

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILMINGTON HOSPITALITY, LLC,
Plaintiff

CIVIL ACTION

v.

NEW CASTLE COUNTY,
Defendant

NO. 01-6007

ORDER

AND NOW, this 30th day of June, 2003, upon consideration of the defendant's Motion to Dismiss (Docket No. 2), the plaintiff's opposition thereto, the supplemental filings of the parties, the Report and Recommendation of United States Bankruptcy Judge Diane W. Sigmund, the plaintiff's objections to the Report and Recommendation, and the parties' supplemental filings regarding the Report and Recommendation, IT IS HEREBY ORDERED THAT:

- (1) The plaintiff's objections to the Report and Recommendation are overruled.
- (2) The Report and Recommendation is APPROVED and ADOPTED.
- (3) The defendant's motion to dismiss is GRANTED.

On November 15, 2002, the Court referred this case to United States Bankruptcy Judge Diane W. Sigmund. The referral was for the limited purpose of determining whether the bankruptcy abstention doctrines raised by the defendant in its motion to dismiss required the Court to abstain in this case. On May 21,

2003, Bankruptcy Judge Sigmund issued her Report and Recommendation. She concluded that: (1) mandatory abstention under 28 U.S.C. § 1334(c)(2) was not required and (2) permissive abstention under 28 U.S.C. § 1334(c)(1) was appropriate. In finding permissive abstention appropriate, Bankruptcy Judge Sigmund noted two issues that may weigh against abstention. First, permissive abstention may not be appropriate if the state statute of limitations for the plaintiff's cause of action has expired. Second, permissive abstention may be inappropriate if this Court would resolve the matter more expeditiously than the state court. Bankruptcy Judge Sigmund stated that she did not have enough information to determine how these two issues impacted the permissive abstention analysis.

The plaintiff filed objections to the Report and Recommendation. The plaintiff objected to the conclusions that: (1) state law issues predominated over federal law issues and (2) the plaintiff's use of the affiliate rule to file the case in the Eastern District of Pennsylvania weighed in favor of abstention. Both parties also filed briefs on the two issues for which Bankruptcy Judge Sigmund stated that she did not have enough information.

The Court will approve and adopt the Report and Recommendation and **will** grant the defendant's motion to dismiss. The Court writes separately to address the objections raised by the

plaintiff and the two issues for which Bankruptcy Judge Sigmund did not have enough information to decide.

The plaintiff's objection to Bankruptcy Judge Sigmund's conclusion that state law predominates over federal law in this case is twofold. First, the plaintiff argues that the presence of local land use laws does not automatically mean that abstention is appropriate for the plaintiff's substantive due process and equal protection claims. Second, the plaintiff claims that its post-petition dispute is a core proceeding concerning the administration of the bankruptcy estate, and abstention is not appropriate with respect to core proceedings.

To violate substantive due process in the local land use context, the government actions must shock the conscience. United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 401 (3d Cir. 2003). Much of the plaintiff's substantive due process claim turns on the nature of the local zoning ordinances and building codes and how those local laws were applied to the plaintiff. Resolution of the plaintiff's claim will require: (1) examining the substance of the local laws; (2) determining whether the defendants acted permissibly under the local laws; and (3) deciding whether the local laws and the defendant's behavior under the laws was conscience shocking. Although federal law is implicated to some extent in these inquiries, the main focus of each inquiry will **be on state law.**

The plaintiff's equal protection claim requires an examination of: (1) the local zoning laws; (2) the types of developers and property owners in New Castle County; and (3) how the local zoning laws are applied by the county to the similarly situated developers. The county's practices could still be sustained if the practices are reasonable and bear a rational relationship to a permissible state objective. See Congregation Kol Ami v. Abinston Township, 309 F.3d 120, 133-34 (3d Cir. 2002). There are federal law issues present with respect to the equal protection challenge, but state law issues play a predominate role.

The plaintiff is correct that the presence of local land use laws does not automatically require abstention. In this case, however, the predominance of state law issues favors abstention under 28 U.S.C. § 1334(c)(1) on the plaintiff's substantive due process and equal protection claims.

The post-petition dispute between the parties is a core proceeding. The dispute, however, is not central to the bankruptcy reorganization or to administering the bankruptcy estate. The reorganization plan has been approved independently of the outcome of the civil action. As Bankruptcy Judge Sigmund noted, the outcome of the civil action has a marginal impact on the administration of the bankruptcy estate. The Court agrees with Bankruptcy Judge Sigmund that permissive abstention may be appropriate despite the presence of a core proceeding when the core proceeding has a marginal impact on the administration of the

bankruptcy estate. Additionally, the plaintiff's claims in the civil action exist independently of the Bankruptcy Code.

The relative lack of importance of the core proceeding to the bankruptcy reorganization and the administration of the bankruptcy estate stands in stark contrast to the centrality of state law in resolving the post-petition dispute. Resolution of the dispute will be heavily influenced by whether there is a contract and whether the contract is enforceable. These are matters of state law that predominate over federal law. This conclusion favors abstention under 28 U.S.C. § 1334(c)(1).

The plaintiff's objection regarding how Bankruptcy Judge Sigmund applied the forum shopping factor is also without merit. Bankruptcy Judge Sigmund concluded that the plaintiff was likely engaged in forum shopping based on her observation that the plaintiff filed three state court actions regarding the same underlying events and was unsuccessful in each action. The Court agrees with Bankruptcy Judge Sigmund's conclusion regarding the likelihood that the plaintiff was engaged in forum shopping.

Bankruptcy Judge Sigmund noted that the bankruptcy case is only properly in this district because of the presence of a related entity. The Court agrees that the tenuous relationship **of** the bankruptcy case to this forum also supports a conclusion that the plaintiff was engaged in forum shopping. Like Bankruptcy Judge Sigmund, however, the Court **does** not hold the plaintiff's use of

the affiliate rule against it when determining whether abstention is appropriate under 28 U.S.C. § 1334(c)(1).

The possible state statute of limitations problem raised by Bankruptcy Judge Sigmund does not exist. The defendant promised to waive the defense for the claims contained in the plaintiff's complaint if the plaintiff files a complaint in Delaware Superior Court within thirty days of the Court's decision on abstention.

With respect to whether this Court or a state court could decide the case more expeditiously, there appears to be little difference between how quickly either forum could resolve the case. The plaintiff believes the case can proceed to trial in this Court in eight months. The defendant has pointed to expedited procedures in Delaware that the plaintiff could take advantage of that would allow disposition of this case within six to nine months of filing. Additionally, prior state court proceedings involving the same parties and the same underlying events moved quickly. The plaintiff filed a complaint in state court on October 18, 2000. The plaintiff's motion for a temporary restraining order was denied on October 20, 2000. The plaintiff's motion for a preliminary injunction was denied on November 3, 2000. The state court was ready to proceed to a trial on the equity portion of the case by November 27, 2000, but the plaintiff opted not to go forward. Without a discernible difference between how quickly the case could be resolved in this Court and state court, the factor is neutral in terms of whether the Court should abstain.

The Court agrees with Bankruptcy Judge Sigmund that permissive abstention is appropriate because of the predominance of state law issues and the likelihood that the plaintiff is engaged in forum shopping. Because there is not a state statute of limitations problem and the case can be resolved as expeditiously in state court as this Court, no factors counsel against permissive abstention. The Court, therefore, exercises its authority under 28 U.S.C. § 1334(c)(1) to abstain from hearing the dispute in this case and grants the defendant's motion to dismiss.

BY THE COURT:


MARY A. MCLAUGHLIN, J.

6/30/03

M. A. Cusick

F. Maurina

H. Fay

J. Simon - fay

J. Silvestri -

J. Gannone

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA
ROBERT N.C NIX BUILDING
900 MARKET STREET
SUITE 400
PHILADELPHIA 19107-4299

Joseph Simmons
Joseph Simmons
Clerk

57
Telephone
(215) 408-2800

May 20, 2003

Re Wilmington Hospitality. LLC, Inc
Bankruptcy No. 01-19401DWS Adv No 03-3004DWS

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01-6007

Dear Mr Kunz

We herewith transmit the following document(s) filed in the above matter(s), together with a certified copy of the docket entries

- Certificate of appeal from order entered by the Honorable .
Notice of appeal filing fee paid not paid
- Supplemental certificate of appeal.
- Motion for leave to appeal filed .
 Answer to motion filed .
- Proposed findings of fact and conclusions of law entered by the Honorable .
 Objections filed .
- Report and recommendation entered on 5/20/2003 by the Honorable Diane W. Sigmund.
 Objections filed
- Original record transferred to the District Court pursuant to the order of the Honorable .
- Other:

FILED

MAY 21 2003
MICHAEL E. KUNZ, Clerk
Den. Clerk

Kindly acknowledge receipt on the copy of the letter provided.

For the Court

Joseph Simmons
Clerk

By: *J. M. Glueck*
Deputy Clerk

Received Above material or record file thi _____ day of _____ 2001.

Civil Action No. 01-6007 Signature: Joe Lamm

Miscellaneous No. _____ Date: 5/21/03

Assigned to Judge RLK

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BFL5 frm2

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

57

01-6007-file

In re : Chapter 11
:
WILMINGTON HOSPITALITY, LLC, : Bankruptcy No. 01-19401DWS
INC., :
:
Debtor. :

WILMINGTON HOSPITALITY, LLC : Misc. Proceeding No. 03-3004DWS
Plaintiff, :

v.

NEW CASTLE COUNTY, :
Defendant. :

FILED

MAY 21 2003

By: [Signature]
MICHAEL E. KUNZ, Clerk
Den. Clk:

REPORT AND RECOMMENDATION

BY: DIANE WEISS SIGMUND, United States Bankruptcy Judge

This report and recommendation is issued in response to the Order (“Referral Order”) entered by District Judge **Mary A. McLaughlin** referring Wilmington Hospitality, LLC v. New Castle County, Civil **Action** No. 01-6007 (the “**District Court Action**”), to me for the “limited purpose” of determining whether the bankruptcy abstention doctrine requires the District Court to abstain from hearing the case.’ This abstention issue was raised by

1 According to the docket in this miscellaneous proceeding, the Referral Order, which is dated November 15, 2002, was filed in the Bankruptcy Court on December 10, 2003.

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defendant, New Castle County (the “County”), in a motion to dismiss the complaint (“Complaint”) which debtor, Wilmington Hospitality, LLC (“WH”), filed against it in the District Court Action.

At a status hearing which I held on the abstention issue, the parties presented oral argument and I set a post-hearing briefing schedule. All memoranda have now been filed. Upon consideration, I conclude that mandatory abstention pursuant to 28 U.S.C. §1334(c)(2) is not applicable to the District Court Action. Nevertheless, the District Court may exercise its discretion to abstain from deciding the Complaint pursuant to 28 U.S.C. §1334(c)(1). A discussion of the factors which courts utilize in deciding whether to abstain under §1334(c)(1) is set forth below. Based on the record before me, I recommend that the District Court exercise discretionary abstention in this case unless the District Court concludes that: (i) the statute of limitations would bar WH from pursuing its § 1983 claim against the County in state court; and (ii) the state court would resolve WH’s claim against the County less expeditiously than the District Court. The record before me contains insufficient evidence to make findings on these *two* issues.

BACKGROUND

The following facts are relevant for my disposition of this matter.² WH is a limited

² Since this abstention matter ~~was~~ raised in a motion to dismiss, **all** allegations in the Complaint, and all reasonable inferences that can be drawn therefrom must be accepted **as** true and viewed in **the** light most **favorable** to **the** debtor **as** the non-moving party. See *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3rd Cir. 1989) (citations omitted); *Annelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3rd Cir.), cert. denied, 474 U.S. 935 (1985).

liability company organized and existing under the laws of Delaware; its principal place of business is in Wilmington, Delaware. Complaint ¶1. The principals of WH are Joseph L. Capano (“Capano”) and Albert Vietri (“Vietri”). Id.

On January 5, **1990**, WH’s predecessor, Hodev, Inc. (“Hodev”) submitted a preliminary plan (“Preliminary Plan”) to the New Castle Department of Planning for the construction of a six-story, 118,805 foot hotel to be called the Radisson located alongside **Airport Road and 1-95** (the “Site”) in New Castle County, Delaware. Id. ¶¶5, 8. After the Preliminary Plan was approved, Hodev submitted a final plan (the “Record Plan”) which was consistent with the Preliminary Plan. Id. ¶¶10-11. The Record Plan was approved and recorded. Id. **712.**

Hodev subsequently retained an architect for the building. Id. ¶13. Despite having received the Record Plan with the correct square footage for the building, the architect mistakenly prepared drawings for a hotel with a total square footage of approximately 156,000. Id. ¶15. Because of a downturn in the hotel industry, the project to build the hotel was placed on hold and the plans for the hotel were not completed. Id. ¶16. However, approximately seven years later, Hodev retained a new architectural ~~firm~~ by the name of Architectural Alliance, Inc. to complete the plans which it did based on the drawings prepared by the original architect. Id. ¶18. On June 5, **1998**, Architectural Alliance, on Hodev’s behalf, filed an application for a building permit with the County. Id. **720.** The application was approved, and the County issued a building permit for the construction of

the hotel. Id. 7/21. Prior to construction, Hodev conveyed its interest to WH. Id. ¶22. WH invested approximately \$25 million to construct the Radisson, borrowing \$15.3 from the Republic Bank. Id. ¶23.

WH expected that the Radisson would be ready to open during the first week of June, 2000. Id. ¶25. However, on May 12, 2000, in response to WH's request for an inspection for a Certificate of Occupancy, employees of the County's Department of Land Use visited the Site. Id. 7/26. They noted that the garage and parking arrangement did not appear to conform with the Record Plan and reported the discrepancies to the department's management. Id. **As** a result, it **was** discovered that the Radisson as designed and built was approximately 38,000 square feet larger than indicated in the Record Plan. Id. County officials accordingly refused to issue a certificate of occupancy.³ Id. ¶27.

On June 22, 2000, despite construction being substantially complete, the County purported to revoke WH's permit to build the hotel. Id. ¶28. Shortly thereafter, the County's Department of Land Use ordered a stay of the purported revocation of the building permit. Id. ¶29. However, the County's Board of License, Inspection and Review affirmed the purported revocation of the permit and denied WH any continued activity on the Site. Id.

³ The Department of Land Use's decision denying WH's request for a temporary certificate of occupancy was subsequently affirmed by the Board of License, Inspection and Review. See Exhibit 5 (copy of Petition for Writ of Certiorari) to Defendant's Memorandum in Further Support of Request for the District Court to Abstain from Exercising Jurisdiction over Wilmington Hospitality LLC's Claims ("County's Post-Hearing Memorandum"). WH filed a writ of certiorari in the Delaware Superior Court appealing this decision but it appears that WH did not pursue this matter. See id & Exhibit 6 (docket entries from Superior Court Action No. 1) to County's Post-Hearing Memoranda.

¶30. On October 27, 2000, WH filed a writ of certiorari in the Delaware Superior Court (“Superior Court Action No. 1”) appealing the decision by the Board of License, Inspection and Review.⁴ See Exhibit 3 (copy of Petition for Writ of Certiorari) & Exhibit 4 (docket entries from Superior Court Action No. 1) to County’s Post-Hearing Memorandum.

WH also applied to the County Board of Adjustment for variances to resolve all purported objections of the County and allow the opening of the Radisson, but the variances were denied. Complaint ¶¶31, 34. WH filed a writ of certiorari in the Delaware Superior Court (Superior Court Action No. 2) appealing these denials. See Exhibit 1 (copy of Petition for Writ of Certiorari) & Exhibit 2 (docket entries from Superior Court Action No. 2) to County’s Post-Hearing Memorandum.

As a result of its inability to operate the hotel, WH could not meet its financial obligations. Id. ¶37. Accordingly, the Bank declared the loan with WH in default. Id. Following the Board’s denial of WH’s application for variances, WH repeatedly requested permission to open part of the hotel. Id. ¶¶ 38-39, 41-42. The County acknowledged WH’s **right** to open and operate 118,805 square feet of the Radisson, but demanded **as** a condition of opening that WH “remove the **top two** floors of the hotel or ‘foam in’ the top *two* floors of the hotel.” Id. ¶39. WH could not satisfy this condition because it would “destroy the

⁴ At the status hearing on this matter, the County’s attorney made reference in her oral argument to litigation which she asserted is related to the District Court Action and pending in the Delaware state courts. I advised her that I had no evidence in the record before me (which consisted of the Complaint, the County’s motion to dismiss and WH’s response thereto) regarding such litigation. Since the existence of a related proceeding is relevant to the issue of discretionary abstention, see infra at 13, I provided the parties with the **opportunity** to submit evidence on such litigation **with** their **post-hearing** memoranda.

value of the project and be so expensive and take so long to accomplish that WH would be forced out of business or destroyed.” Id. ¶42. See also id 739. The County also advised WH that it would cooperate with any party other than WH or its principals provided that neither of the principals or anyone related to them “have any interest in the hotel for a period of twenty years.” Id. ¶40.

On October 18, 2000, WH filed a complaint against the County in the Chancery Court of the State of Delaware seeking injunctive relief to allow the hotel to open. Id. ¶43. The Chancery Court denied WH’s motion for a temporary restraining order and its request for a preliminary injunction. See Declaration of Hamilton R. Fox, III (“**Fox** Declaration), attached **as** Exhibit 9 to the County’s Post-hearing Memorandum, at ¶¶4, 7.

On November 6, 2000, the Honorable Stephen P. Lamb, who was presiding over WH’s suit in the Chancery Court, was designated to sit temporarily in the Delaware Superior Court “to hear, decide or otherwise conclude” Superior Court Actions Nos. 1 and 2 (together the “Superior Court Actions”) in order “to permit one judicial officer to resolve related matters now pending in this Court **and** the Court of Chancery.” Exhibits 2 & 4 to the County’s Post-Hearing Memorandum. A trial was thereafter set in the **state** court matters for Monday, November 27, 2000 and continued for one day. **Fox** Declaration at ¶10. On November 27, 2000, the plaintiffs announced that they wished to pursue on-going settlement negotiations; the trial was cancelled and never rescheduled, Id. ¶ 11-12.

At some point during *the* aforementioned litigation, the Chancery Court suggested that the parties consider a settlement whereby the principals of WH would step aside, ownership of the hotel would be transferred to the Bank **and** the **County** would do what was necessary

to allow the hotel to open. Complaint ¶43. The County had repeatedly stated that it would allow all **six** floors to open on the condition that the principals of WH be prevented from owning the property. Id. 743. **The** parties could not agree on the terms of a settlement because the County insisted on a deed restriction preventing “WH”s principals or affiliates from regaining ownership of the hotel.” Id. 744.

On December 26, 2000, the Bank commenced foreclosure proceedings in the Superior Court of the State of Delaware. Id. ¶45. Approximately six months later, on June 29, 2001, WH filed a Voluntary Petition for Bankruptcy under Chapter 11 of the United States Code. Id. ¶46. Notably jurisdiction in this court over this Delaware enterprise and corporation was obtained only **by** invoking the affiliate rule of bankruptcy venue which permits the commencement of a case in a district where there is a pending case under title 11 of an affiliate. 28 U.S.C. §1408(2).⁵ To support venue for WH, its shareholders first filed a Chapter 11 petition for Spring Meadow Homes, Inc., a corporation they owned whose sole asset was a parcel of undeveloped land in Chester County, Pennsylvania.⁶

Subsequent to the bankruptcy filing, WH requested the County to permit it to open the first four floors of the hotel under a temporary certificate of occupancy. Complaint ¶47. At a meeting between the parties, the County “agreed to issue a temporary certificate of

⁵ The affiliate rule has provided debtors with the ability to forum shop in such highly visible cases as Eastern Airlines filed after its affiliate, Ionosphere Clubs, Inc. (the entity operating Eastern’s preferred flyers club) in New York, and Enron Corp. filed after its affiliate, Enron Metals & Commodity Corp., also in New York. The principal places of business of Eastern and Enron were Florida and Texas, respectively.

⁶ The Chapter 11 case was converted to one under Chapter 7 wherein the Chapter 7 Trustee concluded there were no assets to be administered for creditors, the real estate being encumbered by mortgages.

occupancy if WH complied with the terms” of a letter (“February Letter”), dated February 2,2001, by William Rhodunda, Jr., a County attorney. Id. 749. Based on that agreement, WH, its attorneys and engineers proceeded to prepare the documents requested in the February Letter. Id. WH submitted the same to the County and requested that a Temporary Certificate of Occupancy be granted. Id. On November 2,200 1, the County issued a letter stating that the February Letter was being taken out of context and that the County’s original and current position was that “[i]n order to receive a certificate of occupancy, the building must be brought into full compliance with all applicable laws.” Id. ¶ 50 & Exhibit C to Complaint (copy of February 2,2001 letter).

On November 2, 2001, WH entered into an agreement to sell the hotel. Complaint 753. The terms of the agreement required WH to obtain a certificate of occupancy for the hotel in order to close the transaction. Id. 754.

On November 30, 2001, WH commenced the District Court Action by filing the Complaint which contains two counts. Count I asserts a claim under 42 U.S.C. §1983. In this Count, WH alleges that the County acted “arbitrarily and irrationally” and that it violated WH’s Fourteenth Amendment rights by depriving it of property without “substantive due process” and failing to treat WH “in the same manner as similarly situated landowners and developers.” Id. ¶¶57-62. Count II contains a breach of contract claim which alleges, in pertinent part:

64. WH and County subsequent to the filing of the bankruptcy petition entered into negotiations to allow for the opening of the hotel under a temporary certificate of occupancy.
65. WH, through its counsel and counsel for the Creditor's Committee, a potential buyer through its counsel and WH's architect attending [sic] a meeting with the County where the County outlined the steps necessary to obtain the temporary certificate of occupancy. WH and County reached an agreement as a result of this meeting which [] WH proceeded to perform.

* * *

68. WH retained the necessary professionals to complete the County's Request.
69. The County breached the agreement it reached with [] WH which agreement ~~was~~ witnessed by the Official Committee of Unsecured Creditors[.]
70. The breach was willful and intentional and done with the intent to interfere and undermine [] WH's reorganization efforts before the Bankruptcy Court in the Eastern **District of Pennsylvania**.
71. The loss **of** the ability to obtain the Temporary Certificate **of** Occupancy **caused** substantial damages to WH.

Complaint ¶¶ 68-71.

On December 4, 2001, I granted the Bank relief from the automatic stay.⁷ As WH was

⁷ I take judicial notice of the docket entries in this case. Fed.R.Evid. 201, incorporated in these proceedings by Fed.R.Bankr.P. 9017. See Maritime Elec. Co., Inc. v. United Jersey Bank,

(continued...)

unable to meet the condition of its agreement to sell the hotel, the Bank obtained ownership of the hotel pursuant to an agreement with WH that had set a drop dead date for payment of its debt through a sale **of** the hotel or a refinancing.

Following the loss of the hotel, WH's sole assets are its claims against the County and the professionals who designed the hotel. In February of 2002, WH obtained confirmation of its Fourth Amended Chapter 11 Plan, a liquidating plan which provides a distribution to creditors in the event WH succeeds in the District Court Action and/or in a separate action which it commenced against the professionals.

DISCUSSION

I.

In its motion to dismiss, the County originally argued that the District Court should abstain from exercising its jurisdiction over WH's claims pursuant to the mandatory abstention provision in **28 U.S.C. §1334(c)(2)** or the discretionary abstention in **28 U.S.C. §1334(c)(1)**. However, at the hearing before me, the County conceded that mandatory abstention is not applicable.

(...continued)

959 F.2d 1194, 1200 n. 3 (3d Cir.1991); Levine v. Egidí, 1993 WL 69146, at *2 (N.D.Ill.1993); In re Paolino, 1991 WL 284107, at *12 n. 19 (Bankr. E.D. Pa.1991); see generally In re Indian Palms Associates. Ltd., 61 F.3d 197 (3d Cir. 1995). Moreover, while a court may not take judicial notice *sua sponte* of facts contained in the debtor's file that are disputed, In re Augenbaugh, 125 F.2d 887 (3d Cir.1942), it may take judicial notice of adjudicative facts "not subject to reasonable dispute ... [**and**] so long as it is not unfair to a **party** to do so and does not undermine the trial court's factfinding authority." In re Indian Palms Assoc., 61 F.3d 197, 205 (3d Cir.1995) (*citing* Fed.R.Evid. 201(f) advisory committee note (1972 proposed rules)).

As held in Federal National Mortgage Association v. Rockafellow (In re Taylor), 115 B.R. 498,500 (E.D. Pa, 1990) (adopting report and recommendations of bankruptcy court), mandatory abstention pursuant to §1334(c)(2) is applicable only when all of the following six requirements are met: (1) a timely motion is made; (2) the proceeding is based upon a state **law** claim or state law cause of action; (3) the proceeding is related to a case under Title 11; (4) the proceeding does not arise under Title 11; (5) the action could not have been commenced in a federal court absent jurisdiction under **28 U.S.C** §1334; and (6) an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction. The party seeking mandatory abstention has the burden of satisfying each of these requirements. Pinnacle Corporation v. Long-term Capital Management. L.P. (In re Pinnacle Corporation), 237 B.R. 240,242 (Bankr. D. Conn. 1999).

At the hearing, the County acknowledged that neither the fifth nor sixth requirements for mandatory abstention are met in this proceeding because: (i) the action could have been commenced in federal court absent jurisdiction under **28 U.S.C.** § 1334 since Count **I** of the Complaint sets **forth** a claim under **42 U.S.C.** §1983; **and** (ii) no action is pending in state court raising the same claims as those set **forth** in the Complaint. While it would appear that the County has abandoned its mandatory abstention **argument**,⁸ in any event for the foregoing reasons, the County has not met its burden of showing that all **of** the requirements for

⁸ This conclusion **is** also **supported** by the County's omission of any argument in its post-hearing memoranda regarding mandatory abstention, rather focusing solely on its request for discretionary abstention.

mandatory abstention are met.

II.

The County maintains that the District Court should exercise its discretionary abstention under 28 U.S.C. §1334(c)(1) and abstain from exercising jurisdiction over WH's Complaint. Section 1334(c)(1) states:

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). The decision whether to abstain under this provision is within the sound discretion of the district court. In re Thaggard, 180 B.R. 659,663 (M.D. Ala. 1995). Abstention is “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.” County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 188(1959). See also Commercial Financial Services. Inc. v. Jones (In re Commercial Financial Services. Inc.), 251 B.R. 397,413 (Bankr. N.D. Okla. 2000) (applying this principle to permissive abstention under §1334(c)(1)).

The party seeking abstention has the burden of establishing that abstention is appropriate. Commercial Financial Services. Inc. v. Jones (In re Commercial Financial Services. Inc.), supra, 251 B.R. at 413. In determining whether to exercise discretionary abstention, courts consider the following factors:

- (1) the presence in the proceeding of nondebtor parties;
- (2) the extent to which state law issues predominate over

- bankruptcy issues;
- (3) the difficulty or unsettled nature of the applicable law;
 - (4)** the presence of a related proceeding commenced in state court or other nonbankruptcy court;
 - (5)** the jurisdictional basis, if any, other than **28 U.S.C.S** 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;
 - (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 effect or lack thereof on the efficient administration of the estate if a Court recommends abstention;
 - (10)** the existence of a right to a jury trial;
 - (11) the burden on the bankruptcy court’s docket; and
 - (12) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties.

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 6 F.3d 1184, 1189 (7th Cir. 1993); Eastport Associates v. City of Los Angeles (In re Eastport Associates), 935 F.2d 1071 (9th Cir. 1991). These factors are applied “flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative.” In re Chicago, Milwaukee, St. Paul & Pacific Railroad Company, *supra*, 6 F.3d at 1189. While I review each factor below, I note that as typically applied, the question of bankruptcy abstention involves a choice between retention of jurisdiction in the bankruptcy court where all matters arising in and related to the title 11 case are automatically referred by order of the district court. 28 U.S.C. §157(a); Eastern District of Pennsylvania Administration Orders, Standing Order of Reference, dated July 25, 1984 as amended by order dated November 8, 1990. The parties have not requested that the District Court Action

be referred to this Court, and thus I examine abstention from the perspective of a district court exercising bankruptcy jurisdiction. As discussed below, the rationale for and against abstention is different when the federal court administering the bankruptcy case is different than the one adjudicating the adversarial proceeding.

(i) Discussion of Factors

(1) *The presence in the proceeding of nondebtor parties.*

Only the Debtor and the County are parties to this proceeding. The presence of other nondebtor parties would weigh in favor of abstention. This is primarily because a bankruptcy court might have no jurisdiction over non-debtor parties. This factor is neutral as applied here.

(2) *The extent to which state law issues predominate over bankruptcy issues.*

In Count I of the Complaint, WH alleges that the County engaged in arbitrary and irrational conduct in violation of WH's civil rights. Complaint ¶¶57-62. More specifically, WH alleges that the County's actions violated WH's right to substantive due process and equal protection under the Fourteenth Amendment of the United States Constitution. While WH's claim in Count I arises under federal law, resolution of the claim will primarily require an examination of local land use laws including local zoning ordinances and local building codes to determine whether the County's conduct "shocks the conscience," see United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392,399-402 (3d Cir. 2003) (ruling that "shocks the conscience" standard applies to substantive due process claims

in land-use disputes), and whether the County's actions were "rationally related to a legitimate purpose," Ryan v. Lower Merion Township, 205 F. Supp.2d 434,442 (E.D. Pa. 2002) (quoting Taylor Investment, Ltd. v. Upper Darby Township, 983 F.2d 1285,1294(3d Cir. 1993))(noting that for plaintiff to prevail on his equal protection claim "that Defendants violated his equal protection rights by applying the [landuse] ordinancesdifferently to him than to other similarly situated properties[.]" plaintiff would have to "demonstrate that the Defendants' actions were not 'rationally related to a legitimate purpose.'"). Land use matters come within the traditional jurisdiction of the state courts. See United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, supra, 316 F.3d at 402 ("Land-use decisions are matters of local concern[.]"); Garland & Lachance Construction Company, Inc. v. City of Keene, 144 B.R. 586, 594-95 (D. N.H. 1991) (reasoning that "zoning and planning matters" are within the "traditional jurisdiction of the state courts.").

In Count II of the Complaint, WH alleges that the County breached a post-petition agreement providing that it would issue a Temporary Certificate of Occupancy for the Radisson if WH complied with the terms of the February Letter. Despite WH's insistence that this claim involves federal bankruptcy law since the alleged agreement was entered post-petition, the determination of whether an agreement exists is governed by state law. See In re Atlanta Retail, Inc., 287 B.R. 849,855 (Bankr.N.D. Ga. 2002) (holding that determination of whether a debtor has entered into valid and enforceable post-petition contract is governed by state law); Interstate Gas Supply, Inc. v. Wheeling Pittsburah Steel Corporation (In re Pittsburgh-Canfield Corporation), 283 B.R. 231,236 (Bankr. N.D. Ohio 2002) (ruling that state law governs the determination of whether a contract exists).

Consequently, while federal law will be implicated in WH's § 1983 action, the legal issues involved in resolving this litigation arise primarily under state and local law. The state courts in Delaware are more likely to have familiarity with such laws than the federal courts in the Eastern District of Pennsylvania. See Marcus v. Township of Abington, 1993 WL 534279, at *5 (E.D. Pa. December 23, 1993) (“[A] zoning dispute is essentially a matter of local concern, best adjudicated by courts familiar with local ordinances and land use regulations.”). Therefore, this factor weighs in favor of abstention.⁹

⁹ In Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743 (3d Cir. 1982), the Third Circuit held that *Burford* abstention, which is applicable “where a difficult question of state law is presented which involves important state policies or administrative concerns,” did not apply to the case before it wherein the plaintiffs argued that the defendants “illegally conspired to destroy [their] constitutional rights to conduct a legitimate business” by denying building permits and refusing certificates of occupancy. The bases of the Supreme Court’s ruling were twofold: (i) there was no uniform state policy at issue which could be disrupted by a federal court decision in the case; and (ii) since the plaintiffs alleged an illegal conspiracy to destroy their constitutional rights to conduct a legitimate business, the case was “not simply a land use case.” Id. at 747-48. See also Acierno v. New Castle County, 1994 WL 720273, at *23 (D. Del. 1994) (ruling that *Burford* abstention was inapplicable to a dispute involving, as in the instant case, the New Castle County Code since no statewide policy or regulation was at issue and the case was more than simply a land use case), rev’d on other grounds, 40 F.3d 645 (3d Cir. 1994). Nevertheless, in Heritage Farms, Inc., the Supreme Court specifically stated that it agreed with the district court in Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978), that “a district court is not a ‘state-wide Board of Zoning Appeals.’” Heritage Farms, Inc., 671 F.2d at 748 (quoting Kent Island Joint Venture, 452 F. Supp. at 464). Moreover, in United Artists Theatre Circuit, Inc., supra, wherein the more demanding “shock the conscience” standard for substantive due process claims in land-use disputes was adopted in place of the less demanding “improper motive” test, the Supreme Court reasoned, inter alia, that the more demanding standard would prevent the federal courts “from being cast in the role of a ‘zoning board of appeals.’” 316 F.3d at 402. Elaborating on this point, the Supreme Court further stated:

The First Circuit in [Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982),] observed that every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but “[i]t is not enough simply to give these state law claims constitutional labels such as ‘due process’ or ‘equal protection’ in

(continued..)

(3) *The difficulty or unsettled nature of the applicable law.*

WH contends that its claims “do not raise any unsettled or complex issues of state law for this Court to interpret.” WH’s Memoranda at **26-27**. The County does not dispute this contention insofar as there being no unsettled issues of state law. However, the County asserts that the local and state laws at issue “are particularly complex.” County’s Post-Hearing Memorandum at 9. Nevertheless, the County acknowledges that “there is no doubt that the district court ... could interpret the various state and county laws at issue[.]” *Id.* at 8. See also Heritage Farms, Inc., *supra*, 671 F.2d at 747 (quoting Note, *land Use Regulation, the Federal Courts and the Abstention Doctrine*, 89 Yale L.J. 1134, 1143 n.5 (1980)) (“Federal and state courts are equally capable of applying settled state law to a difficult set of facts.”). Consequently, for purposes of determining whether discretionary abstention is appropriate, I shall assume that this factor does not weigh in favor of or against abstention.

(4) *The presence of a related proceeding commenced in state court or other nonbankruptcy court.*

While WH commenced several proceedings in Delaware state court relating to its **\$1983** claim in Count I of the Complaint (*i.e.*, appeal of the decision of the Board of License, Inspection and Review affirming the decision of the Department of Land Use to revoke

⁹(...continued)

order to raise a substantial federal question under section 1983.” Estabrook, 680 F.2d at 833. Land-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with “improper” motives.

316 U.S. at 402. See also Acierno v. New Castle County, *supra*, 1994 WL 720273, at *23 (“The Court is cognizant of the local nature of land use decisions and the caution with which a federal court should entertain land use disputes.”).

WH's building permit, appeal of the decision of the Board of License, Inspection and Review affirming the Department of Land Use's decision to deny WH's request for a Temporary Certificate of Occupancy and appeal of the County Board of Adjustment's denial of WH's requests for variances and WH commenced its action in the Chancery Court seeking injunctive relief), no proceedings were commenced in state court relating to its breach of contract claim in Count II of the Complaint. Moreover, since WH no longer owns the hotel, the state court proceedings may be moot. In any event, there is no evidence in the record that the state court proceedings are currently pending. Thus, this factor does not weigh in favor of abstention. Indeed the absence of a state court proceeding could dictate not abstaining if **the** pending District Court Action were the only vehicle to adjudicate WH ' s claims against the County.

The District Court Action is still in the pleading stage which could mean that no party would be prejudiced if the action is dismissed and re-commenced. However, if such action is required," there may be an issue of whether the statute of limitations has expired on WH's §1983 claim. See Gibbs v. Deckers, 234 F. Supp.2d 458, **461** (D. Del. 2002) (ruling that "[f]or Section 1983 claims arising in Delaware, a two-year statute of limitations period found in 10 Del. C. §8119 is applicable."); Alston v. Hudson, 700 A.2d 735, 1997 WL 560883, at *2 (Del. August 22, 1997) (unpublished table decision, text on Westlaw) (explaining that two year statute of limitations found in 10 Del. C. §8119 is applicable to claims under 42 U.S.C.

¹⁰ Both of WH's claims could have been filed in state court since state courts have concurrent jurisdiction over actions based on 42 U.S.C. §1983. See Citicorp Savings v. Chapman (In re Chapman), 132 B.R. 153, 160 (Bankr. N.D. Ill. 1991).

§1983). See also Elliot Reigher Siedzikowski & Egan v. The Pennsylvania Employees Benefit Trust Fund, 29 Fed. Appx. 838,840 2002 WL **336964** (3d Cir. February 27,2002) (“Section 1983 claims are governed by the relevant state’s statute of limitations for personal injury actions[.]”).” If the statute of limitations has expired on the §1983 claim, then abstention would be inappropriate since WH would be prejudiced by dismissal of the District Court Action. See Unbreit v. Stump. Harvey & Cook. Inc. (In re Baltimore Motor Coach, Inc.), 103 B.R. 103, 107 (D. Md. 1989) (denying request for permissive abstention where abstention would prevent the trustee from filing suit for post-petition tortious conduct damaging the bankruptcy estate “because of the bar of limitations.”); Miller v. BTS Transport Services (In re Total Transportation. Inc.), 87 B.R. 568, 571 (D. Minn. 1988) (ruling that “[a]bstention is not appropriate” where the statute of limitations would bar the litigant from recommencing its action in another forum and thus “leave the litigant with no other forum for proceeding.”). The County may be willing to waive its statute of limitations defense if it is the only impediment to dismissal of the District Court Action. In the alternative, the

¹¹ While state law is used to determine the applicable statute of limitations, federal law determines when the statute of limitations begins to run. See Gibbs v. Deckers, *supra*, **234 F. Supp.2d at 461**; Hankin Family Partnership v. Upper Merion Township, 2002 WL 461794, at *4 (E.D. Pa. March 22,2002). “Under federal law, the statute of limitations begins to run ‘when the plaintiff knew or should have known of the injury upon which its action is based.’” Elliot Reighner Siedzikowski & Egan, *supra*, 29 Fed. Appx. at 840,2002 WL 336964, at *1 (*quoting Sameric Corp. of Delaware. Inc. v. City of Philadelphia*, 142 F.3d 582,599 (3d Cir. 1998)). “When a defendant’s conduct is **part** of a continuing practice, **an** action is timely **as** long as the last act evidencing the continuing practice falls within the limitations period[.]” Hankin Family Partnership, *supra*, 2002 WL 461794, at *4. The Third Circuit utilizes a two-part test for determining if there is a continuing violation which “requires a plaintiff to establish that (1) at least one act **of** the defendant occurred within the filing period; **and** (ii) the conduct resulting in the constitutional violation must be ‘more than the occurrence of isolated or sporadic acts of intentional discrimination’ on the **part** of the defendant.” *Id.* (*quoting West v. Philadelphia Electric Co.*, **45 F.3d 744, 754-55** (3d Cir. 1995).

District Court may be able to transfer the case to state court rather than dismiss it, thereby preserving the filing date of the Complaint. Cf. Little v. Liberman, 90 B.R. 700,709-10 (E.D. Pa. 1988) (exercising discretionary abstention to abstain from deciding claim under Pennsylvania State Debt Collection Trade Practices Regulation and directing the parties' attention to 42 Pa. C.S.A. §5103 which allows the federal courts to transfer a matter "over which [it] does not have jurisdiction" to the state court rather than dismissing it). The parties have not addressed the implications of the statute of limitations on the question of abstention in this case and the record before me is inadequate to draw a definitive conclusion on its outcome here.

(5) *The jurisdictional basis, if any, other than 28 U.S.C. § 1334*

Since WH has asserted a claim against the County under 42 U.S.C. § 1983, another jurisdictional basis exists for this litigation other than 28 U.S.C. § 1334. With WH having elected to pursue its § 1983 claim in federal court rather than state court, this factor appears at first blush to weigh against abstention. However, to so conclude ignores the fact that but for the connection to the bankruptcy case filed in the Eastern District of Pennsylvania Bankruptcy Court, venue of this federal question action would lie, not in the Eastern District of Pennsylvania, but in the District of Delaware.

(6) & (7) *The degree of relatedness or remoteness of the proceeding to the main bankruptcy case and the substance rather than the form an asserted "core" proceeding.*

WH contends that the District Court Action is a core proceeding since it involves a claim arising from a post-petition contract made with the debtor-in-possession and is integral to the administration of the bankruptcy estate. Accepting all allegations as true as I must

with a Rule 12(b)(6) motion, I generally agree with this characterization of the action as a core proceeding. However, I do so recognizing that some proceedings are more integral to the administration of a bankruptcy estate than others. See Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1249 n.8 (3d Cir. 1994); Valley Forge Plaza Associates v. Fireman's Fund Insurance Companies, 107 B.R. 514, 517 (E.D. Pa. 1989). In Hughes-Bechtol, Inc. v. The Department of Rehabilitation and Correction, 141 B.R. 946, 956 (Bankr. S.D. Ohio 1992), the court in exercising discretionary abstention, reasoned that since the debtor was in the “process of liquidating as a chapter 11 debtor in possession” and the adversary proceeding “merely represent[ed] an attempt to obtain assets and liquidate claims[,]” the Bankruptcy concern over centralizing and monitoring litigation “in the same forum where the debtor in possession is attempting to formulate and obtain confirmation of a plan of reorganization **[was]** less compelling[.]”

In applying this factor, I reiterate that the abstention concern is different where the bankruptcy court is administering the main case and the litigation is pending in the district court. The reasons for retaining a case because of its relatedness to the bankruptcy case do not really pertain where the bankruptcy court is not managing the litigation. Where the bankruptcy court is overseeing the reorganization and the adversary case, it is in a position to prioritize the litigation according to the needs of the case. Even were this court managing the litigation, the priority I would assign to it would be dictated by the nature and status of the Chapter 11 proceeding. The Chapter 11 plan bankruptcy case is centered around the liquidation of claims framed by two lawsuits, one of which is the District Court Action. Whether any distribution will be made to creditors in WH's Chapter 11 case depends upon

the success of one or both of these lawsuits. Obviously, it is in the interests of the creditors of WH to have these lawsuits resolved as expeditiously as possible so that if a distribution is to be made to the creditors, it will occur sooner rather than later. See Cooper v. Coronet Insurance Co. (In re Boughton), 49 B.R. 312,316 (Bankr. N.D.Ill. 1985)(bankruptcy court declining to exercise discretionary abstention since the outcome of the adversary proceeding would “determine whether the creditors are to receive any dividend whatsoever.”). However, the viability of WH’s plan of reorganization does not hinge and fall on the resolution of these lawsuits. The plan has been confirmed and the case is otherwise fully administered. Compare Northwestern Institute of Psychiatry, Inc. v. The Travelers Indemnity Company (In re Northwestern Institute of Psychiatry, Inc.), 272 B.R. 104, 108-09 (E.D. Pa. 2001) (concluding that resolution of the adversary action seeking a declaratory judgment of the debtor’s rights under a post-petition insurance contract “could have a substantial effect on [the debtor’s] ability to reorganize.”) with Personette v. Kennedy (In re Midgard Corporation), 204 B.R. 764,779 (10th Cir. B.A.P. 1997)(“[I]n a chapter 7 case or a chapter 11 case with a confirmed liquidating plan, where the primary concern is the orderly accumulation and distribution of assets, the requirement of timely adjudication is seldom significant.”). In that respect, the District **Court** Action is less integral to the administration of the bankruptcy case than the post-petition actions at issue in some other cases. Furthermore, the substance of the core proceeding is a § 1983 claim and a breach of contract action, both of which exist independently of the Bankruptcy Code. Based on these observations, unless the litigation of WH’s claims in the state court would delay distribution to creditors over the prosecution of the District Court Action, neither of these factors (the

degree of relatedness of the proceeding to the main bankruptcy case and the substance rather than the form of the asserted “core” proceeding) should prevent the District Court from abstaining from exercising its bankruptcy jurisdiction in this matter.

(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.

This factor is intended to allow the bankruptcy court to avoid burdensome non-bankruptcy litigation with its need to control recoveries from the estate consistent with the priorities established by the Bankruptcy Code. If the enforcement can be severed, the bankruptcy court is in a better position to allow the litigation to go forward elsewhere. This concern is not applicable here since the reorganized debtor is a plaintiff and the recovery, if any, is to be distributed according to the confirmed Chapter 11 plan. Enforcement of a judgment obtained in favor of WH in this matter could proceed wherever the judgment is entered.

(9) The effect or lack thereof on the efficient administration of the estate if the Court abstains.

This factor raises some of the same concerns as discussed in subparagraphs (6) and (7). In short, this estate is fully administered but for distribution to creditors pursuant to the confirmed plan once the claims are finally adjudicated. There is no evidence in the record regarding the timetable for resolution of WH’s claims against the County in the District Court versus the state court in Delaware. Consequently, it is impossible for me to determine the effect abstention would have, if any, on the efficient administration of the estate.

(10) *The existence of a right to a jury trial.*

WH has demanded a jury trial in this matter to which it is entitled. Had this action been filed in the bankruptcy court, an Article I court, it could not be adjudicated here without the consent of all parties. See 28 U.S.C. § 157(e). That factor supports bankruptcy abstention in many cases. However, since this matter was filed in the district court, an Article III court, that limitation is not present. Thus, the existence of right to a jury trial does not weigh in favor of or against abstention.

(11) *The burden on the bankruptcy court's docket.*

Since this matter has been referred to this Court for the sole purpose of deciding this abstention issue, this litigation is not a burden on the bankruptcy court's docket. This factor recognizes the heavy caseload of the bankruptcy court and the difficulty of integrating lengthy trials with the routine motions and other proceedings that must be heard, many of which are on an expedited schedule. Where, **as** here, the claims involve predominately issues of state and local law with which **the** state court is bound to be more familiar and bankruptcy issues are not implicated, a workable balance may dictate abstention. The applicability of this factor to the district court sitting in bankruptcy, if at all, is a judgment more properly made by the district court.

(12) *The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties.*

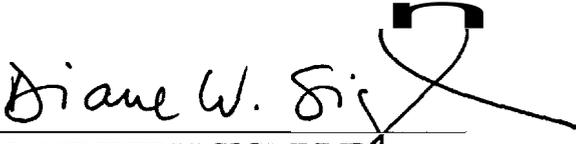
Based on the evidence in the record, I find that it is likely that WH was forum shopping when it commenced this litigation in the District Court rather than in Delaware's state or even federal court. WH filed three state **court** actions regarding the Radisson before

commencing the District Court Action. In all three state court actions, WH received unfavorable rulings. Since WH could have commenced its § 1983 action as well as its breach of contract claim in Delaware's state court or even the District Court of Delaware, I conclude that its decision to file the action in the District Court of the Eastern District of Pennsylvania, more than likely, involved forum shopping. This conclusion is underscored by the tenuous relationship that the bankruptcy case itself has to this forum. As noted above, but for the existence of a related entity that provided the **key** to this venue, this bankruptcy case belonged in the District of Delaware. Had it been filed in its natural venue, the Complaint would have been brought in that district or, **as** with the prior actions, in the state court.

(ii) Summary of Factors

Based on the aforementioned discussion of the factors that courts consider in determining whether to exercise discretionary abstention under 28 U.S.C. §1334(c)(1), I recommend that the District Court exercise discretionary abstention unless it concludes that: (i) the statute of limitations will bar WH from pursuing its §1983 against the County elsewhere; or (ii) adjudication of the Complaint elsewhere will delay liquidation of the claims to the prejudice of creditors entitled to distribution under the Debtor's confirmed Chapter 11 plan. **If** the creditor interests can otherwise be protected, I see no reason to accord WH the usual deference to a party's choice of venue given the means by which it arrived in this District. Other than the **two** reasons noted above for which I am unable to reach any conclusions on this record, I find no compelling reason that the District Court should exercise

bankruptcy jurisdiction to adjudicate these claims.



DIANE WEISS SIGMUND
United States Bankruptcy Judge

Dated: May 20, 2003

cc: Honorable Mary A. McLaughlin

Courtesy copies from
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