains in the breast of the Circuit Court of King George County.

Id. at 829.

Here, just as in *Tilley*, the Removed Matter was filed against Sells, Wilson and Greenwell as individuals—not Gordon Properties, CSI or any other company they own, control or operate.

The fact that the Removed Action seeks relief against one or more of Gordon Properties' members does not make Gordon Properties a "party" to the Removed Action. As explained above, it is well settled that there "is a substantial difference between the individual and the debtor corporations he owns [or controls]." *KFC Corporation*, 27 B.R. at 160. Because Gordon Properties is not a party to the Removed Action, Wilson's removal based on her relationship to Gordon Properties is improper and this matter should be immediately remanded to the state court for adjudication.

Other courts have applied similar narrow interpretations of removal statutes while construing the scope of other analogous general removal statutes (28 U.S.C. § 1441) that used the term "defendant" to define who may remove. For example, the United States Supreme Court has held that in light of the fact that the "interpretation of removal statutes call[s] for strict construction" even the original plaintiff may not remove a counterclaim to federal court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) (interpreting the predecessor statute to 28 U.S.C. § 1441 that also used the term "defendant"). Since the *Shamrock* decision, legions of cases in the Fourth Circuit and elsewhere have construed the removal statutory scheme narrowly to limit the right of general removal (in non-bankruptcy actions) to only defendants named in the original state court action. *E.g.*, *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) (third party defendants may not remove under 28 U.S.C. § 1441(a)); *Cross Country Bank v. McGraw*, 321 F. Supp. 2d 816, 821-22 (S.D. W. Va. 2004) (same); *Galen-Med, Inc. v. Owens*, 41 F. Supp. 2d 611, 614 (W.D. Va. 1999) (same).

The admonishment from the courts to strictly construe the removal statutes applies with equal force to § 1452. In seeking to remove Plaintiffs' declaratory judgment action against the Defendants, Wilson and Gordon Properties are essentially taking the position that this Court may

exercise jurisdiction over any state court action that may have any supposed tangential effect on Gordon Properties, however attenuated. For example, if Plaintiffs were to bring a declaratory judgment action seeking to determine the validity of any action by FOA's Board of Directors, under Gordon Properties' view it would have the right to remove *that* lawsuit to this Court. Such a result would be an absurd construction of the removal statute and would amount to an impermissible exercise of jurisdiction by this Court. Moreover, this is the exact construction that this Court previously rejected in *Tilley* and *KFC*. For these reasons, the matter should be remanded to the State Court.

Lastly, there is no legal basis for Gordon Properties to contend that it should be allowed to remove this matter as the real-party-in-interest because the Defendants are members of Gordon Properties. This argument is disingenuous at best, has no legal basis for the reasons set forth above, and should be rejected. Plaintiffs initiated their declaratory judgment action in the Alexandria Circuit Court against the Defendants as members of the Board. That Ms. Wilson is Gordon Properties' representative on the Board does not relieve her of her personal obligation as an individual member of the Board to comply with her fiduciary duties. Her loyalty as a Board member is owed to FOA and its members, not to Gordon Properties. She has either complied with her personal obligations as a Board member or not. Thus, Gordon Properties is not the "real party" in interest. Whether Ms. Wilson complied with her fiduciary obligations as a Board member has nothing to do with Gordon Properties. Plaintiffs do *not* seek any relief or damages from Gordon Properties nor do Plaintiffs seek to re-litigate Gordon Properties' right to representation on the Board. There is simply no basis for Gordon Properties "real party" in interest argument.

Moreover, any decision by the State Court concerning (1) the validity of the appointment of the Second Special Litigation Committee, (2) the ability of Sells, Wilson and Greenwell to vote on matters relating to the dispute between FOA and Gordon Properties and CSI, or (3) their votes to rehire CSI, would not have any effect on Gordon Properties. Plaintiffs' lawsuit against Defendants has nothing to do with Gordon Properties. No factual basis exists for Gordon Properties to claim that it is the "real party in interest", or for this matter to proceed in this Court. Therefore, a remand to the State Court is proper.

IV. THIS COURT LACKS JURISDICTION AND CONSTITUTIONAL AUTHORITY OVER PLAINTIFFS' DECLARATORY JUDGMENT CLAIM AGAINST DEFENDANTS.

This Court has neither jurisdiction over, nor constitutional authority to hear, Plaintiffs' declaratory judgment claim against Defendants.

The United States Supreme Court recently held that the bankruptcy courts are not constitutionally vested with the authority to hear a state law counterclaim brought by a debtor against a proof of claim claimant, even if such counterclaim constitutes a core proceeding under 28 U.S.C. § 157. *Stern v. Marshall*, _ U.S. _, 131 S. Ct. 2594, 2609 (2011). In reaching its holding, the Court cited to its prior decision in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) that held that because bankruptcy courts are not Article III courts, assignment of state-law contract claims against entities not otherwise part of the bankruptcy proceeding "violate[d] Art. III of the Constitution." *Id.* (citing *Northern Pipeline*, 458 U.S. at 91). Applying the *Northern Pipeline* holding to the facts of *Stern*, the Court held that the debtor's tortious interference counterclaim against the proof of claim claimant, although related to the bankruptcy proceeding, "is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling only on the creditor's proof of claim in bankruptcy." *Id.* at 2611. As such, the bankruptcy court's constitutional authority to enter a

final judgment in it was lacking. *Id.* at 2620. Plainly, this Court lacks the constitutional authority to hear Plaintiffs' claim against Defendants. The nexus between Plaintiffs' claim and the bankruptcy action is even more attenuated that that in the *Stern* case: Gordon Properties is not even a party to the state law declaratory judgment claim. On this basis, this Court should remand to the State Court.

Leaving aside this Court's lack of constitutional authority over Plaintiffs' claim, this Court may only exercise jurisdiction over Plaintiffs' declaratory judgment action against Defendants if Wilson and Gordon Properties can show that a basis exists under 28 U.S.C. § 1334. Section 1334 confers jurisdiction on district courts over civil actions that arise in Title 11 cases or arise under Title 11 or are related to a Title 11 case. Plainly, FOA's declaratory judgment action neither arises under, nor in, a Title 11 case. Plaintiffs' action "would have existed whether or not the Debtor filed bankruptcy." *Valley Historic Limited Partnership v. Bank of New York*, 486 F.3d 831, 836 (4th Cir. 2007) (rejecting debtor's argument that certain claims fell under the court's "arising in" jurisdiction where those claims would have existed regardless of debtor's bankruptcy filing).

In order to invoke this Court's "related to" jurisdiction, Wilson and Gordon Properties must show that a "close nexus" exists between the bankruptcy petition and Plaintiffs' complaint for declaratory judgment against Defendants. *Valley Historic Limited Partnership v. Bank of New York*, 486 F.3d at 837; *In re Harlan*, 402 B.R. 703, 711 (W.D.Va. 2009) ("'Related to' jurisdiction 'is not so broad as to encompass litigation of claims arising under state law or non-bankruptcy Federal law that will not have an effect on the bankruptcy estate, simply because one of the litigants filed a petition in bankruptcy.'") (citations omitted). (In this case none of the litigants has filed for bankruptcy.) Here, no such nexus exist. Having members of the Board act

in accordance with their fiduciary obligations is not "related to" Gordon Properties' bankruptcy proceeding. Clearly, Gordon Properties cannot insist on members of FOA acting contrary to their fiduciary obligations to benefit Gordon Properties. The determination of whether members of the Board acted in keeping with their fiduciary obligations is not related to the Gordon Properties' bankruptcy and is a matter for the State Court.

Even if Plaintiffs' complaint for declaratory judgment against Defendants "related to" the bankruptcy proceedings, "the jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is not without limit." *In re Klavan*, 297 B.R. 474, 477 (E.D.Va. 2002) (finding that resolution of pending state law claims would have no impact on debtor's chapter 7 estate). The Removed Matter does not assert that Gordon Properties (or CSI) owes any new debts, nor does it assert any causes of actions against Gordon Properties. Plaintiffs seek to enjoin Sells, Wilson, and Greenwell from committing any further breach of the fiduciary duties they owe to FOA and ask the state court to re-empanel the First Special Litigation Committee that Sells, Greenwell and Wilson improperly voted to disband. Enjoining Sells, Greenwell, and Wilson, as members of FOA's Board, from further violating FOA's By-laws, Virginia's Condominium Act, Virginia's Nonstock Corporation Act, and common law fiduciary duties all involve claims arising under state law that will not have any impact on Gordon Properties or CSI's bankruptcy actions. To hold otherwise, would require the Court to ignore the holding in *Stern*. As such, this Court does not even have "related to" jurisdiction over the matter. FOA's complaint must be remanded.

V. EVEN IF THIS COURT HAD JURISDICTION AND/OR CONSTITUTIONAL AUTHORITY TO HEAR THE REMOVED MATTER, PLAINTIFFS' DECLARATORY JUDGMENT ACTION AGAINST DEFENDANTS WOULD NOT BE A CORE PROCEEDING

Contrary to Gordon Properties' baseless assertion, Plaintiffs' declaratory judgment action would not be a core proceeding to the bankruptcy case, even assuming jurisdiction existed.

Despite its burden, Wilson and Gordon Properties failed to present any facts to support their baseless conclusion. *See* Notice of Removal ¶ 4.

"Core" proceedings are those claims that "would not exist in law absent the Bankruptcy Code." *In re Landbank Equity Corporation*, 77 B.R. 44, 47 (E.D.Va. 1987) (abstaining and finding that the Bankruptcy Court erred in ruling that the claims at issue were "core" proceedings). Under 28 U.S.C. § 157, the Court "may hear and determine all cases under Title 11 and all core proceedings arising under Title 11." 28 U.S.C. § 157(b)(1). Gordon Properties claims that the removed action is a core proceeding because it is a matter concerning the administration of the estate. *See* Notice of Removal ¶ 4 *citing* 28 U.S.C. § 157(b)(2) (A).

Given that Plaintiffs' declaratory judgment action was brought not against Gordon Properties, Plaintiffs' claims clearly exist outside the bankruptcy proceedings. *See In re Red Ash*, 83 B.R. 399, 400 (W.D. Va. 1988) (noting that a claim against a nonparty to the bankruptcy is not a core proceeding). As set forth above, because the outcome of the declaratory judgment action would not have any effect on Gordon Properties, any claim that the removed action is a "matter concerning the administration of the state" is baseless. Nor is the State Court Action "related to" the bankruptcy proceeding. This Court has held that "related cases" should not be swept "under the 'core' umbrella merely by alleging that a recovery would benefit the estate, otherwise there would be no 'related' cases at all." *In re Landbank*, 77 B.R. at 48. Gordon Properties simply cannot show that Plaintiffs' declaratory judgment action is a core proceeding. The Removed Matter should be remanded to the State Court.

In any event, Plaintiff does not consent to this Court entering a final order in this matter.

VI. EVEN IF LINDSAY WILSON AND GORDON PROPERTIES COULD SATISFY THEIR BURDEN TO SHOW THAT REMOVAL IS PROPER, MANDATORY ABSTENTION IS APPROPRIATE.

Even assuming that Wilson and Gordon Properties could overcome the insurmountable jurisdictional hurdles confronting removal (which it cannot), this Court should still abstain from hearing Plaintiffs' declaratory judgment action under § 1334. Under 28 U.S.C. § 1334(c)(2), the requirements for mandatory abstention are:

> (1) a party to the proceeding files a timely motion to abstain; (2) the proceeding is based upon a state law claim or state law cause of action; (3) the proceeding is a "non-core, but related to" proceeding (not "arising under" Title 11); (4) the proceeding is one which could not have been commenced in a federal court absent jurisdiction under § 1334; (5) an action is commenced and can be timely adjudicated in state court.

Massey Energy Co. v. West Virginia Consumers for Justice, 351 B.R. 348, 350 (E.D. Va. 2006) (citing *In re Seven Springs, Inc.*, 148 B.R. 815 (E.D. Va. 1992) (citing 28 U.S.C. § 1334)); *see also Wheeling-Pittsburgh Corp. v. American Ins. Co.*, 267 B.R. 535, 538 (N.D.W.V. 2001) (finding that the mandatory abstention statute applied and remanding the matter to state court).

In this case, all of the elements are present. As to the first element, Wilson filed her Notice of Removal on December 6, 2012 and this Motion was filed a mere 6 days later. Second, Plaintiffs' declaratory judgment action is based on state law and state law causes of action, namely Virginia's declaratory judgment statute (Virginia Code § 8.01-184), over which this Court has already stated it has no jurisdiction. Plaintiffs' complaint seeks a determination of its rights *vis a vis* the actions of three individual members of the Board of Directors of FOA, all nonparties to the bankruptcy proceedings. Fourth, there are no allegations that federal law is implicated, nor are the parties diverse, therefore, there is no basis for federal jurisdiction absent a finding of jurisdiction under § 1334.

Finally, the fifth element is present as well. Prior to Wilson's removal, Plaintiff filed a motion for an expedited hearing on its complaint for declaratory judgment. That motion was

scheduled to be heard on December 7, 2012. As recognized in *Massey*, the relevant inquiry under the fifth requirement is not whether the federal court will dispense with the Removed Matter more quickly than the Circuit Court for the City of Alexandria. Rather, the proper inquiry is whether the Removed Matter will be timely adjudicated in state court. 351 B.R. at 352; *see also Wheeling-Pittsburgh Corp. v. American Ins. Co.*, 267 B.R. 535, 538 (N.D.W.V. 2001) (holding that the Court "must abstain from hearing a non-core, related matter if the action can be timely adjudicated in state court."). Accordingly, all five requirements for mandatory abstention are present here and this Court should grant FOA's Motion.

VII. ALTERNATIVELY, THIS COURT SHOULD EXERCISE PERMISSIVE ABSTENTION.

Even if this Court finds that the mandatory abstention provision of § 1334(c)(2) is inapplicable, the Court nonetheless should abstain under the permissive provisions of § 1334(c)(1). The *Massey* Court found that abstention was appropriate because the requirements for mandatory abstention existed and that permissive abstention provided an alternative basis for remanding the claims. 351 B.R. at 353 (holding that abstention was appropriate: "in the interest of comity with State courts and respect for State law").

VIII. EQUITABLE GROUNDS EXIST FOR REMAND.

This Court properly may consider equitable grounds when deciding this Motion. 28 U.S.C. § 1452(b) ("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."). Equitable grounds include reducing forum shopping and confusion, conservation of resources and judicial economy. *See, e.g.*, *In re Landbank Equity Corporation*, 77 B.R. at 49. Even if this Court finds that the Removed Action is "related to" the bankruptcy proceeding ***and*** chooses not to abstain from the Removed Matter, the Court still may remand the Removed Action on equitable grounds. *Massey*, 351 B.R. at 350.

Wilson's Notice of Removal with respect to the Removed Matter simply is another example of impermissible forum shopping. Moreover, "Congress has indicated a strong preference for allowing state law claimants to litigate their disputes in state courts rather than the bankruptcy courts." *In re The Steingold Companies, Ltd*., 960 F.2d 147 (4th Cir. 1992). Given the legislative preference, the fact that the State Court can timely adjudicate these claims, comity with state law, judicial economy and other equitable considerations, the Removed Action should be remanded to the Circuit Court for the City of Alexandria.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court enter an Order: (1) granting this Motion; (2) remanding this matter to the Circuit Court for the City of Alexandria, Virginia, where it was pending as Civil Action No. CL12005183 and (3) awarding Plaintiff such further relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of December, 2012, caused a copy of the foregoing to be served electronically through the CM/ECF system upon all persons entering their appearance and requesting notice in this adversary proceeding.

/s/ Alison R.W. Toepp
Alison R.W. Toepp