The relief described hereinbelow is SO ORDERED.

SIGNED this 26th day of September, 2022.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

MATTHEW WILFRED ROBERTS and
SHELLEY D. GARZA-ROBERTS,

Debtors.

Case No. 18-20906
Chapter 7

ORDER DENYING MOTION FOR STAY RELIEF

Creditors Freebird Communications, Inc. Profit Sharing Plan, Freebird Communications, Inc., and Michael Scarcello (collectively, "**Freebird**") sued debtors Matthew Roberts and Shelley Garza-Roberts in federal district court for misappropriation of trade secrets, breach of fiduciary duty, tortious interference with contract, and unjust enrichment in January 2018. Seven months later, the

Robertses ("**Debtors**") filed for bankruptcy under Chapter 7 of the Bankruptcy Code. In response, Freebird filed an adversary proceeding to determine the dischargeability of its claims under § 523 of the Bankruptcy Code.[1] The matter now comes before the Court on Freebird's motion for relief from the automatic stay (1) "to allow them to proceed to judgment on their claims against Debtors in the United States District Court for the District of Kansas" or, alternatively, (2) "to allow them to move in the District Court under 28 U.S.C. § 157(d) for the District Court to withdraw from the Bankruptcy Court discovery and the trial of [Freebird's] substantive claims against Debtors."[2]

1. Stay relief: 11 U.S.C. § 362(d)

Section 362(d)(1) of the Bankruptcy Code provides that a bankruptcy court shall grant stay relief "for cause." The Code does not define "cause," and the Tenth Circuit has not set forth a precise framework in which to identify it. *See Chizzali v. Gindi (In re Gindi)*, 642 F.3d 865, 872 (10th Cir. 2011), *overruled on other grounds by TW Telecom Holdings, Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011) (holding that automatic stay prevented Chapter 11 debtor in possession from pursuing appeal against it).

Courts in the Tenth Circuit often consider the twelve factors identified in *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984), to determine whether cause exists to

[1] *See* Adv. No. 18-6063.

[2] ECF 74 at 1.

modify the stay to permit litigation against the debtor to proceed in another forum.[3] *See Busch v. Busch (In re Busch)*, 294 B.R. 137, 141 (B.A.P. 10th Cir. 2003). An additional factor—which can be dispositive—is whether the movant has a probability of prevailing on the merits of his case in the other forum. *See In re Gindi*, 642 F.3d at 872.

The moving party has the initial burden to show that cause exists to lift the stay, after which the burden shifts to the debtor to show why the stay should remain in place. *In re Busch*, 294 B.R. at 141 (quoted in *Jim's Maint. & Sons Inc. v. Target Corp. (In re Jim's Maint. & Sons Inc.)*, 418 F. App'x 726, 728 (10th Cir. 2011)); *see also In re Elmira Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994) ("[E[very party seeking relief from the automatic stay under § 362(d)(1) must carry

[3] The twelve *Curtis* factors are (1) whether stay relief will result in partial or complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy case; (3) whether the foreign proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases; (5) whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question; (7) whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee, and other interested parties; (8) whether the judgment claim arising from the foreign action is subject to equitable subordination under § 510(c); (9) whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under § 522(f); (10) the interest of judicial economy and the expeditious and economical determination of litigation for the parties; (11) whether the foreign proceedings have progressed to the point whether the parties are prepared for trial; and (12) the impact of the stay on the parties and the "balance of hurt." *Curtis*, 40 B.R. at 799-800.

the initial burden of showing that it is entitled to relief before the debtor is obligated to go forward with its proof.").

Here, following a series of unsupported factual allegations, Freebird argues:

> 6. The District Court gained familiarity with some of the issues in this case by addressing [Freebird's] claims against Debtor[s'] co-defendants while waiting on the bankruptcy issues involving Debtors to be resolved in this Court. As a matter of judicial efficiency and familiarity with jury trials, it makes sense for this Court to lift the bankruptcy stay and allow Plaintiffs to proceed to Judgment against Debtors on their pending claims in the District Court.
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> 7. Allowing [Freebird's] claims to be resolved in the District Court under appropriate jury instructions would help this Court determine with finality whether those claims as submitted to the jury were dischargeable, making the ultimate resolution of this bankruptcy case easier.[4]

These bare assertions—which identify no similarities between Freebird's claims in district court against Debtor's co-defendants, its claims in district court against Debtors, and its adversary proceeding against Debtors to determine the dischargeability of its claims against them under § 523 of the Bankruptcy Code—do not satisfy Freebird's burden of going forward with cause for stay relief. (Although

[4] ECF 74 ¶¶ 6, 7. Freebird also implies that this Court—which previously dismissed Freebird's Second Amended Complaint for failure to comply with Fed. R. Civ. P. 8—would violate the Kansas Code of Judicial Conduct if it were to deny Freebird's motion for stay relief. *Id.* ¶ 7 (citing Rule 2.2 ("*Impartiality* and Fairness") and Rule 2.3 ("Bias, Prejudice, and *Harassment*"). However, assuming that Freebird meant to cite the standards applicable to federal bankruptcy judges (i.e., the Code of Conduct for United States Judges and/or 28 U.S.C. § 455), "[a]dverse rulings alone are insufficient grounds for disqualification." *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1501 (10th Cir. 1994).

some similarities likely exist, "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).)[5] Moreover, the applicable *Curtis* factors weigh against stay relief here: the district court case is about liability, not dischargeability, such that stay relief would not completely resolve the issues before this Court (factor 1); the district court case is connected to Debtors' bankruptcy case because it involves claims against the estate (factor 2); there is no evidence that the breaches of fiduciary duty alleged by Freebird in the district court case are the type with which *Curtis* is concerned[6] (factor 3); a district court is not a specialized tribunal[7] (factor 4); a determination of liability in the district court would negatively affect the interests of Debtors' other creditors in the estate property currently held by the Chapter 7 trustee (factor 7); even if stay relief were granted for the district court to determine liability, the parties would need to return to bankruptcy court for a determination of dischargeability under § 523 (factor 10); and the district court case was not ready for trial as against Debtors (factor 11). Furthermore, the only evidence as to the

[5] Nor does Freebird's motion—which cites neither record nor caselaw and makes only passing references to § 362—satisfy D. Kan. Rule 7.6, under which all briefs and memoranda filed with the court must contain "a concise statement of the facts, with each statement of fact supported by reference to the record," and refer to "all statutes, rules, and authorities relied upon." *See* D. Kan. Rule 7.6(a)(2), (4); D. Kan. LBR 1001.1(a) (applying D. Kan. Rules to bankruptcy court).

[6] *See In re Dampier*, 523 B.R. 253, 257 (Bankr. D. Colo. 2015).

[7] *See In re MBF Inspection Servs., Inc.*, Case No. 18-11579-t11, 2018 WL 6584286, at *4 (Bankr. D.N.M. Dec. 12, 2018).

likelihood of Freebird's success in district court is that the district court has already granted summary judgment *against* Freebird as to its claims against Debtors' co-defendants.[8]

Because Freebird has not met its burden of going forward with cause for stay relief, the applicable *Curtis* factors weigh against stay relief, and the district court has already granted summary judgment against Freebird in favor of Debtors' co-defendants, Freebird's motion for stay relief is hereby denied.

2. Withdrawal of the reference: 28 U.S.C. § 157(d)

To the extent Freebird's motion for stay relief can be construed as a request for transfer of Adv. No. 18-6063 to the district court, it is hereby denied for failure to comply with D. Kan. Rule 83.8.6.

IT IS SO ORDERED.

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[8] A federal court may take judicial notice of proceedings in another court. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.3d 1169, 1172 (10th Cir. 1979); *cf.* Fed. R. Evid. 201.