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IN THE UNITED STATES DISTRICT COURT

THE DISTRICT OF ARIZONA

ML LIQUIDATING TRUST, as successor-in-interest to Mortgages Ltd.,

Plaintiff,

v.

MAYER HOFFMAN MCCANN P.C., a Missouri professional corporation; CBIZ, Inc., a Delaware corporation; CBIZ MHM, LLC, an Ohio limited liability company,

Defendants.

Case No. CV 10-2019-PHX-MHM

RESPONSE TO PLAINTIFF'S MOTION TO REMAND OF DEFENDANTS MAYER HOFFMAN MCCANN P.C., CBIZ, INC., AND CBIZ MHM, LLC

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INTRODUCTION

Plaintiff ML Liquidating Trust (the "Trust") brought this suit in Arizona state court as successor in interest to Mortgages Ltd. ("ML") against Mayer Hoffman McCann P.C. ("Mayer Hoffman"), CBIZ, Inc., and CBIZ MHM, LLC (collectively "Defendants"). (Doc. 1, Notice of Removal, Ex. A., Compl., ¶¶ 4-6 (hereinafter "Compl.").) Defendants removed the suit under 28 U.S.C. §§ 1441 and 1452(a) based on diversity and bankruptcy jurisdiction. *See* 28 U.S.C. §§ 1332(a)(1), 1334(b). The Trust has moved to remand, but its motion should be denied for two *alternative* reasons.

First, and most straightforwardly, the Trust does not seriously dispute that the Court has diversity jurisdiction. Diversity jurisdiction exists where an action is between "citizens of different States" and the amount in controversy "exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). Defendants' Notice of Removal satisfies their burden "at this stage of the case" of "alleg[ing]" facts indicating that "diversity" exists. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). In response, the Trust initially argues that Defendants should have provided evidentiary support for their allegations. But Defendants were under no obligation "to *prove*" anything in their Notice of Removal. *Id.* (emphasis added). Regardless, Defendants are permitted to show that diversity exists by attaching "summary-judgment-type evidence" to an opposition to a motion to remand. *See Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2006) (internal quotation marks omitted).

The Trust next contends that Defendants have not proved their principal places of business, claiming that "[t]he determination of an entity's 'principal place of business' . . . is fact intensive." (Doc. 33, Mot. to Remand, at 16-17 & n.4.) But the Trust relies entirely on precedent *overruled* by *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010). In *Hertz*, the Supreme Court rejected the Trust's fact-intensive approach in favor of a bright-line rule that equates principal place of business with "the place where the corporation maintains its headquarters." *Id.* at 1192. Under *Hertz*, citizenship in this case is easy. As the declarations attached to this opposition indicate, Defendants have their headquarters in

states different from the Trust's state of citizenship. Given *Hertz*, moreover, the Trust has no basis to seek jurisdictional discovery. Complete diversity unambiguously exists. That fact alone, without more, requires the Court to deny the Trust's Motion to Remand.

Second, and independently, the Court has "related to" bankruptcy jurisdiction under 28 U.S.C. § 1334(b). As numerous cases have recognized, federal courts generally possess "related-to" jurisdiction over a liquidation trust's claims that are brought on behalf of a bankruptcy debtor and that have been assigned to the trust under a bankruptcy plan. That is because the function of the trust "is virtually indistinguishable from that of the bankruptcy estate itself: to gather the assets of a defunct debtor for distribution to its creditors." *Kirschner v. Grant Thornton LLP (In re Refco, Inc. Sec. Litig.)*, 628 F. Supp. 2d 432, 442 (S.D.N.Y. 2008). Here, ML's Bankruptcy Plan expressly assigned the Trust with the rights "in [ML's] Non-Loan Assets," including any "Causes of Action" that ML may have against third-parties. Bankruptcy jurisdiction thus exists.

In addition, the Court should decline to equitably remand this suit under 28 U.S.C. § 1452(b), which permits a suit that has been removed on the basis of *bankruptcy* jurisdiction under 28 U.S.C. § 1452(a) to be remanded "on any equitable ground." Most obviously, the Court has no authority to equitably remand a case removed on the basis of *diversity* jurisdiction under 28 U.S.C. § 1441. Since the Court has diversity jurisdiction, it need not even consider the Trust's equitable-remand arguments. Regardless, equity favors removal because Defendants have another case pending against them in federal court under the Class Action Fairness Act. That case will remain in federal court no matter how the Court rules here and so efficiency and fairness considerations suggest that these cases should be coordinated.

STATEMENT OF FACTS

As a licensed mortgage broker, ML provided short-term real-estate loans to developers of commercial projects. (Compl. ¶ 12.) To obtain the funds for these loans, ML turned to private investors. These investors either took direct interests in specific loans or

invested in Limited Liability Corporations ("LLCs") that, in turn, invested in ML's loans. (*Id.* ¶ 15.) From 2005 until it filed for bankruptcy in 2008, ML allegedly grew deeper and deeper into insolvency. (*Id.* ¶¶ 10, 124.) Mayer Hoffman, with the help of the other Defendants, is alleged to have performed negligent audits of ML's financial statements during these years. (*See generally id.* ¶¶ 33-122.) For each audit between 2004 and 2008, Mayer Hoffman allegedly certified to ML's board and management that it conducted its audits in accordance with Generally Accepted Accounting Standards ("GAAS") and that ML's financial statements fairly presented its financial health in accordance with Generally Accepted Accounting Principles ("GAAP"). (*Id.* ¶¶ 34, 115-16.) These representations were allegedly false for numerous reasons. (*Id.* ¶¶ 117-20.)

ML entered bankruptcy in June 2008. (*Id.* ¶ 10.) In April 2009, an investors committee filed ML's Bankruptcy Plan. (Doc. 1532, Plan, *In re Mortgages, Ltd.*, No. 2:08-bk-07465, Bankr. D. Ariz.) The bankruptcy court has since confirmed the Plan. (Compl. ¶ 1.) The Plan created the Trust, a "representative of the Estate," to pursue the "Causes of Action on behalf of the Debtor's Estate" that ML had against third parties, including the causes of action it brings here. (Plan § 6.2 & Ex. 1; *see* Compl. ¶ 2.) The Trust filed this suit in state court pursuant to the Plan to recover the amount of the obligations incurred by ML during the years Defendants allegedly provided negligent services to ML. (Compl. ¶ 126.) Defendants removed the case. (Doc. 1, Notice of Removal.) The Trust now seeks to have the case remanded. (Doc. 33, Mot. to Remand.)

ARGUMENT

The Court has two independent bases for retaining jurisdiction over this suit. First, the Court has diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Second, the Court has bankruptcy jurisdiction under 28 U.S.C. § 1334(b). As long as the Court finds that *one* of these two *alternative* grounds for removal exists, it must keep this case.

I. THE COURT HAS DIVERSITY JURISDICTION.

The Court has diversity jurisdiction over the Trust's lawsuit under 28 U.S.C. § 1332(a)(1). Diversity jurisdiction exists over actions between "citizens of different States" if the amount in controversy "exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). To properly assert this type of jurisdiction, a notice of removal need only contain "a short and plain statement of the grounds for removal," *id.* § 1446(a), a "requirement [that] mirrors the language of the general pleading rules" for complaints, 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.30[2][a][i] (3d ed. 2008); *see Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 200 (4th Cir. 2008) (finding it "inappropriate for the district court to have required a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint"). Thus, "at this stage of the case, the defendants [are] merely required to *allege* (not to *prove*) diversity." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (emphasis added); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3733, at 645-46 & n. 15 (4th ed. 2009) ("[T]he same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of removal.") (footnote omitted).

Defendants' Notice of Removal meets these standards. To begin with, it alleges that the amount in controversy exceeds $75,000. (Doc. 1, Notice of Removal, ¶ 4.e.) In addition, it alleges that all Defendants are citizens of different states from the Trust. (*Id.* ¶ 4.) The Trust takes the citizenship of its trustee, *see Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006), which is Georgia. (Doc. 1, Notice of Removal, ¶ 4.d.) No Defendant is a citizen of Georgia. CBIZ, Inc., is a citizen of the state in which it is incorporated (Delaware) and the state in which it has its principal place of business (Ohio). 28 U.S.C. § 1332(c)(1); (Doc. 1, Notice of Removal, ¶ 4.b.) CBIZ MHM, LLC, a limited liability company, is "a citizen of every state of which its owners/members are citizens." *Johnson*, 437 F.3d at 899. The Notice of Removal alleges that CBIZ

Operations, Inc., is the sole member of CBIZ MHM, and that CBIZ Operations is incorporated under the laws of, and has its principal place of business in, Ohio. (Doc. 1, Notice of Removal, ¶ 4.c.) Lastly, Mayer Hoffman, a professional corporation, is treated as an ordinary corporation for diversity purposes, *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1182 (9th Cir. 2004), and the Notice of Removal provides that it "is incorporated under Missouri Law with its principal place of business in Kansas." (Doc. 1, Notice of Removal, ¶ 4.) Complete diversity exists under these facts.

In response, the Trust makes no argument regarding (and thus concedes) two points. First, the Trust does not dispute that the amount in controversy satisfies the statutory requirement. Because the Complaint specifies "damages totaling no less than $100 million" (Compl. ¶ 126), the jurisdictional threshold is presumptively satisfied. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007). Second, the Trust does not dispute that it is a citizen of Georgia for diversity purposes.

Instead, the Trust challenges the citizenship of the Defendants, arguing that the Notice of Removal needed to demonstrate diversity "by a preponderance of the *evidence*" and criticizing Defendants for "provid[ing] *no* evidence at all" of their citizenship. (Doc. 33, Mot. to Remand, at 15-16.) The Trust, however, does not cite a single case in which a court required a notice of removal not only to provide a "short and plain statement," 28 U.S.C. § 1446(a), but also to attach evidence proving the facts alleged in that statement. The lone case cited by the Trust did not even involve a notice of removal and the dispute was over the amount in controversy, not the diversity of the parties. *See Geographic Expeditions, Inc. v. Estate of Lhokta*, 599 F.3d 1102, 1107 (9th Cir. 2010). And controlling Ninth Circuit law holds that a defendant need only "allege (not . . . prove) diversity" in its notice of removal. *Kanter*, 265 F.3d at 857.

Regardless, to remove all doubt, Defendants are permitted to prove that diversity exists by attaching "summary-judgment-type evidence" to an opposition to a motion to remand. *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2006) (internal quotation

marks omitted); *Del Real v. Healthsouth Corp.*, 171 F. Supp. 2d 1041, 1043 (D. Ariz. 2001) ("the court may entertain extrinsic evidence in order to determine" if elements for diversity jurisdiction have been met); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 755 (11th Cir. 2010) (stating that "[t]he other circuit courts of appeal that have addressed the issue agree . . . that defendants may submit a wide range of evidence in order to satisfy the jurisdictional requirements of removal").

The Trust challenges Defendants' principal places of business under 28 U.S.C. § 1332(c). Specifically, it asserts that "[t]he determination of an entity's 'principal place of business' for purposes of establishing diversity jurisdiction is fact intensive," looking to such factors as the location of employees, tangible property, and production activities. (Doc. 33, Mot. to Remand, at 16-17 & n.4 (citing *Davis v. HSBC Bank Nev., N.A.*, 557 F.3d 1026, 1028 (9th Cir. 2009).) But the Trust relies entirely on *overruled* precedent. In *Hertz*, the Supreme Court *rejected* the Trust's fact-intensive approach because "administrative simplicity is a major virtue in a jurisdictional statute." 130 S. Ct. at 1193. In its place, the Supreme Court held that "principal place of business" "is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities," which "should normally be the place where the corporation maintains its headquarters." *Id.* at 1192.

Under *Hertz*, citizenship in this case is easy. Attached as Exhibit A is the sworn declaration of Michael W. Gleespen, General Counsel and Corporate Secretary of CBIZ, Inc. Mr. Gleespen avers that CBIZ, Inc., is a corporation incorporated under Delaware law and that CBIZ, Inc., has its national headquarters in Cleveland, Ohio. *See* Declaration of Michael W. Gleespen, attached as Ex. A. From that headquarters, Mr. Gleespen and a majority of the other officers direct, control, and coordinate CBIZ's corporate activities throughout the United States. *Id.* ¶ 3. Mr. Gleespen also indicates that CBIZ MHM, LLC, is a limited liability company whose sole member, CBIZ Operations, Inc., is a corporation incorporated under Ohio law with its headquarters in Ohio. All officers of CBIZ

Operations, Inc., work out of that Ohio headquarters, and direct, control, and coordinate its corporate activities from there. *Id.* ¶ 4.

Additionally, attached as Exhibit B is the sworn declaration of William L. Hancock, President and Chairman of the Board of Mayer Hoffman. *See* Declaration of William L. Hancock, attached as Ex. B. Mr. Hancock indicates that Mayer Hoffman is incorporated under Missouri law. *Id.* ¶ 2. He also makes clear that Mayer Hoffman maintains its national headquarters in Leawood, Kansas, from which Mr. Hancock and a plurality of the officers direct, control, and coordinate Mayer Hoffman's corporate activities. *Id.* ¶ 3. And he notes both that other corporate personnel manage Mayer Hoffman's activities from this headquarters, including the Director of Quality Control, National Training Director, Controller, and Director of Operations, and that Mayer Hoffman's central marketing department is also located at this headquarters. *Id.* Given *Hertz*, this evidence more than suffices to prove that CBIZ and CBIZ MHM have their principal places of business in Ohio and that Mayer Hoffman has its principal place of business in Kansas. *Hertz*, 130 S. Ct. at 1192.

Also given *Hertz*, the Trust has no basis to seek jurisdictional discovery to dispute the allegations in the Notice of Removal. As the Trust concedes, the Court has broad discretion to order or deny jurisdictional discovery. *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 692 (9th Cir. 2006). And the Trust does not even suggest—nor would it have any good-faith basis for suggesting—that any Defendant has a corporate headquarters in Georgia, as would be necessary to destroy diversity. With respect to CBIZ and CBIZ MHM, the Trust simply criticizes Defendants for not presenting evidence. (Doc. 33, Mot. to Remand, at 15-16.) As indicated, evidence is not required now. *Kanter*, 265 F.3d at 857. And Mr. Gleespen's declaration more than suffices to put the issue to rest.

As for Mayer Hoffman, the Trust claims that its principal place of business may not be Kansas, as alleged in the Notice of Removal, because a contract suggests that Mayer Hoffman's principal place of business is California, not Missouri. But the Trust's *own*

Complaint, like the Notice of Removal, alleges that Mayer Hoffman maintained its principal place of business in Kansas. (Compl. ¶ 4.) Because the Trust did not move to amend its Complaint, which reflected Mayer Hoffman's diversity from the Trust on its face, the Trust cannot challenge that allegation. *See D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366 F.3d 972, 974 n.2 (9th Cir. 2004). And even if Mayer Hoffman had its principal place of business in California, diversity still exists because the Trust is a citizen of Georgia, not California. It has failed to explain how this contract helps it. *See Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1248 n.2 (11th Cir. 2005) (noting that a party need not affirmatively show where a corporation has its principal place of business, only that "the corporation's [principal place of business] is not in a State which would destroy complete diversity"). In addition, Mr. Hancock's declaration clarifies that the contract attached to the Trust's Motion to Remand incorrectly listed California as Mayer Hoffman's principal place of business because the contract was "a carryover from prior contracts between the City of Inglewood and Conrad & Associates, whom Mayer Hoffman acquired in 2006." Declaration of William L. Hancock ¶ 4.

Finally, the Trust seems to suggest that the Court may equitably remand this case under 28 U.S.C. § 1452(b) *even if* it finds that diversity jurisdiction exists. (Doc. 33, Mot. to Remand, at 12.) But the Court has equitable-remand power *only* for claims removed on the basis of bankruptcy jurisdiction under 28 U.S.C. § 1452(a). *See* 28 U.S.C. § 1452(b). Here, however, Defendants removed on diversity grounds under 28 U.S.C. § 1441(a), not 28 U.S.C. § 1452(a). The Court has no power to equitably remand a suit removed under 28 U.S.C. § 1441(a). And since diversity exists, the Court need not even consider the Trust's suggestion that it equitably remand this case. *See, e.g., Dalkon Shield Claimants Trust v. MacLeod (In re A.H. Robins Co.)*, 197 B.R. 575, 580 n.4 (E.D. Va. 1995) ("Under 28 U.S.C. § 1452(b), cases removed on the basis of federal bankruptcy jurisdiction, *unlike those removed on diversity grounds*, can be remanded 'on any equitable ground.'") (emphasis added). This fact thus distinguishes the two other cases brought against Defendants or other

professionals of ML that were recently equitably remanded to state court. (Doc. 33, Mot. to Remand, at 12 (citing *Ashkenazi v. Greenberg Traurig LLP*, No. 2:10-ap-01402 (Bankr. D. Ariz.); *Victims Recovery LLC v. Greenberg Traurig, LLP*, No. 2:10-ap-01214 (Bankr. D. Ariz.)).) Unlike in this case, neither of those cases involved a basis for jurisdiction other than bankruptcy jurisdiction.

In sum, to permit further jurisdictional discovery now would allow the Trust to engage in the very "gamesmanship" that the Supreme Court sought to avoid by adopting a bright-line rule for principal place of business. *Hertz*, 130 S. Ct. at 1193. Diversity jurisdiction exists and the Trust has not identified any good-faith basis for challenging it. It is not entitled to any jurisdictional discovery.

II. THE COURT HAS BANKRUPTCY JURISDICTION.

Since diversity jurisdiction exists, the Court has no need to even consider whether bankruptcy jurisdiction represents an independent ground for removal. In any event, even if the Court decides to answer that question, bankruptcy jurisdiction exists here under 28 U.S.C. § 1334(b). This case is "related to" ML's bankruptcy within the meaning of § 1334(b) because the Plan provided for the establishment of the Trust and vested the Trust with the claims at issue. And, even without diversity jurisdiction, equitable factors suggest that this case should remain in federal court.

A. The Court Possesses "Related-To" Bankruptcy Jurisdiction.

1. Federal courts have "related-to" bankruptcy jurisdiction over claims brought by post-confirmation trusts.

Under § 1334(b), federal courts have jurisdiction over "all civil proceedings . . . related to cases under title 11." 28 U.S.C. § 1334(b). This "'related to' jurisdiction is very broad," *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 868 (9th Cir. 2005), covering any case that "could conceivably have any effect on the estate being administered in bankruptcy." *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988) (emphasis omitted) (internal quotation marks omitted). At the same time, the Ninth Circuit has indicated, once a bankruptcy plan has been confirmed, a narrower test generally applies,

one that requires a case to have a "close nexus" to the bankruptcy plan. *State of Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005) (noting that matters affecting "the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus") (internal quotation marks omitted). As the First Circuit has pointed out, however, the Ninth Circuit "has yet" to determine whether this narrower standard should apply when the relevant bankruptcy proceeding "involv[es] a liquidating plan of reorganization" like the ML Plan at issue here. *Boston Reg'l Med. Ctr., Inc. v. Reynolds (In re Boston Reg'l Med. Ctr., Inc.)*, 410 F.3d 100, 107 (1st Cir. 2005). For the reasons articulated by the First Circuit, the Ninth Circuit would likely hold that the broader pre-confirmation test should apply to such plans. *See id.* at 106-07; *Kirschner v. Grant Thornton LLP (In re Refco, Inc. Sec. Litig.)*, 628 F. Supp. 2d 432, 442 (S.D.N.Y. 2008) (finding "First Circuit's reasoning . . . persuasive""); *see also Lindsey v. Travelers Indem. Co.*, No. CV 06-609-PHX-MHM, 2007 WL 841411, at *4-5 (D. Ariz. Mar. 16, 2007) (applying pre-confirmation test to post-confirmation claim). But the Court need not decide this complex issue here. Even under the close-nexus test, courts overwhelmingly find that they retain post-confirmation jurisdiction over claims on behalf of a debtor assigned to a liquidating trust under a bankruptcy plan.

A liquidation trust established by a bankruptcy plan is an integral component of the bankruptcy process. Its function "is virtually indistinguishable from that of the bankruptcy estate itself: to gather the assets of a defunct debtor for distribution to its creditors." *Refco*, 628 F. Supp. 2d at 442. By prosecuting claims for the benefit of creditors, a liquidation trustee "represents the estate." *Guttman v. Martin (In re Railworks Corp.)*, 325 B.R. 709, 719 (Bankr. D. Md. 2005). Confirmation of a bankruptcy plan does not change the liquidation trust's role. While the reorganized debtor is re-vested with property of the estate, "property vested in the [liquidation] trust . . . continue[s] to function as property of the estate." *Premium of Am., LLC v. Sanchez (In re Premium Escrow Servs., Inc.)*, 342 B.R. 390, 399 (Bankr. D.D.C. 2006).

As a result, numerous courts have found that a close nexus to the bankruptcy plan exists whenever a post-confirmation liquidation trust prosecutes pre-petition claims vested in the trust by a bankruptcy plan. *See, e.g.*, *Refco*, 628 F. Supp. 2d at 443; *Air Cargo, Inc. Litig. Trust v. i2 Techs., Inc. (In re Air Cargo, Inc.)*, 401 B.R. 178, 187-89 (Bankr. D. Md. 2008); *Premium*, 342 B.R. at 400-01; *AstroPower Liquidating Trust v. Xantrex Tech., Inc. (In re AstroPower Liquidating Trust)*, 335 B.R. 309, 323-25 (Bankr. D. Del. 2005); *Michaels v. World Color Press, Inc. (In re LGI, Inc.)*, 322 B.R. 95, 102-06 (Bankr. D.N.J. 2005). This is proper because "implementation of the payment of unsecured creditors through claims prosecuted by the [Liquidation] Trustee . . . falls squarely in the realm of limited jurisdiction that a bankruptcy court may hear." *Railworks*, 325 B.R. at 723. Permitting jurisdiction "[u]nder such circumstances . . . 'would not raise the specter of 'unending jurisdiction' over continuing trusts.'" *AstroPower*, 335 B.R. at 325 (quoting *Binder v. Price Waterhouse & Co. (In re Resorts In'tl, Inc.)*, 372 F.3d 154, 167 (3d Cir. 2004)). To the contrary, requiring a trust "to pursue potential assets in fragmented litigation" outside federal court would "undermin[e] the goal of unified administration of bankruptcy cases." *Refco*, 628 F. Supp. 2d at 442.

2. Because the Plan vested the Trust with the claims at issue here, the claims bear a close nexus to the Plan.

Here, the Plan transferred to the Trust the rights "in [ML's] Non-Loan Assets," including any "Causes of Action" that ML may have against third-parties. (Plan §§ 6.2, 6.6.) It thus vested assets that "continue to function as property of the estate," *Premium*, 342 B.R. at 399, in the Trust, which acts as the "successor[] to the interests of [the] liquidating . . . debtor[]." *Harrow v. Street (In re Fruehauf Trailer Corp.)*, 369 B.R. 817, 822 (Bankr. D. Del. 2007). Indeed, the Plan does not merely create a successor to carry out claims. It also specifically enumerates causes of action the Trust has authority to prosecute. (*See* Plan § 4.3 & Ex. 1.) Among those claims are the ones asserted against Defendants. (Plan Ex. 1; Compl. ¶¶ 127-145). "These facts, without more, could well establish the close

nexus to the bankruptcy plan or proceeding." *LGI*, 322 B.R. at 102 (finding related-to jurisdiction where plaintiff's claims developed pre-petition and the bankruptcy plan defined the claims as assets) (internal quotation marks omitted).

The existence of a close nexus between the Trust's claims and the Plan is reinforced by the Plan's jurisdictional provisions. The Plan expressly provides for the bankruptcy court's continuing jurisdiction "[t]o determine all . . . Causes of Action brought by the Liquidating Trust." (Plan § 9.1(i).) "[W]here, as here, the Plan specifically describes an action over which the Court has 'related to' jurisdiction pre-confirmation and expressly provides for the retention of such jurisdiction to liquidate that claim for the benefit of the estate's creditors, there is a sufficiently close nexus with the bankruptcy proceeding to support jurisdiction post-confirmation. *AstroPower*, 335 B.R. at 325; *see Kirschner v. Bennett*, No. 07 Civ. 8165(GEL), 2008 WL 1990669, at *5 (S.D.N.Y. May 7, 2008) (holding that when a bankruptcy plan specifically retains jurisdiction over claims, litigation of those claims "serves the implementation, consummation and execution of the [p]lan") (internal quotation marks omitted).

The Plan established the Trust, moreover, "*solely* to implement the Plan." (Plan § 6.2 (emphasis added).) By litigating claims identified and retained in the Plan, the Trust undertakes "matters affecting the . . . implementation [and] execution . . . of the confirmed plan." *Pegasus*, 394 F.3d at 1194 (internal quotation marks omitted). In fact, any actions brought by the Trust *must* by definition have a close nexus to the Plan or the Trust would be acting outside its assigned authority. Therefore, where, as here, a liquidation trust pursues claims against parties specifically contemplated in the plan, "the implementation and execution of the confirmed [p]lan are directly at issue." *Refco*, 628 F. Supp. 2d at 443 (internal quotation marks omitted).

Finally, the Trust's lawsuits serve to benefit ML's unsecured creditors, which are "beneficiaries" of the Trust. (Plan §§ 3.6(l)-(r), 6.7.) Many courts have recognized a close nexus between a Trust's lawsuit and the Plan where, as here, any proceeds go to creditors.

See, e.g., *Krys v. Sugrue*, No. 08 Civ. 3065 (GEL), 2008 WL 4700920, at *6 (S.D.N.Y. Oct. 23, 2008) (finding "'close nexus' between the Trustee's claims and the bankruptcy proceedings" where "any funds recovered by the . . . Trust in this case will go directly to [the debtor's] largest creditors"); *Morris v. Zelch (In re Reg'l Diagnostics, LLC)*, 372 B.R. 3, 23 (Bankr. N.D. Ohio 2007) ("While the potential to increase recovery to the creditors or former creditors of the estate is not enough alone to confer jurisdiction, potential benefit to creditors or former creditors weighs in favor of jurisdiction."); *Railworks*, 325 B.R. at 723 ("Here the implementation of the payment of unsecured creditors through claims prosecuted by the Litigation Trustee is precisely at issue, and falls squarely in the realm of limited jurisdiction that a bankruptcy court may hear.").

In response, the Trust makes essentially two points. First, it relies almost entirely on the Third Circuit's decision in *Resorts*. (Doc. 33, Mot. to Remand, at 7-9.) But *Resorts* involved different facts. There, *after* the bankruptcy plan was confirmed, a liquidating trust hired an accounting firm "to provide auditing and tax-related services" to the trust. 372 F.3d at 158. The trust later alleged that the firm had committed malpractice in its accounting and tax advice. *Id.* Thus, the trust's claim arose not from any accounting services performed on behalf of the pre-bankruptcy debtor, but from services performed for the trust itself. Numerous courts that have found jurisdiction over a trust's claims have distinguished *Resorts* on this basis. In *Premium*, for example, the court found jurisdiction over a trust's state claim, and distinguished *Resorts* by noting that "[i]f a litigation trust prosecutes a cause of action that did not belong to the debtor or the debtor's estate prior to confirmation, that cause of action belongs to the litigation trust personally . . . and such claim is not subject to a court's jurisdiction under 28 U.S.C. § 1334." 342 B.R. at 399. Numerous other courts have recognized the same distinction. *See, e.g.*, *LGI*, 322 B.R. at 102 ("Unlike *Resorts* (where the cause at issue developed post-confirmation), here the cause of action developed prepetition."); *Railworks*, 325 B.R. at 723 ("In *Resorts* the basis of the claim was for work performed by the accounting firm for the Litigation Trust, and not for

the debtor, or the debtor-in-possession.). Here, the Trust alleges that its "tort claims against Defendant[s] do not arise out of services performed for the Trust, but rather, for the pre-bankruptcy debtor." (Doc. 33, Mot. to Remand, at 8; Compl. ¶¶ 10-126.) Thus, the critical factor on which courts have relied to distinguish *Resorts* exists here.

Second, the Trust contends that related-to jurisdiction cannot lie because it asserts state-law claims. (Doc. 33, Mot. to Remand, at 9.) But this position is at odds with numerous decisions. *See Bennett*, 2008 WL 1990669, at *2, *7 (denying remand of state-law claims); *Refco*, 628 F. Supp. 2d at 434-35, 445 (same); *Premium*, 342 B.R. at 395, 401 (same); *AstroPower*, 335 B.R. at 315, 325 (same); *LGI*, 322 B.R. at 97, 102 (same). The Trust, moreover, relies on cases in which the action was brought, not by a trust, but by third-parties, *Battle Ground Plaza v. Ray (In re Ray*,) 624 F.3d 1124, 1127-28 (9th Cir. 2010), or post-confirmation debtors, *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 834 (4th Cir. 2007); *Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 389-90 (5th Cir. 2001). In short, as numerous cases have recognized, federal courts retain jurisdiction over claims, like those here, brought by a liquidating trust pursuant to a bankruptcy plan.

B. Traditional Equitable Factors Confirm That The Court Should Retain Jurisdiction Over This Case.

The Trust lastly argues that even if bankruptcy jurisdiction exists, the Court should exercise its power to remand "on any equitable ground" those claims removed on the basis of bankruptcy jurisdiction. 28 U.S.C. § 1452(b). The Court need not even consider this argument, however, because, as indicated above, Defendants removed this case under both 28 U.S.C. § 1441 (on the basis of diversity jurisdiction) and 28 U.S.C. § 1452(a) (on the basis of bankruptcy jurisdiction). The Court has the power to equitably remand *only* those suits removed under 28 U.S.C. § 1452(a). *See id.* § 1452(b). Thus, it has no power to equitably remand a case removed under § 1441 on the basis of diversity jurisdiction.

In all events, equitable factors support retaining jurisdiction. Courts have set forth divergent multi-factored tests when considering whether to remand on equitable grounds. *See Snider v. Sherman*, No. CV-F-03-6605 OWW, 2007 WL 1174441, at *43 (E.D. Cal. Apr. 19, 2007) (citing one case considering twelve factors and another considering seven). These tests represent a proxy for the common-sense determination of what "is fair and reasonable." *Cathedral of Incarnation in Diocese of Long Island v. Garden City Co. (In re Cathedral of Incarnation in Diocese of Long Island)*, 99 F.3d 66, 69 (2d Cir. 1996). Thus, "[j]udicial economy and fairness always play an important role." *Parrett v. Bank One, N.A.* (*In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*), 323 F. Supp. 2d 861, 885 (S.D. Ohio 2004); *see Med. Lab. Consultants v. Am. Broad. Cos. (In re Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487, 1493 (D. Ariz. 1996). Here, a remand would undermine efficiency and fairness.

1. Judicial efficiency favors a federal forum for this case.

As numerous cases recognize, remand is inappropriate where the possibility exists of litigating related cases in federal court.[1] Here, if the Court remands this case, state and federal courts will *both* have to oversee similar suits against Defendants. That is because one suit is in federal court based on the Class Action Fairness Act. (Doc. 1, Compl., ¶ 31, in *Facciola v. Greenberg Traurig, LLP*, 2:10-cv-01025-MHM (D. Ariz.), attached hereto at

[1] *See Mich. Tractor & Mach. Co. v. Red Top Rentals, Inc.* (*In re Red Top Rentals, Inc.*), No. 09-05229-JKC-11, 2010 WL 2737182, at *4 (Bankr. E.D. Mich. Jan. 11, 2010) ("If this case were to be remanded . . . , the issues . . . would be litigated in two separate forums, which could lead to uneconomical use of judicial resources[.]"); *Official Unsecured Creditors' Comm. of Hearthside Baking Co. v. Cohen (In re Hearthside Baking Co.)*, 391 B.R. 807, 818 (Bankr. N.D. Ill. 2008) ("Remanding . . . would result in . . . uneconomical use of judicial resources by having two courts decide matters that involve the same facts[.]"); *Newby v. Enron Corp.* (*In re Enron Corp. Sec., Derivative & "ERISA" Litig.*), 511 F. Supp. 2d 742, 765 (S.D. Tex. 2005) ("[T]he desirability of dealing with [related] civil actions . . . in a single forum . . . weighs heavily" in favor of jurisdiction.); *N.Y. City Emps.' Ret. Sys. v. Ebbers* (*In re WorldCom, Inc. Sec. Litig.*), 293 B.R. 308, 333 (S.D.N.Y. 2003) ("[I]f this Court were to . . . remand . . . , motion practice and discovery would proceed separately in many jurisdictions.").

Exhibit C.) Remanding, therefore, "would result in duplicative and uneconomical use of judicial resources by having two courts decide matters that involve the same facts." *Hearthside*, 391 B.R. at 818. Conversely, retaining jurisdiction would permit "the judges" in this District to "coordinate[] proceedings so there [would be] no material obstacle to efficient administration" of the related suits. *Enron Corp.*, 511 F. Supp. 2d at 765. Further, any "burden" on the federal courts' docket from retaining jurisdiction (Doc. 33, Mot. to Remand, at 13), would not be eliminated by a remand, as a similar case will remain on the court's docket no matter what.

2. Fairness concerns also favor a federal forum for this case.

If the Court declines jurisdiction, it could prejudice Defendants. Related suits against Defendants in different courts create "the possibility of inconsistent" results. *Med. Lab.*, 931 F. Supp. at 1493. It would be unfair, for example, if several courts ruled for Defendants on their motions to dismiss but another court found that similar claims stated a cause of action. *See, e.g., Turner v. Frascella Enters., Inc.* (*In re Frascella Enters., Inc.*), 349 B.R. 421, 435 (Bankr. E.D. Pa. 2006) (rejecting remand because of "potential for inconsistent relief"). Similarly, the possibility exists that this suit will prejudice third parties. A failure to keep these suits in a federal forum could "encourage a race for assets" among the various plaintiffs, "a race that may deprive many victims of [ML's] alleged fraud of their fair share of any recovery." *WorldCom*, 293 B.R. at 334.

Adjudicating these suits in federal court will, by contrast, not injure the Trust. The Trust asserts that "[r]emoval of this suit is but the first step in Defendants' larger effort to deprive [it] of its right to jury trial. (Doc. 33, Mot. to Remand, at 14.) That is incorrect. This Court can offer the Trust a jury trial. And even if this case gets referred to the bankruptcy court, the Trust "may move . . . for withdrawal of the reference . . . to obtain a jury trial" were the case to make it that far. *Snider*, 2007 WL 1174441, at *44; *see Morris Black & Sons, Inc. v. 23S23 Constr., Inc.* (*In re Carriage House Condos., L.P.*), 415 B.R. 133, 148 (Bankr. E.D. Pa. 2009) (noting that a "jury trial demand" did not "dictate remand"

because the bankruptcy court could handle pre-trial matters "subject to it then being tried by the District Court in front of a jury").

Nor will the Court's oversight undermine comity with state courts. (Doc. 33, Mot. to Remand, at 13.) Defendants removed this case at its beginning, and thus removal does not impact comity. *Senorx, Inc. v. Coudert Bros., LLP*, No. C-07-1075 SC, 2007 WL 1520966, at *3 (N.D. Cal. May 24, 2007) (rejecting comity concerns because state "court had not made significant progress" before removal); *H.J. Rowe, Inc. v. Sea Prods., Inc. (In re Talon Holdings, Inc.)*, 221 B.R. 214, 221 (Bankr. N.D. Ill. 1998) ("[A]t the time this action was removed, the proceedings in the State Court were not sufficiently advanced such that concerns for comity . . . are implicated."). Equally true, while the Trust correctly notes that this case involves state-law claims (Doc. 33, Mot. to Remand, at 13), the claims are well-trodden. *See Carriage House*, 415 B.R. at 147 (rejecting remand where "legal theories and claims" were, "more or less, typical . . . causes of action); *Nat'l Century*, 323 F. Supp. 2d at 886.[2]

CONCLUSION

For the foregoing reasons, the Court should deny the Trust's Motion to Remand.

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[2] Contrary to the Trust's claims, the bankruptcy court's recent decisions equitably remanding other cases against Defendants or other professionals of ML do not suggest a different result. (Doc. 33, Mot. to Remand, at 12 (citing *Ashkenazi v. Greenberg Traurig LLP*, No. 2:10-ap-01402 (Bankr. D. Ariz.); *Victims Recovery LLC v. Greenberg Traurig*, LLP, No. 2:10-ap-01214 (Bankr. D. Ariz.).) To begin with, those claims are currently pending on appeal in this Court. Regardless, the bankruptcy court decided to equitably remand those claims because it did not believe the suits *by third parties* were "sufficiently related" to anything in ML's bankruptcy for the court to hear the cases. 11/17/10 Tr. at 46, attached as Ex. C. For actions brought by the Trustee, however, the bankruptcy court recognized that "the trustee [is a] federally-created entit[y] and that is sufficient to give Congress power to grant jurisdiction over causes of action [it] may assert even though they arise under state law." *Id.* at 43. Because the suit here is by the *very entity created by ML's Bankruptcy Plan* and concerns causes of action assigned to that entity under the Plan, it directly relates to the Plan and the underlying bankruptcy proceeding.

DATED December 22, 2010.

Respectfully submitted,

By: /s/ *Katherine V. Brown*

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2010, I electronically filed the foregoing Joint Motion to Dismiss Complaint with the Clerk of the Court using the CM-ECF system and serve the following parties by U.S. mail:

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