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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ML LIQUIDATING TRUST, as successor-in-interest to Mortgages, Ltd. Plaintiff, vs. MAYER HOFFMAN MCCANN, P.C., a Missouri professional corporation; CBIZ, Inc., a Delaware corporation; CBIZ MHM, LLC, a Delaware limited liability company, Defendants.	Case No. 2:10-cv-02019-MHM **PLAINTIFF'S MOTION TO REMAND TO STATE COURT AND SUPPORTING MEMORANDUM OF LAW**

On August 26, 2010, Plaintiff ML Liquidating Trust (hereinafter "Plaintiff" or the "Trust") filed state law claims against Defendants Mayer Hoffman McCann, P.C., CBIZ, Inc., and CBIZ MHM, LLC (collectively "Defendants") in Maricopa County Superior Court and demanded a jury trial.

On September 21, 2010 Defendants filed a Notice of Removal, claiming removal was appropriate on two grounds. Defendants seek removal on the basis that the claim "relates to" the Mortgages Ltd's (hereinafter "ML") Chapter 11 proceeding pursuant to 28 U.S.C. § 1334 (b). In order to invoke bankruptcy "related to" jurisdiction in a post-confirmation context, Defendants must satisfy the "close nexus" test as adopted by the Ninth Circuit in *In Re*

Pegasus Gold Corp., 394 F.3d 1189, 1194 (2005). Specifically, Defendants must demonstrate that there is a "close nexus" between Plaintiff's claims and the bankruptcy plan. Defendants cannot meet this burden.

Second, even if bankruptcy-related or diversity jurisdiction exists in this case, this Court should exercise its authority to remand on equitable grounds pursuant to 28 U.S.C. § 1452. The existence of an alternate basis of jurisdiction is just one factor to be considered in deciding whether to remand on equitable grounds. Here all of those factors weigh heavily in favor of equitably remanding this action to state court.

Defendants also seek removal based on the mere allegation that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332. Defendants have failed to meet their burden of establishing that complete diversity exists for purposes of invoking diversity jurisdiction, as unanswered questions of fact exist regarding Defendants' true principal place of business which, according to publicly available information, may be in one of a number of locations. At a minimum, Plaintiff should be given the opportunity to conduct discovery to determine the true location of Defendants' principal place of business.

II. THE TRUST'S FACTUAL ALLEGATIONS AND CLAIMS.

Plaintiff ML Liquidating Trust was created pursuant to the Investors Committee's First Amended Chapter 1 Plan of Reorganization (the "Plan"). (Complaint ¶ 1.) Pursuant to the Plan, Plaintiff has been given the rights to ML's "Non-Loan Assets" which includes any causes of action that ML may have had against Defendants. (First Amended Plan, 6.6.) As Defendants acknowledges, the Plan was confirmed by the Bankruptcy Court for the District of Arizona on May 20, 2009. (*Id.*)

This suit arises out of Defendants' failed audits of ML. For many years Defendants had been engaged by ML to audit the financial statements of ML and its affiliates. (Complaint ¶ 33.) Defendants promised ML each year that it would conduct its audits in accordance with generally accepted auditing standards ("GAAS"), that it would alert ML to any deficiencies in ML's internal controls which it discovered during its audits, and that it would "advise [ML] about appropriate accounting principles and their application." (Complaint ¶ 46.) As reflected in Defendants' workpapers, Defendants undertook each of its audits with knowledge that ML would be relying heavily upon Defendants expertise to ensure that ML's financial statements accurately reflected ML's financial condition under generally accepted accounting principles ("GAAP"). (Complaint ¶¶ 51-57.)

As alleged in Plaintiff's Complaint, the audits of ML's financial statements for the fiscal years ended 2004 through 2007 violated GAAP and GAAS in numerous respects. Notwithstanding these audit failures, each year Defendant issued an audit report in which it represented to ML that it had, in fact, performed its audits in accordance with GAAS and that ML's financial statements were prepared in conformity with GAAP. (Complaint ¶ 115.) Plaintiff alleges that Defendants knew or should have known that these representations made at the conclusion of each of its 2005, 2006, and 2007 audits were materially false and misleading. (Complaint ¶¶ 115-16.) Defendants' wrongful conduct and misrepresentations concealed ML's true financial condition, thereby artificially prolonging its existence and deepening ML's insolvency. (Complaint ¶¶ 123-126.)

Plaintiff has asserted Arizona state law claims against Defendants for professional malpractice, negligent misrepresentation and breach of contract. None of Plaintiff's claims relate in any way whatsoever to the plan of reorganization or to ML's bankruptcy proceeding

nor do they depend in any way upon the construction or interpretation of the plan of reorganization.

III. THIS MATTER MUST BE REMANDED BECAUSE DEFENDANTS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THE EXISTENCE OF SUBJECT MATTER JURISDICTION.

Courts in the Ninth Circuit "strictly construe the removal statute against removal jurisdiction." *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Id.* Because "it is to be presumed that a cause lies outside the limited jurisdiction of the federal courts," the Ninth Circuit has further held that "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Hunter v. Phillips*, 582 F.3d 1039, 1042 (9th Cir. 2000). Indeed, "the strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Gaus*, 980 F.2d at 566. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

Defendants have not met their burden. Thus this suit should be remanded back to state court.

A. Defendant Has Not Demonstrated The Existence Of "Related To" Jurisdiction Under The "Close Nexus" Test.

Defendants claim that Plaintiff's suit is related to ML's "pending bankruptcy case" and, therefore that jurisdiction is proper under 28 U.S.C. § 1334(b). On this basis, Defendants have also attempted to have this matter "referred" to the Bankruptcy Court. As Defendants point out, however, the Bankruptcy Court confirmed ML's First Amended Plan of Reorganization well over a year ago. (Notice of Removal, p. 4.) This means, of course,

that Plaintiff's claims are asserted in a post-confirmation setting, which is critical to the jurisdictional analysis.

Bankruptcy related jurisdiction is "not limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 115 S.Ct. 1493, 1499 (1995). The jurisdictional boundaries shift once a plan of reorganization has been confirmed. As the Ninth Circuit has recognized "post-confirmation bankruptcy court jurisdiction is necessarily more limited than pre-confirmation jurisdiction." *In Re Pegasus Gold,* 394 F.3d 1189, 1194 (9th Cir. 2005). This conclusion is a function of the fact that, in general, after confirmation, "the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist." *In re Craig's Stores of Texas, Inc.,* 266 F.3d 388, 390 (5th Cir. 2001); *Falise v. American Tobacco Co.,* 241 B.R. 48 (E.D.N.Y.1999) ("[C]onfirmation and substantial consummation of the Debtor's Joint Plan means that this Debtor's estate no longer exists.").

In delimiting the boundaries of related to jurisdiction in the post-confirmation context, the Ninth Circuit expressly adopted the "close nexus" test as adopted by the Third Circuit in *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004). The close nexus test is a "more stringent test" than applies to pre-confirmation claims.[1] *See Vacation Village, Inc. v. Clark*

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[1] Defendants contend that the Ninth Circuit "has yet addressed whether the close nexus standard applies to a case involving a liquidating plan of reorganization." (Notice of Removal, p. 4.) Citing the First Circuit's decision in *Boston Reg'l Med. Ctr. Inc. v. Reynolds,* 410 F.3d 100, 107, Defendants contend that, if and when the Ninth Circuit addresses the issue, it "will hold that that the broader pre-confirmation test applies to liquidating plans like the ML Plan." (Notice of Removal, p. 5.) As set forth herein, the Ninth Circuit has specifically adopted the Third Circuit's formulation of the "close nexus" test. The Third Circuit has concluded that state law malpractice claims against an accountant broad by a continuing trust do not meet the "close nexus" test. *In Re Resorts Int'l,* 372 F.3d at 167. Having adopted the Third Circuit's formulation of the "close nexus" test, it is very likely that the Ninth Circuit will also adopt the Third Circuit's application of the test.

County, 497 F.3d 902, 911 (9th Cir. 2007). Under this test, jurisdiction only exists over claims which have a "close nexus to the bankruptcy plan or proceeding." *In Re Pegasus Gold*, 394 F.3d at 1194. To satisfy the close nexus test, "the claim must affect an integral aspect of the bankruptcy process." *In Re Resorts Int'l*, 372 F.3d at 167. As the Ninth Circuit recently articulated, post-confirmation claims which "exist[] entirely apart from the bankruptcy proceeding and d[o] not necessarily depend upon resolution of a substantial question of bankruptcy law" are claims which do not meet the close nexus test for purposes of establishing related to jurisdiction. *In re Ray* --- F.3d ----, 2010 WL 4160135, *8 (9th Cir., Oct. 25, 2010).

Only "matters affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *In Re Pegasus Gold*, 394 F.3d 1194 (citing *In Re Resorts Int'l*, 372 F.3d at 167.). In general, courts have found a close nexus only where the claims involve construction or interpretation of the plan or an important component of the plan or otherwise involve the confirmation order. *See e.g., Pegasus*, 394 F.3d at 1192, 1194 ("[These claims will likely require interpretation of the Zortman Agreement and the Plan…"); *Trans World Airlines Inc. v. Karabu Corp.*, 196 B.R. 711, 713 (Bankr. D. Del. 1996) (finding jurisdiction existed over claim where case required interpretation of agreement that was a "key building block for [debtor's] plan of reorganization."); *In re Haws*, 158 B.R. 965 (S.D. Tex. 1993) (limiting post-confirmation jurisdiction "to matters necessary to effect the provisions of the confirmation order, to prevent interference with the execution of the plan, and to otherwise tend to post-confirmation matters of a purely administrative nature.").

This case is an accounting malpractice case asserting state law claims. The interpretation, implementation, consummation, execution or administration of the Plan of Reorganization are not implicated.

Defendants conspicuously ignore the Third Circuit's decision in *In re Resorts Int'l., Inc*. and its formulation of the close nexus test as specifically adopted by the Ninth Circuit in *In re Pegasus Gold*. Like this case, *In re Resorts Int'l* involved the assertion of state law accounting malpractice and breach of contract claims against Price Waterhouse by a post-confirmation plan trustee. Similarly, the plan of reorganization in *In re Resorts Int'l* created a post-confirmation trust and specifically gave the trustee the "right, title and interest" to pursue "Litigation Claims" as defined under the plan. 372 F.3d at 169. Like the Plan in this case, the plan at issue in *In re Resorts Int'l* also contained retention of jurisdiction provisions. *Id*. at 160.

In *In re Resorts Int'l*, it was the trustee who "made several arguments why the malpractice claims are sufficiently connected to the bankruptcy process to uphold bankruptcy court jurisdiction." 372 F.3d at 169. Those arguments were essentially the same arguments advanced here by Defendants -- specifically that "the claims affect the Litigation Trust, which is a continuation of the estate; the claims affect the debtor; the claims affect the operation of the Reorganization Plan; the claims affect the former creditors as beneficiaries of the Litigation Trust; and the jurisdictional retention provisions confer continued jurisdiction." *Id.* Notwithstanding the fact that the malpractice claim asserted by the trustee related to services performed by Price Waterhouse *on behalf of the litigation trust itself*, the Third Circuit held that the malpractice suit against Price Waterhouse "lack[ed] a close nexus to the bankruptcy plan or proceeding and affects only matters collateral to the bankruptcy

process." *Id.* In doing so, the Court rejected each of the arguments now raised by Defendants:

> The resolution of these malpractice claims *will not affect the estate*; it will have *only incidental effect on the reorganized debtor*; it *will not interfere with the implementation* of the Reorganization Plan; though it will affect the former creditors as Litigation Trust beneficiaries, they no longer have a close nexus to bankruptcy plan or proceeding because *they exchanged their creditor status to attain rights to the litigation claims*; and as stated, the *jurisdictional retention plans cannot confer jurisdiction greater than that granted under 28 U.S.C. § 1334 or 28 U.S.C. § 157*. For these reasons, the ***malpractice claims here lack the requisite close nexus*** to be within the Bankruptcy Court's "related to" jurisdiction post-confirmation.

Id. (emphasis added).

Unlike the trustee in *In re Resorts Int'l*, Plaintiff's tort claims against Defendants do not arise out of accounting services performed for the Trust, but rather, the pre-bankruptcy debtor. In this regard, Plaintiff's claims are even more detached from the plan of reorganization then were the claims at issue in that case. The fact that the plan provides for "continuing jurisdiction" as Defendants argue is of no moment because the plan cannot "confer jurisdiction greater than that granted under 28 U.S.C. §1334." *Id.*; *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3rd Cir. 2004)("Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization."); *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d 831, 837 (4th Cir. 2007) ("[N]either the parties nor the bankruptcy court can create § 1334 jurisdiction by simply inserting a retention of jurisdiction provision in a plan of reorganization if jurisdiction otherwise is lacking, as it is here."). The fact that Plaintiff's assertion of the state law claims may increase the assets available to Trust beneficiaries also does not create the necessary close nexus. *In Re Pegasus Gold* (rejecting contention that "jurisdiction lies

because the action could conceivably increase the recovery to creditors…"); *In Re Resorts Int'l*, 372 F.3d at 171. Finally, the fact that the provisions of the plan of reorganization transferred to the Trust the right to pursue potential claims against third parties does *not* lead to the inevitable conclusion that a "close nexus" exists, especially when those claims, like the claims asserted by Plaintiff, are state law tort claims which have absolutely no bearing upon the implementation, interpretation, or construction of ML's plan of reorganization. *In re Ray*, 2010 WL 4160135, *8 (9th Cir.) (no post-confirmation jurisdiction over breach of contract claim "that could have existed entirely apart from the bankruptcy proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law."); *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3d Cir.2004) (holding close nexus test not met where trustee asserts malpractice claim in post confirmation setting); *Valley Historic Ltd. Partnership v. Bank of New* York, 486 F.3d 831 (4th Cir. 2007) (close nexus test not met where debtor state law breach of contract and tortuous interference claims lacking in post confirmation setting); *In re Craig's Stores of Texas, Inc.*, 266 F.3d 388 (5th Cir. 2001); *In re Haws*, 158 B.R. at (refusing to find close nexus in context of state law claims asserted by liquidating trust where "[t]he only nexus to this bankruptcy case [was] that the plaintiff …[was] a liquidating trustee representing a group of creditors appointed pursuant to the confirmed plan of reorganization.").[2] To the contrary, the deliberate act of separating the litigation claims from the bankruptcy estate by transferring them to the Trust further

[2] Defendants argue that the pre-petition nature of the conduct alleged in Plaintiff's Complaint somehow helps to establish a close nexus. (Notice of Removal, p. 6.) However, "the timing of the conduct alleged in the complaint is not a factor to be considered in determining whether there is a close nexus." *In re BWI Liquidating Corp.*, 437 B.R. 160 (Bkrtcy. D.Del. 2010).

distances the claims from the plan and the estate "weakens" whatever nexus might otherwise exist. *In re Resorts Int'l,* 372 F.3d at 169.

Defendants cannot demonstrate a close nexus between Plaintiff's Arizona state law claims and the bankruptcy plan or proceeding and, therefore, have not demonstrated the existence of related to jurisdiction. *In Re Pegasus Gold*, 394 F.3d at 1194.

B. <u>The Court Should Exercise Its Authority to Remand On Equitable Grounds.</u>

Even if the Court concludes that bankruptcy "related to" (or diversity) jurisdiction exists, the Court is vested with authority to remand this suit on equitable grounds. 28 U.S.C. § 1452(b) provides that, after a party removes an action to federal court where a bankruptcy case is pending, the non-removing party may move for remand of the action "on any equitable ground." "The purpose of section 1452(b) is to enlarge a trial court's power to…remand a claim related to a bankruptcy case." *Security Farms v. International Broth. of Teamsters, Chauffers,*124 F.3d 999, 1010 (9th Cir. 1997). "The 'any equitable ground' remand standard is an unusually broad grant of authority. It subsumes and reaches beyond all of the reasons for remand under nonbankruptcy removal statutes." *In re* McCarthy, 230 B.R. 414, 417 (9th Cir. 1999). "Courts typically consider a range of factors in deciding whether to grant a motion to remand." *In re Cytodyn of New Mexico, Inc.*, 374 B.R. 733, 738 (Bkrtcy. C.D. Cal. 2007). *Any* one of these factors may provide an equitable basis upon which to remand an action. *See Federal Home Loan Bank of Seattle v. Deutsche Bank Sec. Inc.*, No. C10-0140 RSM, 2010 WL 3512503, *7 (W.D.Wash. Sept. 1, 2010). These factors "reflect the principle that state law claims generally belong in state court." *Brown v. Affiliated*

Computer Servs. Inc., No. C08-5367 FDB, 2008 WL 2856854, *2 (W.D. Wash. July 21, 2008).

1. The Effect Or Lack Thereof On The Efficient Administration Of The Estate.

Plaintiff's post-confirmation state law claims will have little to no effect on the administration of ML's Bankruptcy Estate and are, indeed, very remote from the proceeding itself. ML's Plan was confirmed nearly eighteen months ago. "No longer is expansive bankruptcy court jurisdiction required to facilitate 'administration' of the debtor's estate, for there is no estate left to reorganize." *In re Craig's Stores of Texas, Inc.*, 266 F.3d 388 (5th Cir. 2001). As discussed above, the assertion of state law tort claims does not affect the implementation, interpretation, or construction of the Plan in any way. In any event, "remand of this action will not, in any way, affect the administration of any bankruptcy estate because it is the outcome of the case, not whether the claims are tried in state or federal court, that may have repercussions in bankruptcy." *Brown*, 2008 WL 2856854 at *2.

2. The Extent To Which State Law Issues Predominate Over Bankruptcy Issues.

As set forth above, Plaintiff asserts Arizona state law claims for professional malpractice, negligent misrepresentation, and breach of contract against Defendants arising out of Defendants' failed audits of ML. Defendants also raise various defenses under Arizona law, including (but not limited to) application of Arizona statutes of limitations. Thus, the claims and defenses raised in this suit "present issues of state law only, and there are no issues of federal law in any of Plaintiffs' claims." *Williams*, 169 B.R. at 693. This factor weighs strongly in favor of remand.

3. The Difficulty Or Unsettled Nature Of The Applicable Law.

In its recent Motion to Dismiss, Defendants have raised various "novel" arguments, including whether Arizona law recognizes a claim for professional malpractice separate and distinct from a claim for negligent misrepresentation. While Plaintiff believes the law is well-settled that claims for malpractice are wholly independent of misrepresentation-based claims, Defendant has nevertheless raised a legal issued which is unique and best-resolved by a state-court tribunal.

4. The Presence Of A Related Proceeding Commenced In State Court.

At least three other suits arising out of Defendants' failed audits of ML were commenced in state court by various groups of investors. *Askenazi, et. al. v. Greenberg Traurig LLP, et. al.* (Case No. 2:10-ap-01402) was removed by Defendants but was just recently remanded on equitable grounds back to Maricopa County Superior Court by Order of the United States Bankruptcy Court for the District of Arizona. (*See* Minute Entry dated November 17, 2010, attached hereto as Exhibit 1.) *Victim's Recovery LLC v. Greenberg Truarig, et. al.* (Case No. 2:10-ap-01214) was also removed by Defendants and it too was remanded on equitable grounds back to Maricopa County Superior Court. (*Id.*)

5. The Jurisdictional Basis, If Any, Other Than 28 U.S.C. § 1334.

As was the case in *In re Cytodyn*, this factor "might weigh either way," depending upon whether complete diversity is ultimately demonstrated. 374 B.R. at 740. As set forth below, Defendants have not met their burden of establishing diversity jurisdiction. Importantly, however, even if the Court were to assume that diversity jurisdiction exists, all of the other factors weigh so heavily in favor of remand, that this would not change the result. *Id*. ("For the sake of argument, we will assume that there is diversity jurisdiction; I

believe it makes little difference to the final analysis.") Thus, notwithstanding potential bankruptcy-related or diversity jurisdiction, the Court may still equitably remand the case.

6. The Degree Of Relatedness Or Remoteness Of The Proceeding To The Main Bankruptcy Case.

"Here, it is relevant to ask whether the adversary proceeding is "core" or "non-core." These state law claims are, if anything, non-core claims. *In re ACI-HDT Supply Co.*, 205 B.R. 231, 237 (9th Cir. 1997) ("'[If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding.")

7. The Substance Rather Than Form Of An Asserted "Core" Proceeding.

This factor is irrelevant because this is not a core proceeding. *In re Cytodyn*, 374 B.R. at 740.

8. The Feasibility Of Severing State Law Claims From Core Bankruptcy Matters.

This "probably weighs in favor of remand. There would seem to be no valid reason why a judgment obtained in state court could not be brought back to bankruptcy court for enforcement as part of the chapter 11 case." *Id.*

9. The Burden On The Bankruptcy Court's Docket.

Although the burden on both the state court and federal court would be significant, the burden on the Bankruptcy Court's docket would be greater simply because the court would be asked to resolve issues which purely a matter of state law which would divert its attention and resources away from core bankruptcy issues.

10. The Likelihood That The Commencement Of The Proceeding In Bankruptcy Court Involves Forum Shopping By One Of The Parties.

The removal of this suit is part of a systematic effort by Defendants to corral Plaintiff (and all of the plaintiffs in the other related suits) in the court *of Defendants' choice* and impede Plaintiff's right to a trial by jury. This blatant attempt to forum shop weighs heavily in favor of remand. *In re Cytodyn*, 374 B.R. at 741.

11. The Existence Of A Right To A Jury Trial In State Court.

Removal of this suit is but the first step in Defendants' larger effort to deprive Plaintiff of its right to a jury trial. Recognizing the sanctity of a litigant's Seventh Amendment right to a jury trial in a state-court forum, "[c]ourts have granted equitable remand solely on the basis of a party's entitlement to a jury trial when that party's action was not a 'core proceeding'" as this one obviously is. *Federal Home Loan Bank of* Seattle, 2010 WL 3512503 at *7. Plaintiff's jury trial right weighs heavily in favor of remand. *In re Roman Catholic Bishop of San Diego*, 374 B.R. 756, 764 ("[T]he loss of the Seventh Amendment right to a jury trial will cause severe prejudice to the plaintiffs…").

12. The Presence In The Proceeding Of Non-Debtor Parties.

All of the parties to this suit are non-debtors. As in the *In re Resorts Intern., Inc.*, discussed *supra.*, "[t]he debtor, [ML], is not a party to this litigation" because it gave all rights to assert "Litigation Claims" to the Trust. *See* 372 F.3d at 170-71. After confirmation, ML's estate "cease[d] to exist." *In re Craig's Stores of Texas, Inc.*, 266 F.3d 388, 390 (5th Cir. 2001).

13. Comity.

This suit arises out of audits of an Arizona company which were performed in Arizona by Defendants. All of Plaintiff's claims are brought under the laws of the state of Arizona. Likewise, as discussed above, Defendant has raised various defenses under Arizona law. "In that the case includes state law issues which may bear on state policy concerns, comity is a consideration weighing in favor of remand." *In re Walsh*, 79 B.R. 28 (D. Nev. 1987).

14. The Possibility Of Prejudice To Other Parties In The Action.

Other than Plaintiff and Defendants, there are no other parties who will be affected if this matter is remanded.

C. Defendants Have Not Met Their Burden of Demonstrating Diversity Jurisdiction.

Defendants seek to remove the action on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a)(1). (Notice of Removal, p. 3.)

The law in this circuit is that "in a case that has been removed from state court to federal court…on the basis of diversity jurisdiction, the proponent of federal jurisdiction -- typically the defendant in the substantive dispute -- has the burden to prove, by a preponderance of the *evidence*, that removal is proper." *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010.) The Ninth Circuit concluded that "the preponderance of the evidence standard applies because removal jurisdiction ousts state-court jurisdiction and must be rejected if there is any doubt as to the right of removal in the first instance." *Id.* at 1107.

Defendant not only failed to meet its burden of demonstrating the existence of diversity jurisdiction by a preponderance of the evidence, Defendant has provided no

evidence at all. Without any support, Defendant CBIZ, Inc. claims to be a Delaware corporation "with its principal place of business in Ohio." (Notice of Removal, p. 3.) Defendant CBIZ MHM, LLC, on the other hand, claims without any support to be a single member LLC with its sole member being CBIZ Operations, Inc., an Ohio corporation that allegedly "has its principal place of business in Ohio." (*Id.*) Finally, Defendant Mayer Hoffman McCann, PC claims to be a Missouri professional corporation with its principal place of business in Kansas.[3] (*Id.*) Mayer Hoffman McCann, PC, itself, however, appears to be conflicted as to where its true principal place of business really is. For instance, Plaintiff has found at least once instance, where Mayer Hoffman McCann, PC has claimed its "principal place of business" was in California -- not in Kansas as it represented to the Court. (*See* Contract between Mayer Hoffman McCann, PC and City of Inglewood, attached hereto as Exhibit 2.) Mayer Hoffman's website, on the other hand, refers to Mayer Hoffman McCann, PC as a "national accounting practice with over 30 locations across the country," including offices in Georgia, Arizona, and California. (*See* Webpage from Mayer Hoffman McCann, PC website showing "Locations" of Mayer Hoffman McCann, PC offices, attached hereto as Exhibit 3.)

The determination of an entity's "principal place of business" for purposes of establishing diversity jurisdiction is fact intensive. *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 412, n. 15 (5th Cir. 1987) ("[T]he question of place of business is…fact-

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[3] Mayer Hoffman McCann, PC relies solely upon an allegation in Plaintiff's Complaint which was based upon records maintained with the Arizona Corporation Commission. However, as set forth above, it appears those records do not accurately reflect Defendant's true principal place of business.

intensive.").[4] Defendants have offered no facts. On this basis alone, Plaintiff requests that this matter be remanded. Plaintiff is, however, cognizant that the Court may remand this matter "if at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. § 1447(c). Thus, Plaintiff alternatively requests that the parties be given the opportunity to engage in jurisdictional discovery to determine whether or not this Court is, in fact vested with diversity jurisdiction. *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 692 (9th Cir. 2006) ("decision regarding jurisdictional discovery is a discretionary one, and is governed by existing principles regarding post-removal jurisdictional discovery…").

IV. CONCLUSION.

Defendants have not met their burden of rebutting the strong presumption against removal. For the reasons set forth herein, Plaintiff respectfully requests an order remanding this suit back to state court.

RESPECTFULLY SUBMITTED: this 19th day of November, 2010.

DICARLO CASERTA MCKEIGHAN & PHELPS PLC

/s/ Nicholas J. DiCarlo
Nicholas J. DiCarlo
Christopher A. Caserta

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[4] In analyzing a party's principal place of business for purposes of diversity jurisdiction, the Ninth Circuit has adopted the "place of operations" test. *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1028 (9th Cir. 2009). "Under that test, a corporation's principal place of business is the state containing a substantial predominance of corporate operations." *Id.* In applying the test, various factors may be considered, including "the location of employees, tangible property, production activities, sources of income, and where sales take place." *Id.* If (and only if) no one state contains a substantial predominance of corporate operations, then the "nerve center" test applies. *Id.* This test "locates the corporation's principal place of business in the state where the majority of its executive and administrative functions are performed." *Id.* The analysis is, therefore, fact intensive.

ORIGINAL electronically filed with the Clerk's Office;
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By: */s/ Nicholas J. DiCarlo*