IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,	)	Case No. 20-10343 (LSS)
	)	
Debtors.[1]	)	(Jointly Administered)
PONIL RANCH, L.P.,	)	
	)	
Plaintiff,	)	
	)	Adv. Pro. No. 21-51185 (LSS)
v.	)	
	)	
BOY SCOUTS OF AMERICA,	)	**Re: D.I. 18**
	)	
Defendant.	)	

BOY SCOUTS OF AMERICA'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO ABSTAIN OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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January 25, 2022

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300); and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

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NATURE AND STAGE OF THE PROCEEDING

This is an adversary proceeding filed by Ponil Ranch L.P. ("Ponil Ranch" or "Plaintiff"), seeking a declaratory judgment that it holds an easement under New Mexico law with respect to real property in New Mexico owned by the Boy Scouts of America ("BSA" or "Defendant"), known as the Philmont Scout Ranch (the "Property" or the "Philmont Ranch"). By its Complaint filed on October 19, 2021 [Adv. D.I. 1] ("Compl."), Plaintiff seeks a judgment of the Court declaring that it holds an easement by prescription or, in the alternative, by necessity, allowing it to cross the Philmont Ranch for purposes of accessing an adjacent property which, Plaintiff alleges, is not readily accessible via other means of ingress and egress. Because the resolution of Plaintiff's claims implicates purely state law interests and would not impact the efficient administration of the Debtors' bankruptcy estate, the BSA has filed a motion (the "Motion") requesting that the Court abstain from this adversary proceeding pursuant to 28 U.S.C. § 1334(c)(1). Alternatively, the BSA requests that the Court transfer venue of this case to the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1412. This is the BSA's opening brief in support of this Motion.

SUMMARY OF ARGUMENT

Plaintiff seeks declaratory relief concerning the validity of an alleged easement arising under New Mexico law with respect to real property located in New Mexico, claims which have no place in this Court. Simply stated, aside from the pendency of the BSA's chapter 11 case in this jurisdiction, this adversary proceeding and the underlying facts on which it is based have no Delaware nexus and should be litigated in New Mexico. While Plaintiff attempts to frame this action as a core proceeding implicating the "administration of the estate" and "affecting the liquidation of the estate," Compl., ¶ 4, Plaintiff's claims are, at best, "related to" non-core proceedings which do not implicate any substantive rights provided by title 11. Rather, these

claims raise purely state law questions concerning the existence and validity of a real property easement under New Mexico law. Accordingly, because the relevant factors weigh decidedly in favor of abstention, this Court should exercise its discretion to abstain from this adversary proceeding under 28 U.S.C. § 1334.

Alternatively, should the Court decline to abstain, the Court should transfer this adversary proceeding to the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1412 in the interests of justice and for the convenience of the parties. As previously noted, Plaintiff's claims all arose in New Mexico and concern real property in New Mexico as to which New Mexico law indisputably applies. Many of the fact witnesses presumably reside, work, or regularly do business in New Mexico and are subject to the Court's subpoena power there. Indeed, but for the Debtors' bankruptcy case, there would be no connection to Delaware and no reason for the case to be brought in Delaware. The thin reed of the Debtors' bankruptcy case simply cannot bear the weight of the overwhelming connections to New Mexico, and must bend to allow the case to be transferred to New Mexico.

STATEMENT OF FACTS[2]

Plaintiff alleges that it is a Texas limited partnership with its principal place of business located in Dallas, Texas, which owns and operates a 19,600-acre property located in Colfax County, New Mexico known as the Ponil Ranch. Compl., ¶ 6. Plaintiff further alleges that the Ponil Ranch is bordered to the south by the Philmont Ranch, which is owned and operated by the BSA as a scout camp, and is otherwise surrounded by private properties such that it cannot be accessed directly by public road or highway. *Id.*, ¶ 20.

[2] The factual background is drawn entirely from the allegations of Plaintiff's Complaint which the BSA disputes, and as to which all rights are reserved.

According to Plaintiff, the Philmont and Ponil Ranches were originally part of a 300,000+ acre-parcel owned by Waite Phillips (the "Phillips' Parcel"). *Id.*, ¶ 12. In 1941, Plaintiff alleges that 127,000 acres of the Phillips' Parcel was donated to the BSA, and another approximately 130,000 acres, including what was known as the "Ponil Tract,"[3] was thereafter sold to McDaniel & Sons, Inc. *Id.*, ¶ 14. As the result of several subsequent transfers, Plaintiff claims to have acquired the Ponil Tract in late October 2016. *Id.*, ¶ 17.

Plaintiff alleges that it has historically accessed the Ponil Ranch through one of several canyons that run through the property (i*d.*, ¶ 22), including via a dirt road which cuts through the Philmont Ranch. *Id.*, ¶ 24. Plaintiff claims that this is both the least hazardous and most commonly used access point to the Ponil Ranch, and that it has been openly and continuously used by the current and former owners of the property without BSA's permission for at least ten years (i*d.*, ¶ 26), creating an easement by prescription under New Mexico state law. *Id.*, ¶ 30. Alternatively, Plaintiff claims an easement by necessity under New Mexico law by virtue of the severance of the Ponil Tract from the Phillips' Parcel, which Plaintiff alleges curtailed access to the Ponil Ranch from the public roadway creating a reasonable necessity for a right of way over the Philmont Ranch. *Id.*, ¶ 41. Plaintiff concedes that both its claims arise under and are governed exclusively by New Mexico law. *Id.*, ¶¶ 30, 37.

[3] The terms "Ponil Tract" and "Ponil Ranch" are used interchangeably throughout.

ARGUMENT

I. THE COURT SHOULD ABSTAIN FROM THIS ADVERSARY PROCEEDING PURSUANT TO 28 U.S.C. §§ 1334(c)(1).

The Court should abstain from this adversary proceeding, which involves purely state law questions related to the validity of an alleged easement under New Mexico law with respect to real property located in New Mexico.

Permissive or discretionary abstention is available to federal courts hearing bankruptcy cases, and may be exercised in the interest of justice, in the interest of comity with state courts, or out of respect for state law. 28 U.S.C. § 1334(c)(1).[4] In considering permissive abstention under section 1334(c)(1), courts in the Third Circuit evaluate the following twelve factors:

> (1) the effect or lack thereof on the efficient administration of the estate;
>
> (2) the extent to which state law issues predominate over bankruptcy issues;
>
> (3) the difficulty or unsettled nature of the applicable state law;
>
> (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court;
>
> (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;
>
> (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
>
> (7) the substance rather than form of an asserted "core" proceeding;

[4] "Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1).

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden of the court's docket;

(10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of non-debtor parties.

In re Penson Worldwide, 587 B.R. 6, 22 (Bankr. D. Del. 2018); *In re Maxus Energy Corp.*, 560 B.R. 111, 125 (Bankr. D. Del. 2016); *In re Integrated Health Servs., Inc.*, 291 B.R. 615, 619 (Bankr. D. Del. 2003). The evaluation of these factors is not based on some mathematical formula, although courts in this district have placed particular importance on three factors: (1) the effect on the administration of the estate, (2) whether the claim involves only state law issues, and (7) whether the proceeding is core or non-core. *In re Welded Constr., L.P.*, 609 B.R. 101, 112 (Bankr. D. Del. 2019); *DHP Holdings II Corp. v. Peter Skop Industries, Inc. (In re DHP Holdings II Corp.)*, 435 B.R. 220, 224 (Bankr. D. Del. 2010); *In re Fruit of the Loom, Inc.*, 407 B.R. 593, 600 (Bankr. D. Del. 2009). Ultimately, the decision is left to the broad discretion of the bankruptcy court. *In re DHP Holdings II Corp.*, 435 B.R. 220 at 224. Importantly "when most or all but one of the requirements for mandatory abstention[5] are met, careful consideration should be given to whether it would be appropriate to exercise discretionary abstention under § 1334(c)(1)." *In re*

[5] "Upon a *timely* motion under 28 U.S.C. § 1334(c)(2), a [court] *must* abstain if the following five requirements are met: (1) the proceeding is based on a state law claim or cause of action; (2) the claim or cause of action is 'related to' a case under title 11, but does not 'arise under' title 11 and does not 'arise in' a case under title 11; (3) federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case; (4) an action 'is commenced' in a state forum of appropriate jurisdiction; and (5) the action can be 'timely adjudicated' in a state forum of appropriate jurisdiction." *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006) (emphasis added).

Argus Grp. 1700, Inc., 206 B.R. 737, 751 (Bankr. E.D. Pa. 1996), *aff'd sub nom. Argus Grp. 1700, Inc. v. Steinman*, 206 B.R. 757 (E.D. Pa. 1997); *see also Frelin v. Oakwood Homes Corp.*, 292 B.R. 369, 386 (Bankr. E.D. Ark. 2003) ("[E]ven if the Plaintiffs had failed to prove every element required for mandatory abstention under § 1334(c)(2), most of those elements were undoubtedly met, and accordingly, discretionary abstention is appropriate under § 1334(c)(1).").

A. Abstention Will Not Impede The Efficient Administration Of The Debtors' Estates.

Pre-confirmation, courts in this district have held that where, like here, resolution of the adversary proceeding is not instrumental to the plan of reorganization and will not hold up confirmation and consummation, then there is little to no effect on the administration of the estate. *Hopkins v. Plant Insulation Co.*, 342 B.R. 703, 711 (D. Del. 2006) ("[C]onfirmation of a plan in its bankruptcy is not contingent upon resolution of the [state court action.]"); *In re Integrated Health Servs., Inc.*, 291 B.R. at 620 (finding that resolution of $78 million claim, which represented a potentially large recovery for creditors, was just one of several significant claims or issues being pursued in the chapter 11 cases, and therefore its resolution would have "little effect" on the debtors' proposed plan of reorganization to transfer its operations); *In re OMNA Med. Partners, Inc.*, No. 00-1493 (MFW), 2000 WL 33712302, at *3 (Bankr. D. Del. June 12, 2000) (finding that abstention of proceeding over breach of contract, which had been terminated pre-petition would have little to no effect on the administration of the estate, where its resolution would not require considerations of assumption or rejection or impact confirmation of the plan). Following confirmation, courts in this district find that resolution of an adversary proceeding has little to no effect on the administration of the estate. *In re Fruit of the Loom, Inc.*, 407 B.R. at 600 (Bankr. D. Del. 2009); *In re Fedders N. Am., Inc.*, No. 07-11176 (BLS), 2009 WL 2151245, at *2 (Bankr. D. Del. July 17, 2009); *In re LaRoche Indus., Inc.*, 312 B.R. 249, 254 (Bankr. D. Del. 2004);

Pharm. Rsch. Assocs., Inc. v. Innovative Clinical Sols., Ltd., No. 00-1621 PJW, 2001 WL 1819314, at *2 (Bankr. D. Del. July 12, 2001).

In assessing whether an adversary proceeding will have an effect on the efficient administration of the estate, courts also consider whether abstention will lead to inconsistent judgments in resolving related litigation both inside and outside of bankruptcy court, or whether abstention will lead to a waste of judicial resources, because the court has already become familiar with the facts and issues and/or already rendered rulings in the adversary proceeding. *In re Extraction Oil & Gas, Inc.*, No. 20-11548, 2020 WL 8881086, at *18 (Bankr. D. Del. Oct. 14, 2020) (denying abstention, in part, where briefing and oral argument was already completed on summary judgment motion, with the issue under the court's advisement); *In re Semcrude, L.P.*, 442 B.R. 258, 276–77 (Bankr. D. Del. 2010) (finding that the court was particularly familiar with the facts and issues of the proceeding, which was related to several other claims already pending before the court); *In re Mobile Tool Int'l*, 320 B.R. 552, 557 (Bankr. D. Del. 2005) (abstaining from one adversary proceeding in light of two related proceedings still pending in bankruptcy court, because of possible problem of inconsistent judgments, which would have a negative effect on the administration of the estate). Finally, some courts consider whether abstention will require the debtor to incur costs in refiling the complaint in another court, where the debtor is the plaintiff. *E.g.*, *In re Valley Media, Inc.*, 289 B.R. 27, 30 (Bankr. D. Del. 2003).

None of these considerations demonstrates that this adversary proceeding will have any impact on the efficient administration of the Debtors' estates. While the Philmont Ranch is a significant asset of the Debtors' estates, the outcome of this adversary proceeding would have no impact on the Debtors' ongoing restructuring efforts. Such efforts are geared toward providing a framework for the global resolution of abuse claims against the Debtors, related non-debtor

entities, and local councils, as well as certain chartered organizations, and insurance companies that make contributions to the settlement trust for the benefit of abuse survivors. *Amended Disclosure Statement for the Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC* [D.I. 6445, p. 8]. Moreover, the adversary proceeding is at a very early stage and raises no concerns of inconsistent judgments that could negatively affect the estate.

B. State Law Issues Predominate.

The extent to which state law issues predominate over bankruptcy issues also favors abstention. There can be no question that New Mexico state law issues predominate with respect to Plaintiff's claims. Plaintiff's claims involve only state property law, they raise no federal question and do not implicate any bankruptcy issues. *See, e.g., In re Fruit of the Loom, Inc.*, 407 B.R. at 600 (finding factor two favored abstention because contract at issue was governed by state law and no provision of the Bankruptcy Code was implicated); *FKF Madison Grp. Owner LLC v. 18 E. 23rd St. Realty Co. (In re FKF Madison Park Grp. Owner, LLC)*, No. 10-11867 KG, 2012 WL 174342, at *2 (Bankr. D. Del. Jan. 20, 2012) ("These proceedings involve the interests of New York residents in a condominium located in New York City, New York. New York law applies. The property involved, most of the parties, the witnesses and the applicable law have no connection with this forum."). Where the state law issues so predominate the proceeding as they do in this case, this factor weighs decidedly in favor of having the state court decide it. *In re Integrated Health Servs.*, 291 B.R. at 621; *Wells Fargo Bank N.A. v. Johnson*, No. CIV. 11-1205-SLR, 2012 WL 1203427, at *4 (D. Del. Apr. 4, 2012); *see also In re Mobile Tool Int'l*, 320 B.R. at 557. In addition, while the legal issues are not novel, the resolution of Plaintiff's adversary proceeding will likely require a detailed and complicated factual analysis spanning many years. Factors two and three weigh in favor of abstention.

C. A State Court Action Could Be Filed At Any Time.

While there is no pending state court action in New Mexico state court, it is just one factor in the abstention analysis. *In re DHP Holdings II Corp.*, 435 B.R. at 227, 233 (finding that abstention was warranted despite the absence of a related state court proceeding). Moreover, there is nothing preventing the Plaintiff from commencing an action there. Under the circumstances, the Court should abstain from this proceeding in the interests of comity with state courts, respect for state law, and deference to the expertise of state courts in matters involving state law.

D. There Is No Independent Basis For Federal Jurisdiction Over The Proceeding.

In determining whether the fifth factor favors abstention, courts assess whether the parties' diversity of citizenship provides an alternative basis for federal jurisdiction or whether the subject matter of this dispute necessarily involves a federal question outside of section 1334 jurisdiction ("arising under," "arising in," or "related to" cases under title 11). 28 U.S.C. §§ 1331, 1332, 1334. *In re AstroPower Liquidating Tr.*, 335 B.R. 309, 331 (Bankr. D. Del. 2005).

Aside from, arguably, "related to" jurisdiction under 28 U.S.C. § 1334, there is no basis for jurisdiction in this Court over this adversary proceeding. *See In re Integrated Health Servs.*, 291 B.R. at 621 (favoring abstention where bankruptcy court had neither diversity jurisdiction nor federal question jurisdiction); *In re LaRoche Indus., Inc.*, 312 B.R. at 254 (same). There is no federal question jurisdiction implicated by a state law dispute concerning the existence of an easement involving property in New Mexico. There is also likely no diversity jurisdiction here as both parties have their principal place of business in Texas. Compl., ¶ 6-7. Even assuming Plaintiff could somehow establish diversity jurisdiction (and it cannot), this Court should exercise

its discretion to abstain based on the preponderance of the other factors that weigh decidedly in favor of abstention.

E. The Proceeding Is Only, At Most, Remotely Related To Debtors' Bankruptcy Cases.

Plaintiff's claims have only a weak nexus, if any, to these chapter 11 cases, and the outcome of this adversary proceeding will have no effect on a successful reorganization plan.

Courts in this district have previously held that an adversary proceeding is related to the main bankruptcy case where its adjudication necessarily implicates the claims resolution process. *See In re Welded Constr., L.P.*, 609 B.R. at 112 ("[T]his proceeding is essentially an objection to proofs of claim . . . [and therefore] is related to the main bankruptcy case."); *In re Samson Res. Corp.*, 559 B.R. 360, 372 (Bankr. D. Del. 2016) (same). An adversary proceeding may also be considered related to the main case where it implicates the resolution of a rejection motion or where it implicates a prior order entered by the court. *See In re Extraction Oil & Gas, Inc.*, 2020 WL 8881086, at *19 (adversary proceeding filed in response to counter-party's objection to debtors' motion to reject executory contract); *In re Cubic Energy, Inc.*, 603 B.R. 743, 756 (Bankr. D. Del. 2019) ("The Court should not abstain from determining the meaning of its own plan."); *Republic Underwriters Ins. Co. v. DBSI Republic, LLC (In re DBSI, Inc.)*, 409 B.R. 720, 730 (Bankr. D. Del. 2009) ("[T]his proceeding is closely related to Debtors' bankruptcy cases [because the plaintiff's] claims stem from orders this Court entered in the bankruptcy case [including an assumption/assignment order, a rejection order, and a sale order.]"). Finally, if an adversary proceeding involves a core matter, then it is more likely that a court will find it related to the main bankruptcy case. *In re RNI Wind Down Corp.*, 348 B.R. 286, 297 (Bankr. D. Del. 2006), *subsequently aff'd*, 359 F. App'x 352 (3d Cir. 2010); *In re PSA, Inc.*, No. 00-3570 (CGC), 2003 WL 22938894, at *4 (Bankr. D. Del. Dec. 8, 2003) ("Further, the adversary proceeding is

related to the main bankruptcy case in that the outcome of this action will have a direct effect on the distributions to creditors and is a core proceeding.").

Although Plaintiff's attempts to frame this action as a core proceeding implicating the "administration of the estate" and "affecting the liquidation of the estate," Compl., ¶ 4, the outcome will have no impact on the administration of the Debtors' estates or their liquidation, as the Debtors are seeking reorganization (as opposed to liquidation) and expect to retain ownership of the Philmont Ranch post-confirmation. There is likewise no intertwinement between this adversary proceeding and any pending proof of claim filed in the Debtors' cases, nor is there any connection to a substantive bankruptcy motion pending in the main proceeding, such as a sale order under 11 U.S.C. § 363 or a rejection motion under 11 U.S.C. § 365. Most critically, the BSA is not selling the property to which the purported easement allegedly attaches. In fact, on the Effective Date of the *Debtors' Second Modified Fifth Amended Chapter 11 Plan of Reorganization* [D.I. 7832] (the "Plan"), all property of the estate not subject to the Settlement Trust or distributions will re-vest in the Reorganized BSA. *See* Plan §§ V.R, VI.A.3, X.A. Because the Property will not be subject to liquidation, resolution of this adversary proceeding will have no impact on any distribution to creditors. *In re Trans World Airlines, Inc.*, 278 B.R. 42, 52 (Bankr. D. Del. 2002) (where there is only a "weak nexus between" a bankruptcy case and the adversary proceeding, abstention does not "disrupt the efficient administration of [the estate].").

F. The Claims In This Proceeding Are Non-Core.

Courts determine whether a proceeding is core by reference to two sources. First, Section 157(b) of title 28 "provides an illustrative list of proceedings that may be considered core. [] Second, the court applies the Third Circuit's test for a 'core' proceeding . . . . [A] proceeding is core (1) if it invokes a substantive right provided by title 11 or (2) if it is a proceeding, that by its

nature, could arise only in the context of a bankruptcy case." *Halper v. Halper,* 164 F.3d 830, 836 (3d Cir. 1999) (internal citations and quotation marks omitted).

The claims at issue in this adversary proceeding – declaratory judgments as to the validity of an easement by prescription or by necessity under New Mexico law – are not on the "illustrative list of 'core' proceedings found in § 157(b)(2)." *In re Exide Techs.*, 544 F.3d 196, 206–07 (3d Cir. 2008) (citations omitted). Nevertheless, the Plaintiff attempts to shoehorn its claims into the two catch-all provisions listed under 28 U.S.C. § 157(b)(2)(A) ("matters concerning the administration of the estate") and (O) ("other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship . . ."). However, "an action is not core simply because it can fit within the rather broad language of [§ 157(b)(2)]." *In re Integrated Health Servs., Inc.*, 291 B.R. at 618 (Bankr. D. Del. 2003) (citing *Southeastern Sprinkler Co. v. Meyertech Corp. (In re Meyertech Corp.)*, 831 F.2d 410, 416–17 (3d Cir.1987) ("It is difficult to perceive of a proceeding which would not fall under the all-encompassing language of either § 157(b)(2)(A) or § 157(b)(2)(O), but we are cautioned that an expansive interpretation of these provisions may lead to some seemingly incorrect and overbroad results regarding core proceedings")); *see also Hoffmeyer v. Loewen Group Int'l, Inc. (In re Loewen Group Int'l, Inc.)*, 279 B.R. 471 (Bankr. D. Del. 2002).

The claims in the Complaint do not invoke a substantive right provided by title 11, nor is this a proceeding that, by their nature, could arise *only* in the context of a bankruptcy case. *See In re Exide Techs.*, 544 F.3d 196, 206–07 (3d Cir. 2008). To the contrary, the purely state law easement claims raised in Plaintiff's Complaint clearly can and do arise outside of bankruptcy. *See Barnett v. Dutch Run-Mays Draft, LLC*, No. 5:12-CV-01471, 2013 WL 960183, at *5 (S.D.W. Va. Mar. 12, 2013) (finding dispute over existence of easement and obstruction of right-of-way is

at best a non-core 'related to' proceeding as it "do[es] not arise under or in the Bankruptcy Code . . . is not derived or created from Title 11 . . . [and] is not dependent upon the Bankruptcy Code since the claims exist wholly outside of Title 11."); *In re AV Car & Home, LLC*, No. 18-00434, 2018 WL 6650357, at *1 (Bankr. D.D.C. Dec. 17, 2018) (finding that dispute over easement was non-core); *Harris v. Cooley*, No. 1:18-CV-712, 2019 WL 1573311, at *6 (S.D. Ohio Apr. 11, 2019), *report and recommendation adopted*, No. 1:18-CV-712, 2019 WL 4751851 (S.D. Ohio Sept. 29, 2019) (rejecting argument that "the property line dispute should be considered a core proceeding rather than a non-core proceeding that is (at most) related to a case under title 11."); *In re Adams*, No. 13-45239-CEC, 2016 WL 922239, at *1 (Bankr. E.D.N.Y. Mar. 10, 2016) (finding that claim of adverse possession was a non-core proceeding); *In re Integrated Health Servs., Inc.*, 291 B.R. 615, 618 (Bankr. D. Del. 2003) (finding that "the Adversary Proceeding [involving alleged prepetition corporate waste and breach of fiduciary duty] is not dependent on any provisions of the Bankruptcy Code nor is it a proceeding that could only arise in the context of a bankruptcy case," and claims raised were "quintessential state law causes of action"); *LaRoche Indus.*, 312 B.R. at 254 (favoring abstention where claims were based on contract dispute, not bankruptcy law); *Davis v. Merv Griffin Co.*, 128 B.R. 78, 90 (D.N.J. 1991). This factor provides further basis for abstention.

G. Feasibility Of Severing Claims From Core Proceedings.

As discussed above, and contrary to Plaintiff's suggestion, Compl., ¶ 4, this adversary proceeding does not involve core claims that would implicate the feasibility of severing the action. *See In re Integrated Health Servs.*, 291 B.R. at 621 ("Since all the issues involved in the Adversary Proceeding are non-core, severing the counts of the Complaint need not be done. It

is possible to abstain and allow the state court to decide the entire suit with minimal disruption to the main bankruptcy estate.") This factor also favors abstention.[6]

H. Abstention Will Relieve The Burden On The Court's Docket.

Abstention from this adversary proceeding will also serve to lighten the burden on the Court's docket, which also counsels in favor of abstention. *See In re Fruit of the Loom*, 407 B.R. at 601 (holding that heavy case load during 2008 financial crisis favored abstention). The docket report of the BSA chapter 11 cases, alone, currently contains over 8,000 entries, not to mention this Court's other ongoing chapter 11 cases and adversary proceedings.

The District of Delaware has one of the highest average weighted filings per authorized judgeship in the entire country, at 903 weighted filings.[7] Likewise, the Delaware Bankruptcy Court has one of the busiest chapter 11 dockets in the country. For the twelve month period ending September 30, 2020, approximately 1,360 chapter 11 cases were filed in Delaware and for the 12-month period ending September 30, 2021, approximately 914 chapter 11 cases were filed in Delaware.[8] Moreover, approximately 1,439 adversary proceedings were filed in the bankruptcy court for the District of Delaware over the 12-month period ending June 30, 2021,

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[6] Even if the Court were to find that this adversary proceeding raised core claims, "[t]he fact that a matter may be a core proceeding does not preclude abstention where abstention is otherwise appropriate." *In re Elegant Concepts, Inc.*, 61 B.R. 723, 729 (Bankr.E.D.N.Y.1986). See *In re LaRoche Indus., Inc.*, 312 B.R. at 254 (granting permissive abstention despite finding that the claim was core, "where the essence of [the] claim is a contract dispute, not a bankruptcy law dispute."); *Underwood v. United Student Aid Funds, Inc. (In re Underwood)*, 299 B.R. 471, 476 (Bankr. S.D. Ohio 2003) ("But whether it is a core proceeding is of no moment because a bankruptcy court may abstain in both core and non-core proceedings").

[7] https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 (last accessed on January 17, 2022).

[8] https://www.uscourts.gov/sites/default/files/data_tables/jb_f2_0930.2021.pdf (last accessed on January 17, 2022).

https://www.uscourts.gov/sites/default/files/bf_f2_0930.2020.pdf (last accessed on January 17, 2022).

(Continued . . .)

which amounts to an average of 180 proceedings per judge (1,439 filed adversary proceedings divided by 8 judges).[9] Accordingly, this factor overwhelmingly favors abstention.

I. Likelihood Of Forum Shopping.

Because the Plaintiff likely could not have brought this suit outside the bankruptcy court without first moving for relief from the automatic stay, it is unlikely that there was any forum shopping, here. *See In re Longview Power, LLC*, 516 B.R. 282, 295 (Bankr. D. Del. 2014) (citing *In re Ferretti Const., Inc.*, 208 B.R. 396, 398 (Bankr. S.D. Tex. 1995) (holding mandatory abstention did not apply, *inter alia*, where no proceeding had been commenced and could not be commenced without first obtaining relief from automatic stay)). This factor is, therefore, neutral.

J. The Debtors Have The Right To A Jury Trial Under Applicable New Mexico Law.

Although Plaintiff has not demanded it, the BSA has a right to a jury trial with respect to the question of whether an easement exists. *See, e.g.*, *Walker v. 300 S. Main, LLC*, No. 2:05-CV-442 TS, 2007 WL 3088129, at *2 (D. Utah Oct. 22, 2007) (finding that claims of express written and oral easements are contract actions that require findings of fact by the jury and finding that "claims of prescriptive easement and easement by estoppel require a determination on whether the easement exists, and therefore require a jury trial"); *see also* 50A C.J.S. Juries § 88, 270 (2021). Once a "jury makes its findings on the existence of an easement, all issues regarding relief relating to an easement are equitable issues for the court." *See Walker*, 2007 WL 3088129, at *2. That right and the BSA's lack of consent to the entry of final orders or judgments by the Court with respect to this adversary proceeding weighs in favor of permissive abstention. *See In re Appleseed's Intermediate Holdings, LLC*, No. ADV 11-51847 KG, 2011 WL 6293251, at *2

[9] https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data (last accessed on January 17, 2022).

(D. Del. 2011); *In re Integrated Health Servs.*, 291 B.R. at 623 (holding that this factor "favors abstention because the only way to guarantee the right to a jury trial would be for the reference to be withdrawn, which is beyond our control, or to abstain"); *In re Fruit of the Loom*, 407 B.R. at 601 (favoring abstention because bankruptcy court could not hold a jury trial).

K. The Proceeding May Involve Non-Debtor Parties.

While Plaintiff is the only current non-debtor party, there exist other non-debtor adjoining landowners who are necessary or indispensable to the resolution of this action, who may need to be joined as parties to this adversary proceeding. Therefore, this factor weighs in favor of abstention.

Although "not a mathematical formula," where the majority of factors favor abstention, courts have found abstention to be appropriate. *In re LaRoche Indus.*, 312 B.R. at 255. Here, the majority of factors – including the three most important factors – overwhelmingly favor abstention. Perhaps as importantly, none of the factors favor the Plaintiffs. The litigation of Plaintiff's claims in New Mexico state court will have little to no effect on the administration of the estate, particularly, where a negative outcome for the BSA would have only a marginal effect on the Property, which is not subject to liquidation for distributions to creditors, but which the Debtors will continue to own and operate post-emergence. State law issues clearly predominate and Plaintiff's claims will not have any impact on the administration of the estate. Accordingly, this Court should abstain from this adversary proceeding.

II. ALTERNATIVELY, VENUE OF THIS ADVERSARY PROCEEDING SHOULD BE TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO PURSUANT TO 28 U.S.C. § 1412.

Should the Court decline to abstain despite the overwhelming balance of factors in favor of abstention, it should nevertheless transfer venue of this action to the United States District

Court for the District of New Mexico in the interest of justice and for the convenience for the parties.

Transferring an adversary proceeding to another district is governed by 28 U.S.C. § 1412, which provides that "the court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." The decision to transfer venue under section 1412 turns on essentially the same issues as transfer under 28 U.S.C. § 1404(a), which governs transfer of civil cases between district courts. *See, e.g.*, *Pursuit Athletic Footwear, Inc. v. Save Power, Ltd.*, 1996 WL 328596, at *6 (D. Del. June 7, 1996) (citing *In re Emerson Radio Corp.*, 52 F.3d 50, 55 (3d Cir. 1995)). As the Third Circuit has explained, courts may "consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Id.* (quoting *Jumara v. State Farm Ins., Co.*, 55 F.3d 873, 879–80 (3d Cir. 1995)). The relevant factors in the Third Circuit include the following:

> (1) plaintiff's choice of forum, (2) defendant's forum preference, (3) whether the claim arose elsewhere, (4) location of books and records and/or the possibility of viewing the premises if applicable, (5) the convenience of the parties as indicated by their relative physical and financial condition, (6) the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora, (7) the enforceability of the judgment, (8) practical considerations that would make the trial easy, expeditious, or inexpensive, (9) the relative administrative difficulty in the two fora resulting from congestion of the courts' dockets, (10) the public policies of the fora, (11) the familiarity of the judge with the applicable state law, and (12) the local interest in deciding local controversies at home.

In re Fleming Cos., Inc., 444 B.R. 127, 139–40 (Bankr. D. Del. 2011) (quoting *Jumara*, 55 F.3d at 879-80).

These factors overwhelmingly favor transferring the case to New Mexico. First, the plaintiff's choice of forum receives deference only to the extent of placing the initial burden on the movant to show that the other factors favor transfer. *See, e.g., In re DBSI, Inc.*, 2014 WL 4828882 at *4 (D. Del. Sept. 25, 2014). Second, the BSA's choice of forum should be accorded weight because it is based on logical, rational, and practical concerns over the location of material witnesses, evidence, and applicable law. *See id.*

Third, the claims arose in New Mexico and all of the operative events related to the claims occurred in New Mexico, therefore strongly favoring New Mexico venue. *See, e.g., In re Hoffmann–La Roche Inc.*, 587 F.3d 1333, 1338 (Fed. Cir. 2009) ("[I]f there are significant connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor."). Meanwhile, the case has no relevant factual connection to Delaware.

Fourth, the location of books and records favors New Mexico. While both parties have principal places of business in Texas, the properties themselves are located in New Mexico and records related to the Plaintiff's alleged use of the property could be expected to be located there. Accordingly, this factor weighs in favor of transfer. *Smart Audio Techs., LLC v. Apple, Inc.*, 910 F. Supp. 2d 718, 732 (D. Del. 2012) ("Though the court appreciates [the] argument that technological advances in the electronic storage and transfer of documents have made this factor somewhat antiquated, it cannot simply ignore the location of the relevant books and records.") (internal citations omitted). At worst, this factor is neutral as both parties are Texas residents and presumably maintain their books and records in that state.

Fifth, the convenience of the parties strongly favors transfer to New Mexico. In weighing this factor, courts consider several issues, including "(1) the parties' physical location;

(2) the associated logistical and operational costs to the parties' employees in traveling to Delaware (as opposed to the proposed transferee district) for litigation purposes; and (3) the relative ability of each party to bear these costs in light of its size and financial wherewithal." *In re DBSI, Inc.*, 2014 WL 4828882, at *6. As previously noted, both parties have their principal places of business in Texas and both parties operate bordering ranches in New Mexico. *See id.* (finding that Idaho LLC with Utah principal place of business would be inconvenienced by adversary proceeding in Delaware). The BSA expects that most or all of the fact witnesses that Plaintiff would call are employed by or affiliated with Ponil Ranch in New Mexico and the BSA's own witnesses work and reside in New Mexico. Therefore, there is minimal or no inconvenience to Plaintiff to try this dispute in New Mexico where the Property is located.

Sixth, as alluded to above, the convenience of the witnesses strongly favors New Mexico over Delaware. With the December 1, 2013 amendments to Rule 45 of the Federal Rules of Civil Procedure, it is safe to assume that all fact witnesses in this case—including party witnesses—are outside the Court's subpoena power for depositions, and even trial. In particular, Rule 45 no longer authorizes federal courts to compel any witness, even a party or a party's representative, to travel more than 100 miles for trial unless the witness resides, is employed, or regularly transacts business in person in the state. *See* Fed. R. Civ. P. 45 (2014) & Adv. Comm. Notes ("Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state."); *Havens v. Maritime Commc'ns/Land Mobile, LLC*, 2014 WL 2094035, at *2 (D.N.J. May 20, 2014). ("MCLM's argument that Cooper, as an officer, must appear in New Jersey for trial ignores both the text and the spirit of the rule, which expressly mentions both parties and officers of parties—indicating recognition that officers are distinct

entities from parties for purposes of the rule—and provides protection against situations, as here, where the officer (or party) would have to travel across the country to testify at trial."); *A. Hak Indus. Servs. BV v. TechCorr USA, LLC*, 2014 WL 2931794, at *2 (N.D. W. Va. June 30, 2014) ("Here, the Court lacks authority to require that the General Manager of A. Hak Industrial Services, BV attend the motion to compel hearing in person. The General Manager lives and works in the Netherlands, outside of West Virginia and more than 100 miles from Wheeling, West Virginia. He therefore is outside of Rule 45(c)(1)'s ambit.").

This rule informs venue selection and weighs strongly in favor of transferring venue from a court with no subpoena power to a court with absolute or near absolute subpoena power. *See, e.g.*, *McCloud v. McClinton Energy Grp., L.L.C.*, 2014 WL 6388417, at *4 (W.D. Tex. Nov. 14, 2014) ("A venue that has 'absolute subpoena power for both deposition and trial' is favored over one that does not.") (citing 2013 amendments to Rule 45 in support of transferring venue). In contrast to Delaware, the District of New Mexico has near absolute subpoena power because all or substantially all of the party and non-party witnesses likely reside or regularly do business in New Mexico. Accordingly, this factor strongly weighs in favor of transfer. *See Zazzali v. Swenson*, 852 F. Supp. 2d 438, 451 (D. Del. 2012) ("[W]here none of the material non-party witnesses are within this Court's subpoena power and almost all of the material non-party witnesses are within the proposed transferee court's subpoena power, this factor weighs in favor of transfer.").

The seventh factor, enforceability of the judgment, is neutral as any judgment would be enforceable, whether rendered in New Mexico or Delaware.

The eighth and ninth factors – practical considerations and the relative administrative difficulty in getting the case to trial in the two fora – also favor New Mexico over

Delaware, or are neutral. As discussed above, the District of Delaware's average weighted filings per authorized judgeship is 903, while the District Court for the District of New Mexico has a weighted filing figure of 469.[10] There is likewise a similar disparity between the caseloads of the bankruptcy courts in each district. For the twelve month period ending June 30, 2021, approximately 1,439 adversary proceedings were filed in the bankruptcy court for the District of Delaware, which amounts to an average of 180 per judge (1,439 filed adversary proceedings divided by eight judges).[11] By contrast, over the same period, approximately 58 adversary proceedings were filed in the bankruptcy court for the District of New Mexico or an average of 29 per judge (58 filed adversary proceedings divided by two judges). Although this Court is extraordinarily adept at scheduling and conducting litigation expeditiously and efficiently with less resources per case than other districts, the sheer volume of pending cases when compared to the more appropriate and convenient New Mexico venue tilts these factors in favor of transfer.

The tenth and twelfth factors, public policy considerations and local interest in deciding local controversies at home, also favor New Mexico over Delaware.

While "[p]ublic policy favors centralization of bankruptcy matters," that policy "is not greatly frustrated by the transfer of non-core proceedings." *IPC Int'l Corp. v. Milwaukee Golf Shopping Center LLC (In re IPC Int'l Corp.)*, No. 13-12050, 2014 WL 5544692, at *6 (Bankr. D. Del. Nov. 3, 2014). Here, the basis for the adversary proceeding is a non-core easement dispute. This factor favors transfer.

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[10] https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 (last accessed on January 17, 2022).

[11] https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data (last accessed on January 17, 2022).

Finally, the eleventh factor – the familiarity of the judge with applicable state law – strongly favors New Mexico. Although this Court is more than capable of interpreting and applying New Mexico state law, it cannot be said that this Court has greater familiarity with New Mexico law than a New Mexico judge. *See, e.g.*, *DHP Holdings II Corp. v. The Home Depot, Inc. (In re DHP Holdings II Corp.)*, 435 B.R. 264, 275 (Bankr. D. Del. 2010) ("[T]he Court agrees with the Debtors that the legal issues presented are neither complex nor novel. However, because Georgia law governs the parties' contract, the Court agrees . . . that, should any such issues arise, local judges are more familiar with the applicable state law."); *OCB Rest. Co. v. Vlahakis (In re Buffets Holdings, Inc.)*, 397 B.R. 725, 729 (Bankr. D. Del. 2008) ("The Court concludes that any knowledge it has of the Debtors' bankruptcy case would be of little assistance in deciding this adversary proceeding involving a breach of contract under Michigan state law.").

This Court has broad discretion to balance the public and private interests in discerning whether venue should be transferred to the U.S. District Court for the District of New Mexico. *In re Centennial Coal, Inc.*, 282 B.R. 140, 144 (Bankr. D. Del. 2002). Here, the twelve *Jumara* factors, collectively, sound in favor of transfer. The adversary proceeding arose over whether an easement runs between two ranches in New Mexico. The key witnesses who run the ranches and who have the most knowledge of the facts implicating the creation of an easement by prescription or necessity are located in New Mexico and within the subpoena power of the New Mexico courts. New Mexico has a greater interest in the resolution of a matter potentially impacting New Mexico residents, businesses, and the development of New Mexico easement law, particularly, where the adversary proceeding deals with non-core matters and where a New Mexico judge would have a greater familiarity with New Mexico state law. Finally, given the burden on

this Court's docket and the fact that this adversary proceeding is still in its early stages, transfer would best serve both the convenience of the parties and the interests of justice.

CONCLUSION

For all the foregoing reasons, the BSA requests that the Court enter an order abstaining from this adversary proceeding given the state law issues that so overwhelmingly predominate in this action. Alternatively, the BSA requests that venue of this adversary proceeding be transferred to the United States District Court for the District of New Mexico.

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January 25, 2022
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Donna L. Culver, Esquire, do hereby certify that a copy of the foregoing **BOY SCOUTS OF AMERICA'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO ABSTAIN OR, IN THE ALTERNATIVE, TO TRANSFER VENUE** was served this 25th day of January, 2022, upon the following counsel in the manner indicated:

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