SO ORDERED.

SIGNED this 02 day of August, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:
LADY BALTIMORE FOODS, INC., — **Case No. 02-43428**
Chapter 11

Debtor.

LADY BALTIMORE FOODS, INC. and
LADY BALTIMORE OF MISSOURI, INC.,

and

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS,

Plaintiffs,

vs. — **Adversary No. 06-7024**

HARVEST INSURANCE COMPANY,

Defendant.

MEMORANDUM AND ORDER GRANTING IN PART, AND DENYING IN PART, HARVEST INSURANCE COMPANY'S MOTION TO DISMISS AND GRANTING MOTION TO COMPEL ARBITRATION OF BREACH OF CONTRACT CLAIM

Plaintiffs, who include Lady Baltimore Foods, Inc., Lady Baltimore of Missouri, Inc. (Debtors), and The Official Committee of Unsecured Creditors (UCC) of the administratively consolidated Debtors, filed a Complaint to Establish and/or Estimate Claim(s) of Harvest Insurance Company Pursuant to 11 U.S.C. §§ 501 and 502(c), For Turnover of Amounts Due to Debtors under 11 U.S.C. §§ 541 and 542, for Breach of Contract, or, In the Alternative, For Declaratory Judgment.[1] In lieu of filing an Answer to this adversary proceeding, Harvest Insurance Company (Harvest) filed a Motion to Dismiss Plaintiffs' Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(2) and (6) and to Compel Arbitration of Breach of Contract Claim.[2] The main issue before this Court is whether it should give effect to a pre-petition contract between the key parties to arbitrate any disputes that arise during their relationship, or whether it should exercise jurisdiction over the dispute under this Court's "related-to" jurisdiction.

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(a). After reviewing the arguments of the parties, as well as the law, the Court grants Harvest's Motion to Dismiss Count I, but denies Harvest's Motion to Dismiss Counts II, III and IV, without prejudice, at this time. Instead, the Court lifts the automatic stay to allow the parties' dispute to be resolved pursuant to their pre-petition agreement requiring arbitration of the dispute.

I. Background

Harvest is a group captive insurance company organized for the purpose of insuring or re-insuring risks of its members, who are the owners of Harvest. The members, who are all engaged in some food-

[1]Doc. 1.

[2]Doc. 11.

related business, joined the group in order to pool their risks for various kinds of business liability, such as workers' compensation, general liability, and commercial automobile. Lady Baltimore Foods, Inc. (Lady Baltimore), before it filed this bankruptcy, was in the food distribution business, and similarly joined Harvest.

Lady Baltimore was a member of Harvest for the policy years 1999-2002. As a result, Lady Baltimore entered into a "Participation Agreement" with Harvest (a copy of which Plaintiffs attached to their Complaint), which governs the relationship of the parties. That Agreement requires that each member post a Letter of Credit, cash or other acceptable security equal to two-thirds of its audited Frequency Loss Fund (the member's own past loss history) for each of the first three years of involvement.

Lady Baltimore complied with the Participation Agreement by posting a Letter of Credit for Harvest's benefit at Commerce Bank, N.A. It is the money remaining in that Letter of Credit that is the centerpiece of this litigation; Debtors suggest the remaining amount of the posted letter of credit "exceeds $1,000,000,"[3] while its potential remaining liabilities under the Participation Agreement total only $53,730.63. It thus requests this Court order Harvest to release all but that $53,730, or some lesser amount up to the total remaining in the Letter of Credit, so Debtors can include those sums when it makes distributions to its creditors under their pending plan of liquidation.[4]

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[3]Harvest claims the amount remaining, as of May 8, 2006, is $1,019,205, and Plaintiffs' Memorandum in Opposition suggests the amount is "approximately $1.1 million." The actual amount contained in the Letter of Credit is immaterial to this Court's decision.

[4]The Court has approved the Disclosure Statement in this case, has resolved all objections to the Plan of Liquidation, has taken and concluded all evidence that Debtors wished to present in favor of confirmation, and is now awaiting entry of an order of confirmation pending the closing of the sale of the major real estate asset of Lady Baltimore, Inc., which will hopefully be imminently consummated. The Court hopes that confirmation, and the beginning of distributions to creditors, can occur very quickly.

Harvest, on the other hand, claims that Lady Baltimore's "remaining potential liability for premiums to Harvest is approximately $2,815,800," because it remains "potentially responsible for its proportionate share of losses on the approximately 98 open claims of all Harvest Members for the 1999-2002 policy years."[5] Since Harvest contends its potential liability well exceeds the amount remaining in the Letter of Credit, Harvest has declined to release any portion of the Letter of Credit. It relies on the terms of the parties' contract—the Participation Agreement—to allow it to refuse the release at this time. Harvest indicates that "[i]n due course, Harvest's board of directors will 'close' the policy years 1999-2002 and the then-remaining balance of the Letter of Credit (if any) will be released."[6]

Unfortunately for Lady Baltimore's creditors, who have now been waiting well over three years to receive any distribution from Debtors' now mostly liquidated assets, Harvest admits that it could be a decade, "or more," before the amount to be released, if any, will be finally determined.[7] Harvest suggests if Plaintiffs wish to more quickly liquidate this potential asset, its remedy is to convince a third party to purchase Lady Baltimore's contingent residual interest in the Letter of Credit for some likely discounted amount. Plaintiffs instead request this Court to take jurisdiction over its breach of contract claim (and claim for an accounting) against Harvest, notwithstanding that Lady Baltimore admittedly signed a contract that requires arbitration of such disputes. Plaintiffs argue, in essence, that this matter–or parts of it—is a core

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[5]*See* Tivnan Declaration, ¶ 11.

[6]Doc. 31, Harvest's Reply brief at 10.

[7]Doc. 12, Harvest's Memorandum in Support of Motion to Dismiss, at 5, relying on Participation Agreement § 5.2 (authorizing Harvest's Board of Directors to close a policy year only after a minimum of three years after the close of such policy year). The Court understands the last policy year, 2002, would have ended February 1, 2003, so the minimum period for closing has passed and if it chose to do so, Harvest could close the last policy year in which Lady Baltimore participated.

proceeding, and that arbitration would unduly interfere with the orderly administration of the estate.

II. Summary of Plaintiffs' Claims

Count I requests this Court estimate Harvest's claim. Plaintiffs now agree Count I should be dismissed,[8] because it admits Harvest did not file a proof of claim, and has sought no distribution from the estate. Accordingly, Count I is dismissed by agreement. Count II seeks, pursuant to 11 U.S.C. § 541, "return of funds actually or beneficially held by Harvest under the Agreement." The Court, and Harvest, assume that essentially Plaintiffs want Harvest (or this Court), to tell Commerce Bank, the entity that holds the Letter of Credit, to release all but some *de minimus* amount back to Lady Baltimore because it has no further (or very limited) liability to Harvest. Count III is a breach of contract claim, whereby Plaintiffs allege that Harvest has breached the Participation Agreement by "unjustifiably withholding excess funds"—again, the money being held by Commerce Bank in the Letter of Credit. Finally, Count IV merely asks the Court to determine and "declare" the various parties' rights in the funds remaining in the Letter of Credit.

III. Analysis

Congress has enacted comprehensive statutes giving to the bankruptcy courts exclusive jurisdiction of certain bankruptcy matters, as well as an option to exercise jurisdiction in all remaining matters "relating to" the bankruptcy case, by its adoption of the Bankruptcy Reform Act of 1978, as amended. Congress has also prohibited action being taken against debtors outside of the bankruptcy court unless the court gives its permission (or a statutory exception exists). The purpose of these policies is to give debtors and their creditors a full, fair, speedy, and unhampered chance for reorganization, or, in liquidation cases such as this

[8] Doc. 30, Plaintiffs' Brief in Opposition at p. 9.

one, to expedite the ultimate distribution of assets to creditors.[9]

Here, Plaintiffs suggest this Court should assume jurisdiction over its dispute with Harvest concerning the Letter of Credit posted as security for Lady Baltimore's obligations under the Participation Agreement with Harvest. They argue that at least parts of their Complaint are core matters, and that the Court should therefore assume jurisdiction over the entire Complaint, arguing that congressional policy overrides the provisions of the Arbitration Act when a party to the arbitration agreement is in bankruptcy.

This dispute is governed by the Participation Agreement voluntarily entered into by the parties pre-petition.[10] Section 6 of that Agreement expressly provides:

> Any dispute or difference hereafter arising with reference to the interpretation, application, or effect of this Participation Agreement or any part thereof shall be referred to and settled by arbitration in the Cayman Islands in accordance with the rules then in effect of the American Arbitration Association, and judgment upon any award of the arbitrators rendered may be entered in any court having jurisdiction thereof.

This arbitration provision could hardly have been more broadly drawn. Plaintiffs do not seriously argue that absent bankruptcy, they would be allowed to first litigate these issues in a court in lieu of arbitration, or that this Court is better equipped to apply the laws of the Cayman Islands, as required by ¶ 7.2 of the Participation Agreement, than would the chosen arbitrators.

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[9] *In re Braniff Airways, Inc.,* 33 B.R. 33, 34 (Bankr. N.D. Tex. 1983).

[10] The parties' briefs discuss whether the Court should convert Harvest's Motion to Dismiss into a Summary Judgment Motion under Fed. R. Bankr. P. 7056 because the parties have included additional information in support of their respective positions. Since this Court relies only on the Participation Agreement, attached to Plaintiff's Complaint and relied upon by both parties, the Court determines it unnecessary to convert the motion to one under Rule 7056. *See Black & Veatch Int'l Co. v. Wartsila NSD North America, Inc*., 1998 WL 953966, at *2 (D. Kan. Dec. 17, 1998) (analyzing a Rule 12(b)(6) motion to dismiss and to compel arbitration, considering arbitration agreement without converting motion to summary judgment where the parties' overarching contract that contained the arbitration provision was referenced in the complaint), cited with approval in *Umbenhower v. Copart, Inc*., 2004 WL 2660649 at *6 (D. Kan. November 19, 2004).

Whether this Court should enforce the arbitration clause has been recently throughly studied in *In re Farmland Industries, Inc.*[11] That opinion is instructive:

> Generally, a court has little reason to ignore non-executory contractual arbitration clauses, and a court should give effect to a contractual arbitration term in the same manner as the court gives effect to any other non-executory contract in bankruptcy, especially considering the strong federal policy favoring arbitration. *See Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (instructing that the Arbitration Act establishes a federal policy favoring arbitration); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (stating that the Arbitration Act was designed to put arbitration agreements on the same footing as other contracts); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149, 1153 (3rd Cir.1989) (finding "no reason to make an exception for arbitration agreements to the general rule binding trustees to pre-petition non-executory contracts" when the trustee's rights and obligations are derivative of the debtor). Part of the codified Arbitration Act plainly states: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. § 3.[12]

In re Farmland goes on to note that it is widely accepted that bankruptcy courts must stay their own proceedings to allow arbitration in non-core matters because allowing arbitration in non-core matters is unlikely to conflict with the underlying policies of the Bankruptcy Code.[13]

Admittedly, courts often find that a party's right to enforce an arbitration agreement in a core matter is less automatic, and typically courts analyze, in that situation, whether the proceeding "derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict

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[11] 309 B.R. 14 (Bankr. W.D. Mo. 2004).

[12] *Id.* at 18.

[13] *Id* (citing *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 165-66 (2nd Cir. 2000)); *Ins. Co. of North America v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re National Gypsum Co.)*, 118 F.3d 1056, 1066 (5th Cir. 1997).

with the purposes of the Code."[14] Each case seems to turn on its particular facts and on the exercise of the court's discretion. The party opposing arbitration has the burden of showing that Congress intended to preclude arbitration of the statutory rights at issue.[15] Plaintiffs have not met that burden.

The bankruptcy court in the Northern District of Oklahoma recently summarized the views of the Tenth Circuit Court of Appeals about what constitutes a core proceeding.

> In the Tenth Circuit, "[c]ore proceedings are proceedings which have no existence outside of bankruptcy." *Gardner v. United States (In re Gardner),* 913 F.2d 1515, 1518 (10th Cir.1990). "Actions which do not depend on the bankruptcy laws for their existence and which could proceed in another court are not core proceedings." *Id. See also Personette,* 204 B.R. at 771 ("a proceeding 'arises under' the Bankruptcy Code if it asserts a cause of action created by the Code"; "[p]roceedings 'arising in' ··· a bankruptcy case are those that could not exist outside of a bankruptcy case, but that are not causes of action created by the Bankruptcy Code"); *Official Committee of Unsecured Creditors v. Elkins (In re Integrated Health Services, Inc.),* 291 B.R. 615, 618 (Bankr. D. Del.2003) (in the Third Circuit, "a proceeding is core (1) if it invokes a substantive right provided by title 11 or (2) if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case" (quotations and citations omitted)).[16]

The crux of Plaintiffs' Complaint is Harvest's alleged breach of the Participation Agreement, including its failure to provide the accounting required by the contract. It cannot be seriously argued that this breach of contract claim is a core proceeding under 28 U.S.C. § 157(b).[17] The Court finds it is a non-core proceeding, and follows those decisions finding that it cannot, and should not, decline to enforce an

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[14] *Id.* at 19 (citing *Ins. Co. of North America v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re National Gypsum Co.)*), 118 F.3d at 1066.

[15] *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006).

[16] *In re 4 Front Petroleum, Inc.*, ___ B.R. ___, 2006 WL 1997403 at *3 (Bankr. N.D. Okla. June 29, 2006).

[17] *Manley Truck Line, Inc. v. Mercantile Bank of Kansas City*, 106 B.R. 696, 697 n.2 (D. Kan. 1989) (holding that Chapter 11 debtor's action for breach of contract was a non-core proceeding; action clearly could have been brought in a federal or state court absent the bankruptcy); *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101-02 (2d Cir. 1993) (holding that breach of contract claims are non-core,); *In re Cinematrocnis, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990).

arbitration agreement between the parties to resolve that dispute.[18]

Even if any parts of the Complaint were core proceedings, the Court further finds that arbitration would not interfere with the orderly administration of this estate, and should be ordered in any event. First, this case is very close to having a confirmed plan of liquidation. Debtors are not operating an ongoing business, and thus the outcome of the breach of contract claim will have no impact on the reorganization of the Debtors—they are not being reorganized. The outcome of this breach of contract claim will only determine whether, and when, unsecured creditors will ultimately receive, under the liquidation plan, additional distributions as a result of the release of any or all of the funds remaining in the Letter of Credit after satisfaction of any remaining liabilities, if any. In other words, if Lady Baltimore prevails at arbitration, and it is determined that Harvest has breached the Participation Agreement, and that Lady Baltimore is entitled to have part or all of the funds remaining in the Letter of Credit released, then the creditors will then be entitled to receive an additional distribution under the plan (assuming they have received any distribution by that time). Secondly, there is other potential litigation that may also cause a delay in the final distribution to creditors.[19] Further, delay in making such a final payment to creditors under a liquidating plan is insufficient reason to deny enforcement of the parties' voluntary agreement to arbitrate.

Third, the Court is not convinced that a determination of Plaintiffs' claim in this bankruptcy court, with the attendant appellate process, is any more efficient than the parties' agreement to have what the

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[18]*MBNA America Bank, N.A. v. Hill*, 435 F.3d at 108 (holding bankruptcy has no discretion to refuse to stay proceeding pending arbitration); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989).

[19]For example, the Unsecured Creditors Committee has repeatedly sought extensions of time to bring potential claims against certain officer or directors of Debtors. *See, e.g.,* Docs. 1254-1257 (Seventh Stipulation for Tolling of Statute of Limitations under 11 U.S.C. 546 against Mel Cosner, Anthony Tarantino, Jim Driskell and Alan Cosner, insiders of Debtors) and Lady Baltimore has at least one other pending Adversary Proceeding.

Court assumes is binding arbitration. Instead, it is likely the delay, expense, or effort required by the parties to arbitrate their disputes is not materially different than if the matter continued in the bankruptcy court, and theoretically, each forum should reach the same result.[20]

Accordingly, this Court grants Harvest's request that this Court stay Count III (and the Court will also stay Count II and IV), so that Plaintiffs may prosecute its claims through arbitration, as Lady Baltimore agreed when signing the Participation Agreement. If needed, this Court grants relief from any existing stay to allow the parties to participate in such arbitration, for cause, pursuant to 11 U.S.C. § 362(d)(1). The Court further notes that although the parties clearly agreed to arbitrate in the Cayman Islands, Plaintiffs indicate they would prefer to arbitrate in Chicago, Illinois, where counsel for Harvest is located. This Court will not alter the terms of the parties' Arbitration Agreement by substituting its judgment for that of the parties when the agreement was executed. That said, the Court obviously encourages all parties to consider the added costs to arbitrate in the Cayman Islands, and further encourages the parties to choose a forum that is most convenient to all parties, and one that will add the least cost and delay to the proceedings.

Finally, the Court addresses Harvest's contention that Plaintiffs' Complaint must be dismissed because this Court lacks personal jurisdiction over Harvest, under Rule 12(b)(2) of the Federal Rules of Civil Procedure, incorporated into adversary proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The Court finds this contention has no merit.

To obtain personal jurisdiction over a nonresident defendant, a plaintiff must show that jurisdiction

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[20] *In re Farmland Industries, Inc.*, 309 B.R. at 21.

is legitimate under the laws of the forum state and that the exercise of jurisdiction does not offend constitutional guarantees of due process.[21] The first part of this inquiry requires the Court to determine if Harvest's conduct falls within the scope of the Kansas long-arm statute, K.S.A. § 60-308. Plaintiffs contend that §§ 60-308(b)(4) and (b)(5) confer jurisdiction over Defendant. This Court agrees.

The statute provides:

> (b) *Submitting to jurisdiction–-process*. Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person, and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from doing any of these acts:
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> ...
>
> (4) contracting to insure any person, property or risk located within this state at the time of contracting;
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> (5) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state; ....

Harvest admits that members join Harvest to pool their risks for "workers' compensation liability, general liability, commercial automobile, and other types of insurance coverage."[22] The parties' pleadings also reveal no dispute that the insurance was for the purpose of insuring Lady Baltimore's operation in Kansas City, Kansas. Clearly, the risk insured was located in Kansas at the time of contracting and Lady Baltimore's required performance, making premium payments, was performed in Kansas.[23] Having determined that the Kansas long-arm statute allows for jurisdiction, further analysis is necessary to

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[21] *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270 (10th Cir. 2005) (quoting *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995)).

[22] Doc. 12, at p.3.

[23] Harvest argues that because it was not Lady Baltimore's direct insurer, K.S.A. § 60-308(b)(4) does not confer jurisdiction over it. But even if Harvest is not the direct insurer, there is no dispute that the parties entered into a contract, as noted in § 60-308(b)(5).

determine if exercising jurisdiction comports with due process.

The exercise of personal jurisdiction over a nonresident defendant is appropriate "so long as there exist minimum contacts between the defendant and the forum State."[24] The "minimum contacts" standard can be met in two ways.[25] First, the court may exercise general personal jurisdiction if the defendant has "continuous and systematic general business contacts" with the forum state.[26] Second, the Court may assert specific jurisdiction over a defendant "if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injures that 'arise out of or relate to' those activities"[27] In this case, Plaintiffs have made no claim that Defendant's contacts with Kansas have been continuous and systematic.[28] Therefore, the Court's analysis of minimum contacts will be limited to those necessary to establish specific personal jurisdiction.[29]

The inquiry into specific jurisdiction is two-fold:[30]

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[24] *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F. 3d 1244, 1247 (10th Cir. 2000) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1985)).

[25] *TH Agriculture & Nutrition, L.L.C. v. Ace European Group Ltd.*, 416 F. Supp. 2d 1054, 1064 (D. Kan. 2006) (citing *Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd.*, 385 F. 3d 1291, 1296 (10th Cir. 2004)).

[26] *Id.* at 1064 (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-415 (1984)).

[27] *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1090-91 (10th Cir. 1998) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1995)).

[28] Plaintiffs argue that jurisdiction can be established by looking at Defendant's contacts with the United States as a whole, not just this District. However, the Supreme Court has not made a determination of whether the nationwide contacts approach is constitutional under the Fifth Amendment. Additionally, this Court lacks sufficient information to conduct an inquiry as to Harvest's contacts with the United States as a whole. The Court finds it unnecessary to obtain additional information about Harvest's nationwide contacts because the Court has determined adequate minimum contacts exist with the State of Kansas.

[29] *See TH Agricultural & Nutrition, L.L.C.*, 416 F. Supp. 2d at 1064.

[30] *OMI Holdings*, 149 F. 3d at 1091.

> First, we must determine whether the defendant has such minimum contacts with the forum state 'that he should reasonably anticipate being hauled into court there.' Within this inquiry we must determine whether the defendant purposefully directed its activities at residents of the forum and whether the plaintiff's claim arises out of or results from actions by the defendant himself that create a substantial connection with the forum state.' Second if the defendant's actions create sufficient minimum contacts, we must then consider whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice.''[31]

The Complaint alleges that Harvest entered into a contract with Lady Baltimore in Kansas City, Kansas. Presumably, Harvest had full knowledge that Lady Baltimore was a Kansas corporation. Lady Baltimore's Kansas address is also contained in each of the Letter of Credit documents that Harvest attached to its memorandum to support its Motion to Dismiss. Harvest admits it agreed to provide insurance or re-insurance coverage to Lady Baltimore, a corporation doing business in Kansas. Under these circumstances, Harvest "should have reasonably anticipated being hauled into court in the State of Kansas when it entered into a contract with a Kansas corporation, requiring that invoices be sent to the Kansas corporation for payment, and the acceptance of payment from the Kansas corporation."[32] The Court finds that Defendant's actions establish minimum contacts with Kansas.

Even though the Court has determined that Harvest had the requisite minimum contacts, it must also determine if the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice," by considering: (1) the burden on the defendant; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in receiving convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared

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[31] *Id.* (internal citations omitted).

[32] *Oxford Transp. Services, Inc. v. MAB Refrigerated Transport, Inc.*, 792 F. Supp. 710, 713 (D. Kan. 1992) (internal citations omitted).

interest of the several states in furthering fundamental substantive social policies.[33]

Consideration of these factors in this case reveals that traditional notions of "fair play and substantial justice"[34] will not be offended by exercising personal jurisdiction. As the Tenth Circuit has noted,

> "The burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction.... When the defendant is from another country, this concern is heightened and great care and reserve should be exercised before personal jurisdiction is exercised over the defendant. However, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[35]

In this case, Harvest's headquarters in the Cayman Islands is admittedly a substantial distance from this forum. However, Harvest has demonstrated the ability of its representatives to travel to and do business in the United States, and specifically in Kansas, to conduct business dealings and engage in economic activity. Accordingly, the Court finds that it would not be "gravely difficult and inconvenient" to litigate the dispute in this forum.[36]

The Court also notes that in the Participation Agreement, at ¶ 7.3, the parties specifically agreed that the courts of the Cayman Islands do not have exclusive personal jurisdiction over the parties. Specifically, that section states that "Each of the parties to this Participation Agreement hereby submits to the non-exclusive personal jurisdiction of the courts of the Cayman Islands."[37] Accordingly, it appears Harvest was aware that providing insurance or re-insurance could submit it to the jurisdiction of the state

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[33] *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 133 (1987).

[34] *Id.*

[35] *Pro Axess,* 428 F.3d at 1280 (internal citations omitted).

[36] *Id.* (internal citations omitted).

[37] *See* Participation Agreement, p. 7, attached to Plaintiffs' Complaint as Exhibit 1.

where such coverage was being provided.

The second factor, the state's interest in providing its citizens a forum to seek redress, also weighs in favor of exercising personal jurisdiction. "States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out of state actors."[38] The relevant statute, in fact, expresses the strength of Kansas' interest in providing jurisdiction when insurance is at stake. Lady Baltimore is a Kansas corporation with its principal place of business in Kansas, and the State of Kansas has an interest in providing it with a forum to enforce what is in essence an insurance contract, or a contract that helps arrange for the provision of insurance.[39]

The third factor, Plaintiff's interest in convenient and effective relief, may weigh heavily in cases where a plaintiff's chances of recovery will be greatly diminished by forcing him to litigate in a another forum because of that forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit."[40] There is nothing present in the record that indicates that these Plaintiffs would be substantially prejudiced if the proceedings were conducted in another forum, and in fact, the Court has already determined that at least Lady Baltimore contracted for arbitration of the instant dispute in another forum. Therefore, the Court concludes that Lady Baltimore has in essence stipulated, by signing that contract, that it could receive convenient and efficient relief in another forum.

The fourth factor—the interstate judicial system's interest in obtaining efficient resolution, considers whether the forum state is the most efficient place to litigate the dispute. "Key to this inquiry is the location

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[38] *OMI Holdings*, 149 F.3d at 1096 (internal citations omitted).

[39] *See Pro Axess*, 428 F.3d at 1280.

[40] *OMI Holdings*, 149 F.3d at 1097 (internal citations omitted).

of witnesses, where the wrong underlying lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation."[41] Application of this factor is neutral, because Plaintiffs stipulated that another forum's laws would govern the case. On the other hand, it appears witnesses would likely be located in both Kansas and in the Cayman Islands, and the bankruptcy cases of the Lady Baltimore Plaintiffs are pending in Kansas.

The Court must also consider the state's interest in furthering substantive social policies in making this determination. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[42] There is nothing present in the record indicating whether exercising personal jurisdiction would offend the Cayman Island's policy interests.

Although the inquiry is certainly not completely one-sided, the Court concludes that its exercise of personal jurisdiction is reasonable and would not offend traditional notions of fair play and substantial justice. Accordingly, this Court will exercise personal jurisdiction over Harvest.[43] Although this Court finds that it has personal jurisdiction over Harvest, the Court has decided not to dismiss this case (except for Count I), but instead, to stay the rest and remainder of the case in favor of arbitration of the rights of the parties under the Participation Agreement.

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[41] *Id.* (internal citations omitted).

[42] *Pro Axess*, 428 F.3d at 1281 (internal citations omitted).

[43] Defendant argues that the Complaint should be dismissed because Plaintiffs failed to support jurisdictional allegations when they were challenged in the Motion to Dismiss. However, "where, as in the present case, there has been no evidentiary hearing, and the motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written material, the plaintiff need only make a prima facie showing that jurisdiction exists." *Intercon v. Bell Atlantic Internet Solution, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000). Plaintiffs have made the prima facie showing and dismissal on these grounds would not be appropriate.

Although Harvest requests this Court dismiss Count II, on the basis that it has nothing to turn over to Plaintiffs, and the Letter of Credit is not property of the estate, Harvest admits that it will or may at some point authorize Commerce Bank to "release" excess funds in the Letter of Credit when the last policy year is closed. It thus appears Lady Baltimore has some potential contingent interest in funds that even Harvest admits it may authorize release at some unknown time in the future. Harvest never argues that either it or Commerce Bank would be entitled to retain any excess funds after all policy years are closed and a "refund" is determined to exist. If Harvest, after arbitration, refused to turn over funds that the arbitration award compelled it to refund, this Court would have jurisdiction to order that result.

The Court agrees that Plaintiff may well need to amend Count II, if after arbitration it is determined that a certain portion of the Letter of Credit must be released, or to join other parties, but the Court finds that such amendment can wait until completion of arbitration. Similarly, Harvest suggests Count IV should be dismissed because it "is just derivative" of the other counts. If the Court is going to stay Count III, as Harvest specifically requests, then it makes little sense to dismiss the Count that is at least partially derivative of Count III. Counts II, III and IV are not dismissed at this time. Instead, this Court stays this proceeding in favor of arbitration.

IV. Conclusion

The Court agrees with Harvest that Plaintiffs' Count III is a non-core breach of contract claim, and that this Court should enforce the parties pre-petition agreement to arbitrate the disputes under that contract. The Court hereby stays further litigation of Counts II, III and IV, pending completion of arbitration pursuant to the parties agreement. Count I is dismissed with Plaintiffs' consent. The Court further orders that the parties notify the Court, by status letter docketed with the Clerk, with a separate

copy to Chambers, the progress of any arbitration proceeding, on a bi-yearly basis, beginning **January 8, 2007.** This Order supersedes the Court's May 31, 2006 Scheduling Order.[44] Because the Court has denied the Motion to Dismiss (except for Count I), in favor of staying the case during arbitration, all dates established in that Scheduling Order are canceled.

IT IS SO ORDERED.

# # #

[44]Doc. 26.