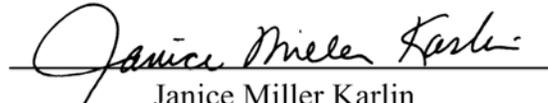


SO ORDERED.

SIGNED this 21st day of September, 2015.




Janice Miller Karlin
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS**

**In re:
Brett Eric Clanton
Sheryl Jean Clanton,**

**Case No. 15-21434
Chapter 7**

Debtors.

Cornerstone Bank,

Plaintiff,

v.

**Case No. 15-6067
Adversary Proceeding**

**McClan Construction, LLC,
NJ Trenching, LLC,
Brett Eric Clanton, and
Sheryl Jean Clanton,**

Defendants.

**Order Granting in Part and Denying in Part Motion to Abstain
and Remanding Proceeding**

This adversary proceeding, although only recently pending in this Court, has a long and tortured procedural history. This Court must now unfortunately add to this

procedural morass by addressing the notice of removal filed by state court Defendants, McClan Construction, LLC (“McClan Construction”) and NJ Trenching, LLC (“NJ Trenching”). The Court grants state court Plaintiff Cornerstone Bank’s Motion to Remand this matter back to the state court where it has pended nearly five years.

I. Background and Procedural History¹

Between 2010 and 2013, Cornerstone Bank obtained money judgments against Debtors Brett and Sheryl Clanton in excess of \$4 million, arising out of personal guarantees Debtors gave to secure repayment of notes, also secured by now foreclosed mortgages on real property.² Cornerstone Bank then began proceedings to execute on these money judgments under Kansas statutes governing executions of judgments.³ Cornerstone Bank issued garnishments to Defendants McClan Construction and NJ Trenching based on testimony (given by one or both of the Debtors during hearings in aid of execution) that Debtors worked for these entities.⁴

¹ The facts as detailed herein are the apparently non-disputed facts gathered from the parties’ pleadings and the facts as they appear on the docket of both this adversary case and Debtors’ bankruptcy case.

² Interestingly, Debtors’ Statement of Financial Affairs reflects that one of the Debtors was a Director of Cornerstone Bank beginning in 2001 and ending in 2010.

³ See K.S.A. 60-2401 through 60-2420 (article 24 of chapter 60 of the Kansas civil statutes governing executions and orders of sale).

⁴ Both business entities are listed in Debtors’ Statement of Financial Affairs as a business “in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full- or part-time . . . , or in which the debtor owned 5 percent or more of the voting or equity securities . . .” In addition, in response to Question 19 which requires Debtors to list all bookkeepers

The “Answers of Garnishees” provided by McClan Construction and NJ Trenching, however, stated that Debtors were *not* employed by these entities. As a result, Cornerstone Bank filed an objection to the garnishment answers, a forensic accountant was ultimately appointed, and the parties engaged in substantial discovery supervised by the state court.

Following this discovery process, on January 2, 2015, Cornerstone Bank filed an Amended Garnishment Objection. Within that Amended Objection, Cornerstone Bank argued that Debtors were in fact employed by McClan Construction and NJ Trenching, and that Debtors had received significant compensation from both companies. Cornerstone Bank alleged that McClan Construction and NJ Trenching had paid at least \$646,801.97 toward Debtors’ mortgage and personal credit card debts in the time since the Bank’s garnishment was issued.

The Bank’s Amended Garnishment Objection asked the state court to enter judgment in its favor and against McClan Construction and NJ Trenching for either 1) the total amount of the judgments against Debtors, or 2) the sum of \$164,141.99, which is 25% of the amount paid by McClan Construction and NJ Trenching on Debtors’ mortgage and credit card debt. The Amended Objection further asked the state court to “impute income” of \$40,425.12 per month to Debtors and order McClan Construction and NJ Trenching to pay 25% of that income (or \$10,106.28) to

and accountants who kept or supervised their accounts and records, Debtors note that Sheryl Clanton was such a bookkeeper or accountant for “McCorkendale Construction, Inc. - (1987- 2012), NJ Trenching, LLC - (1998 - current), and McClan Construction, LLC - (2012 -current).”

Cornerstone Bank each month until the Bank's judgment against Debtors is satisfied. Finally, Cornerstone Bank asked for an award of attorneys fees and other costs and fees.

The garnishment litigation (i.e., the Amended Garnishment Objection) was pending in state court when Debtors filed their chapter 7 bankruptcy petition on July 7, 2015. According to Cornerstone Bank, the parties had begun discovery related to the Bank's Amended Garnishment Objection, the parties had had nine separate hearings before the assigned state court judge, and the state court had recently entered an order permitting Cornerstone Bank to issue numerous business records subpoenas.

In their chapter 7 bankruptcy petition, Debtors list a \$4.2 million claim against them from Cornerstone Bank and other significant debt: half a million dollars owed to the Internal Revenue Service for civil penalties, nearly \$1.1 million in secured debt on their homestead (which they value at \$900,000), and more than a million dollars in unsecured debt in addition to the debt owed Cornerstone Bank. Question 1 of the Statement of Financial Affairs of Debtors' petition requires debtors to state the gross income received from "employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business" for the two years immediately preceding the filing, and Debtors stated, under penalty of perjury, that they received zero income from McClan Construction and NJ Trenching, or from any employment.⁵ In addition, Debtors'

⁵ Question 1 doesn't ask a debtor to state where he or she has *not* received income within the last two years, so it is rare, indeed, to see the answer to this

Schedule I lists no true “income,” as that term is typically understood: rather, they list \$2064.17 in “other monthly income” and specify that this “income” is because “NJ Trenching pays for health ins. and gas for business use.” Debtors’ Schedule J lists \$10,334.65 in monthly expenses, and states a monthly deficit of \$8,270.48.

Twelve days after Debtors filed their bankruptcy petition, McClan Construction and NJ Trenching filed a notice of removal of the state court garnishment litigation pending against them, which initiated the adversary proceeding that is the subject of this Order. In their notice of removal, McClan Construction and NJ Trenching allege this Court’s jurisdiction arises under 28 U.S.C. § 157 and § 1334(a) and (b) and that the removed action is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (E). Specifically, McClan Construction and NJ Trenching allege the removed case involves:

[A] determination of the scope and extent of the Debtors’ interest in property (are the monies at issue “salary or wages” of the Debtors instead of expense reimbursements of the Debtors), the nature, validity and scope of Cornerstone’s interest in and to the property claimed to be salary, and if said property is determined to be salary, the amount of Debtors’ exemption in said property.⁶

In response to the notice of removal, Cornerstone Bank filed its motion to remand, or in the alternative, for the Court to abstain from hearing this matter.

question reflect “\$0.00,” as Debtors’ response states when then listing the “Source” of this “non-income” as NJ Trenching and McClan Construction.

⁶ Doc. 1, Notice of Removal of Civil Proceeding.

II. Analysis

A. This Court's Jurisdiction

Under the federal statutes governing removal, a party “may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of [title 28].”⁷ In support of its motion to remand this matter to the state court, Cornerstone Bank argues this Court lacks jurisdiction to hear the parties’ garnishment dispute.⁸

Under 28 U.S.C. § 1334(b), federal district courts have “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” In this district, pursuant to 28 U.S.C. § 157(a), which permits

⁷ 28 U.S.C. § 1452(a).

⁸ As an initial matter, the parties debate whether there continues to be a presumption against jurisdiction over removed cases in federal courts. *Compare Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (holding that a cause of action is presumed to be outside the limited jurisdiction of federal courts and that “the burden of establishing the contrary rests upon the party asserting jurisdiction”), *with Dart Cherokee Basin Operating Co. v. Owens*, ___ U.S. ___, 135 S. Ct. 547, 554 (2014) (referring to the “purported ‘presumption’ against removal” relied on by the district court in remanding the case to state court, but holding such a presumption did not apply where Congress had specifically enacted a federal statute—there the Class Action Fairness Act—facilitating adjudication in federal courts, and noting that the Court need not then decide whether “such a presumption is proper in mine-run diversity cases”).

Regardless of the continued existence of a presumption against jurisdiction in removed cases, the party asserting subject matter jurisdiction has the burden of proving the existence of that jurisdiction. 2 Moore’s Federal Practice § 12.30[5] (Matthew Bender 3d ed.); *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004). As a result, McClan Construction and NJ Trenching bear the burden of proving jurisdiction here.

referral to bankruptcy judges, the bankruptcy court has been referred “all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11” by the district court.⁹ Pursuant to this referral, bankruptcy judges may thus hear and determine all “core proceedings arising under title 11, or arising in a case under title 11”¹⁰ and all proceedings “arising in or related to a case under title 11.”¹¹

Federal statutes aid in the determination of whether a matter is a “core proceeding.” McClan Construction and NJ Trenching contend the Cornerstone Bank Amended Garnishment Objection is a core proceeding under three sections of 28 U.S.C. § 157(b)(2). That statute defines core proceedings as “(A) matters concerning the administration of the estate,” “(B) the allowance or disallowance of claims against the estate or exemptions from property of the estate,” and “(E) orders to turn over property of the estate.” Cases defining “core proceeding” shed additional light.¹²

The Tenth Circuit has defined core proceedings as those that “arise in” or “arise

⁹ D. Kan. S.O. 13-1; D. Kan. Rule 83.8.5.

¹⁰ 28 U.S.C. § 157(b)(1).

¹¹ 28 U.S.C. § 157(a).

¹² See *Burgess v. Lederer (In re Burgess)*, No. 12-1743 MER, 2013 WL 1344580, at *2 (Bankr. D. Colo. Apr. 2, 2013) (calling the list of examples of core proceedings in § 157(b)(2) instructive, but noting that the statute “does not entirely settle the issue of whether . . . claims are, in fact, ‘core proceedings’” and stating that debtors “must do more than simply attach a superficial classification to an asserted claim; rather, a debtor’s claim must substantially ‘arise under’ or ‘arise in’ a case under title 11”).

under” cases under title 11.¹³ “Matters ‘arise under’ title 11 if they involve a cause of action created or determined by a statutory provision of title 11. Matters ‘arise in’ a bankruptcy if they concern the administration of the bankruptcy case and have no existence outside of bankruptcy.”¹⁴ To sum, core proceedings have no existence outside of bankruptcy, depend on bankruptcy laws for their existence, and could not proceed in another court.¹⁵

Cornerstone Bank argues that there is no core jurisdiction because answers to garnishments are “purely issues of state law,” and any relief it obtains via its Amended Garnishment Objection would be against McClan Construction and NJ Trenching—neither of whom are debtors in any pending bankruptcy. As noted above, in its Amended Garnishment Objection, Cornerstone Bank seeks two types of relief: 1) that judgment be entered against McClan Construction and NJ Trenching for either the total amount of the judgments Cornerstone Bank has against Debtors or 25% of what McClan Construction and NJ Trenching paid to Debtors’ creditors on Debtors behalf during the relevant time period; and 2) that a monthly income of \$40,425.12 be imputed to Debtors and that McClan Construction and NJ Trenching be ordered to pay

¹³ *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1517–18 (10th Cir. 1990).

¹⁴ *Narro v. Ford Motor Credit (In re Narro)*, No. 11-1070 S, 2012 WL 4027258, at *9 (Bankr. D.N.M. Sept. 12, 2012) (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987) and *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997)).

¹⁵ *Santander Consumer, USA, Inc. v. Houlik (In re Houlik)*, 481 B.R. 661, 674 (10th Cir. BAP 2012).

25% of that monthly imputed income each month to Cornerstone Bank until its judgment is satisfied. The first category of requested relief is a judgment against the garnishees McClan Construction and NJ Trenching. The second category of requested relief, however, that monthly income be imputed to Debtors and that Cornerstone Bank be paid part of Debtors' monthly income, is more difficult to categorize.

Imputing income to Debtors, exempting a portion of that imputed income, and ordering turnover of some or all of that imputed income to one particular creditor holding a prepetition debt, could be read as involving "the administration of the estate," consideration of "exemptions from property of the estate," and "orders to turn over property of the estate" under the statutory "core" framework in § 157(b)(2). The Amended Garnishment Objection certainly does not, however, involve a cause of action created or determined by a provision of the Bankruptcy Code. In addition, the resolution of the Amended Garnishment Objection "does not require the interpretation or enforcement of bankruptcy law."¹⁶ The garnishment action may impact the bankruptcy estate, but it has an existence outside of bankruptcy and does not depend on bankruptcy laws for its existence. The Amended Garnishment Objection has existed, and could continue to exist, in another court. Viewed through the lens of "arising under" or "arising in," therefore, the Amended Garnishment Objection does not qualify as a core proceeding.¹⁷

¹⁶ *Id.*

¹⁷ The cases cited by McClan Construction and NJ Trenching do not persuade otherwise. For example, in *In re Brickell*, 142 F. App'x 385, 389 (11th Cir.

The next question, then, with regard to this Court’s jurisdiction, is whether the Court has “related to” jurisdiction over the Amended Garnishment Objection. Proceedings related to a bankruptcy case are those that “could have been commenced in federal or state court independently of the bankruptcy case, but the outcome of that proceeding could conceivably have an effect on the estate being administered in bankruptcy.”¹⁸ To determine whether a matter is related to a bankruptcy case, courts focus on “whether the action potentially impacts administration of the bankruptcy estate.”¹⁹ “Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate.”²⁰

This Court is satisfied that the broad test for related to jurisdiction is met here. Cornerstone Bank argues that the resolution of the Amended Garnishment Objection

2005), the Eleventh Circuit concluded that the garnishment of an estate distribution was a core proceeding, but the facts there were very different from the situation at hand. Here, the garnishment at issue is that of a third party’s payment to a bankruptcy estate, not of a payment *from* the estate, and involves a dispute concerning the answer thereto from non-debtor entities. McClan Construction and NJ Trenching also rely on *In re Pulliam*, 262 B.R. 539, 543 (Bankr. D. Kan. 2001), and *In re Urban*, 262 B.R. 865, 866–67 (Bankr. D. Kan. 2001), but these cases stand only for the proposition that wages earned prepetition and paid either pre or post petition are property of the estate to which a chapter 7 trustee could claim an interest and to which Kansas exemption statutes on earnings could apply. Those cases contain no discussion of “core” or jurisdiction at all.

¹⁸ *Midgard*, 204 B.R. at 771 (internal quotations omitted).

¹⁹ *Houlik*, 481 B.R. at 674.

²⁰ *Gardner*, 913 F.2d at 1518 (internal citations and quotations omitted).

will have no effect on the administration of Debtors' bankruptcy estate because any remedy obtained would only be against McClan Construction and NJ Trenching. But the outcome of the Amended Garnishment Objection could conceivably have an effect on the administration of Debtors' bankruptcy estate. For example, as Debtors' point out, their tax liability could be impacted by a determination regarding income imputed to Debtors and characterized as "earnings" by the state court, and this could have an impact on Debtors' liabilities and the claims made against Debtors' estate.

Potential effects are all that are needed to bring the Amended Garnishment Objection within this Court's related to jurisdiction. The Court is satisfied it has related to jurisdiction over this matter, and that is enough to resolve Cornerstone Bank's motion to remand based on jurisdiction.²¹

B. Abstention

Next, Cornerstone Bank argues that this Court should abstain under 28 U.S.C. § 1334(c), which provides for both permissive abstention under subsection (c)(1) and mandatory abstention under subsection (c)(2). As do the parties, the Court first

²¹ Although bankruptcy courts have jurisdiction to hear matters that are not core proceedings but that are otherwise related to cases under title 11, the bankruptcy judge is required to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be determined by the district judge . . ." 28 U.S.C. § 157(c)(1). The parties may consent to entry of judgment by a bankruptcy court in a related to case, but no statement regarding Cornerstone Bank's position has been filed with this Court. *See* Fed. R. Bankr. P. 9027(e)(3) (requiring parties, within 14 days after the filing of a notice of removal, to "file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core," and if alleging that the cause of action is non-core, "state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge").

assesses the applicability of mandatory abstention under § 1334(c)(2), which states:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

The test to determine whether mandatory abstention applies is multi-factor. “Mandatory abstention applies when all of the following elements are present: (1) the motion to abstain was timely; (2) the action is based on state law; (3) an action has been commenced in state court; (4) the action can be timely adjudicated in state court; (5) there is no independent basis for federal jurisdiction other than bankruptcy; (6) the matter is non-core.”²²

Factors one through three (whether the motion to abstain was timely filed, whether the Amended Garnishment Objection is based on state law, and whether the matter was already commenced in state court) and factor five (that there is no independent basis for federal jurisdiction other than bankruptcy) are not contested by McClan Construction and NJ Trenching. The Court has already determined herein that factor six (that the matter is non-core) is applicable. The remaining factor, and the one the parties dispute, is factor four: whether the action can be timely adjudicated in state court.

²² *Telluride Asset Resolution, LLC v. Telluride Global Dev., LLC (In re Telluride Income Growth, LP)*, 364 B.R. 390, 398 (10th Cir. BAP 2007).

“The burden of proving timely adjudication is on the party seeking abstention.”²³

When assessing this factor, courts “have focused on whether allowing an action to proceed in state court will have any unfavorable effect on the administration of a bankruptcy case” or the bankruptcy court’s efficient and expeditious handling of all matters connected with the bankruptcy estate.²⁴ The consideration of “timely adjudication” is itself a multi-factor test:

In considering whether allowing a case to proceed in state court will adversely affect the administration of a bankruptcy case, courts have considered some or all of the following factors: (1) backlog of the state court and federal court calendar; (2) status of the proceeding in state court prior to being removed (i.e., whether discovery had been commenced); (3) status of the proceeding in the bankruptcy court; (4) the complexity of the issues to be resolved; (5) whether the parties consent to the bankruptcy court entering judgment in the non-core case; (6) whether a jury demand has been made; and (7) whether the underlying bankruptcy case is a reorganization or liquidation case.²⁵

Some of these factors require the party moving for abstention to present evidence.²⁶ For example, the Tenth Circuit BAP has stated that evidence is required to demonstrate “the status of the state court calendar and status of [the] proceedings in state court,” but that other factors that are evident from the bankruptcy court and adversary record, such as the status of the adversary proceeding, the consent of parties to have the bankruptcy court enter judgments, and the nature of the underlying bankruptcy case,

²³ *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 778 (10th Cir. BAP 1997).

²⁴ *Id.*

²⁵ *Id.* at 778–79 (internal footnotes and citations omitted).

²⁶ *Id.* at 779.

do not require evidence.²⁷

Here, the Court has no evidence of any kind from the parties. For example, this Court has no idea of the state court's current backlog, if any, or how much work remained, before removal, to be able to conclude this matter in state court. The parties have mentioned the pre-removal issuance of business subpoenas, but no one has provided any evidence to demonstrate where that issuance fits in the scheme of the discovery time line, or how much work remains for the state court judge.

The Court can admittedly glean the status of the bankruptcy court proceeding from a review of its docket sheet, but it is both very early in the bankruptcy case and difficult to predict the issues that will eventually need resolved in Debtors' bankruptcy. Further, the parties have not yet consented to allow this Court to enter a final judgment.²⁸ As a result, because Cornerstone Bank has failed, as movant, to meet its burden to show timely adjudication, this Court is left to conclude that mandatory abstention under § 1334(c)(2) is not applicable.

The Court next assesses permissive abstention under § 1334(c)(1), which states:

[N]othing 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

²⁷ *Id.*

²⁸ The Court presumes, based on Cornerstone Bank's filing of a motion to remand or abstain, that it would not consent to final adjudication in the bankruptcy court. When a party does not consent to a bankruptcy court entering judgment in a non-core, related to proceeding, the bankruptcy court will make recommendations to the district court, and this requisite, and thus more time-consuming, two-tier review "may favor a finding of timely adjudication in a state court." *Id.*

11 or arising in or related to a case under title 11.

Again, the Court will employ a multi-factor test, which includes:

1. the effect or lack of effect on the efficient administration of the estate if a court abstains;
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 the state court or other nonbankruptcy 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;
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 on the bankruptcy court's docket;
10. the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
11. the existence of a right to a jury trial;
12. the presence in the proceeding of nondebtor parties; and
13. any unusual or other significant factors.²⁹

As the party moving for this Court’s abstention under § 1334(c)(1), Cornerstone Bank has the burden of establishing that permissive abstention is appropriate.³⁰ “Permissive abstention is a matter within the sound discretion of the bankruptcy court.”³¹

Because it is so early in the administration of Debtors’ Chapter 7 case, and because of the limited related-to nature of the garnishment action, there should be only a small effect, if any, on the administration of the bankruptcy case if this Court abstains from hearing this matter. In addition, it seems clear that because state law

²⁹ *In re Lunt*, No. 10-13712, 2011 WL 1656404, at *1–2 (Bankr. D. Kan. May 2, 2011) (citing 1 Norton Bankr. L & Prac. 3d § 8.6 (Thompson/West 2010)).

³⁰ *In re Commercial Fin. Servs., Inc.*, 215 B.R. 397, 413 (Bankr. N.D. Okla. 2000).

³¹ *In re Tri-Valley Distrib., Inc.*, No. BAP UT-05-119, 2006 WL 2583247, at *6 (10th Cir. BAP 2006).

predominates the garnishment action, the state court is certainly an appropriate forum to resolve any disputes therein. And the state court is obviously very familiar with the law and facts here, as the parties and the pertinent garnishment issues have been in front of that court for quite some time. There is no jurisdictional basis to bring the garnishment action to this Court other than § 1334, and although this Court has determined the state court action is related to the bankruptcy, it is not closely intertwined and is not a core proceeding that requires any severing of the cause of action.³²

Turning to the remaining factors, this Court would not be burdened by retaining this case on its docket, and the Court has no evidence of any forum shopping by Debtors or McClan Construction and NJ Trenching, so these factors either lean in favor of retaining the case or are neutral. The presence of nondebtor parties and the consideration of other “unusual or significant factors,” however, are both significant considerations here. Neither McClan Construction nor NJ Trenching are debtors or creditors in Debtors’ bankruptcy, and the fact that the state court has been attempting to resolve the garnishment issue between McClan Construction and NJ Trenching with Cornerstone Bank for several years is a significant factor. Weighing all these factors,

³² Even if the Court is incorrect in its determination of core versus related-to jurisdiction, and the Amended Garnishment Objection was a core matter rather than a related to matter, the Court would still exercise its discretion to abstain from hearing the Amended Garnishment Objection under § 1334(c)(1), which is applicable to “both core and non-core matters when abstention best serves the interest of justice, judicial economy, or in the interest or comity with the state courts.” *The Scoular Co. v. Dalhart Consumers Fuel Assoc., Inc. (In re Podzemny)*, No. 11-09-14226 JL, 2010 WL 1795269, at *6 (Bankr. D.N.M. May 3, 2010).

and in the interest of comity with the state court and efficient and expeditious justice for the parties, the Court concludes it should abstain from hearing this matter.

Both McClan Construction and NJ Trenching chiefly argue against permissive abstention by alleging Cornerstone Bank has violated the bankruptcy automatic stay because it did not release its wage garnishment upon receiving notice of Debtors' bankruptcy, and that this is an "other significant factor" weighing in favor of this Court's retention of the garnishment case. In response, Cornerstone Bank counters that because McClan Construction and NJ Trenching answered its garnishment that Debtors were never employed at either entity, there was no garnishment to release when Debtors filed their bankruptcy petition. Regardless, the Court does not find this dispute changes its determination regarding permissive abstention. Whether there has been a violation of Debtors' bankruptcy automatic stay is a separate issue from the determination of the proper court to decide Cornerstone Bank's Amended Garnishment Objection. Thus, if Debtors contend there has been a violation of the automatic stay and wish to pursue that theory with this Court, this decision does not preclude them from doing so.

C. Remand Based on Equitable Grounds

To complete the analysis, Cornerstone Bank also argues that the Court should remand this matter to the state court under 28 U.S.C. § 1452(b), which permits remand of removed cases "on any equitable ground." Some courts have looked at equitable factors when considering remand under § 1452(b), such as:

- (1) forum non conveniens; (2) a holding that, if the civil action has been

bifurcated by removal, the entire action should be tried in the same court; (3) a holding that a state court is better able to respond to questions involving state law; (4) expertise of the particular court; (5) duplicative and uneconomic effort of judicial resources in two forums; (6) prejudice to the involuntarily removed parties; (7) comity considerations; and (8) a lessened possibility of an inconsistent result.³³

Other courts have determined that the “analysis of a request for equitable remand under § 1452(b) and permissive abstention under § 1334(c)(1) is substantively the same.”³⁴

For the reasons stated above in support of discretionary abstention, the equities of this matter also require remand to state court. The state court is more familiar both with the parties and with the litigation at hand than this Court is, and in the interest of comity and justice, the equities justify remand. The state court has handled this litigation and its attendant legal issues for multiple years and will be able to make a determination with a smaller expenditure of judicial resources.

³³ *Orman v. Hollywood Motion Picture & Television Museum*, No. 09-2333, 2009 WL 2914054, at *3 (D. Kan. Sept. 8, 2009) (quoting *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 204 B.R. 222, 225 (D. Kan. 1996)); see also *Textron Inv. Mgmt. Co. v. Struthers Thermo-Flood Corp.*, 169 B.R. 206, 211 (D. Kan. 1994) (stating factors as “whether (1) there is duplication of judicial resources or uneconomical use of judicial resources; (2) the remand will adversely affect the administration of the bankruptcy estate; (3) the case involves questions of state law better addressed by a state court; (4) there are comity considerations; (5) there is prejudice to unremoved parties; (6) the remand lessens the possibility of inconsistent results; and (7) the court where the actions originated has greater expertise”).

³⁴ *Marah Wood Prods., LLC v. Jones*, 534 B.R. 465, 477 (D. Conn. 2015).

D. Attorneys' Fees

Cornerstone Bank seeks an award of its attorneys' fees and costs for what it characterizes as McClan Construction and NJ Trenching's "improper removal." Under 28 U.S.C. § 1447(c), an "order remanding [a] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."

A fee award under § 1447(c) is a discretionary decision.³⁵ "[T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied."³⁶

Although the Court ultimately finds the parties' dispute should be determined by the state court, the filing of the notice of removal was not objectively unreasonable. The notice of removal was done quickly after Debtors' bankruptcy case was filed, and it was not unreasonable to assert the parties' garnishment litigation could have a foreseeable effect on Debtors' bankruptcy estate. The garnishment litigation touches on questions of Debtors' earnings, and obviously, employment and income are important facets of the administration of a bankruptcy case. There appear to be no unusual circumstances warranting an award of fees under § 1447(c), and the request is therefore denied.

³⁵ *Auld v. Auld*, 553 F. App'x 807, 808 (10th Cir. 2014).

³⁶ *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

III. Conclusion

This Court has subject matter jurisdiction over this cause of action, as it is related to the administration of the bankruptcy case. However, because this case is based on state law garnishment claims that, in the interests of comity and justice, should be heard at the state court, this Court exercises its discretion pursuant to 28 U.S.C. § 1334(c)(1) and abstains from hearing this proceeding. For the same reasons, the Court remands this matter to the state court under 28 U.S.C. § 1452(b). The Court denies, however, Cornerstone Bank's request for attorneys' fees and costs.

Accordingly, Cornerstone Bank's motion for discretionary abstention³⁷ is granted in part and denied in part. This proceeding is remanded to its original court for continued management.

The motion, filed by McClan Construction and NJ Trenching, for waiver of the requirement under Federal Rule of Bankruptcy Procedure 9027 to file certified copies of the state court file³⁸ is denied as moot.

It is so ordered.

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³⁷ Doc. 6.

³⁸ Doc. 2.