

**FAHY CHOI LLC.**  
**Meadows Office Complex**  
**301 Route 17 North, 9<sup>th</sup> Floor**  
**Rutherford, NJ 07070**  
**(201) 438-0200**  
**Attorneys for All Defendants**

**LAW OFFICES OF MARK ANCHOR ALBERT**  
**601 South Figueroa Street Suite 2360**  
**Los Angeles, CA 90017**  
**Tel: 213-687-1515**  
**Fax: 213-622-2144**  
**Email: markalbert@maalawoffices.com**  
**Attorneys for Defendants Mario R. Ferla,**  
**Jack Pitluk, Martin H. Karo, Steve Saleen,**  
**and Thomas Del Franco**

**U.S. DISTRICT COURT**  
**DISTRICT OF NEW JERSEY**

THOMASON AUTO GROUP, LLC,

Plaintiff,

vs.

MARIO R. FERLA, JACK PITLUK,  
MARTIN H. KARO, STEVE SALEEN,  
WILLIAM TALLY, THOMAS DEL  
FRANCO, ALEX MISKOV, RICHARD L.  
KALIKA, and ALEXANDER KEELER,

Defendants.

CASE NO. 2:08-cv-04143 (JLL)(CCC)

**REPLY IN SUPPORT**  
**DEFENDANTS' MOTION FOR**  
**ORDER TRANSFERING VENUE TO**  
**THE UNITED STATES**  
**BANKRUPTCY COURT FOR THE**  
**CENTRAL DISTRICT OF**  
**CALIFORNIA UNDER 28 U.S.C. §**  
**1404(a) AND 28 U.S.C. § 1412**

Hearing Date: Sept. 21, 2009  
Hon. Claire C. Checchi

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 3

    A. THIS CASE ASSERTS CLAIMS THAT ARE SUBJECT TO THE CALIFORNIA BANKRUPTCY COURT'S JURISDICTION ..... 3

        1. Plaintiff's Bad-Faith-Bankruptcy Claim Is A "Core" Matter ..... 4

        2. The Bankruptcy Court Has Rejected The Same Bad-Faith-Bankruptcy Allegations Supporting Thomason's RICO Claims And The Same Venue Arguments Asserted In His Opposition..... 4

        3. "Related To" Jurisdiction Plainly Exists Here Because Thomason Alleges That The Debtors Are "RICO Enterprises." ..... 5

        4. Plaintiff's Purported RICO Jury Rights Do Not Alter The Bankruptcy "Related To" Or Venue Analysis. .... 6

        5. This Case Seeks To Recover Estate Property By Means Of Causes Of Action That Belong To The Debtor, Via Its Trustee. .... 7

        6. This Case Is "Related To" The Bankruptcies As A Result Of Defendants' Indemnity and Contribution Claims. .... 8

        7. This Case Is "Related To" The Bankruptcies As A Result Of The Debtors' Potential Vicarious Liability Resulting From Plaintiff's Claims..... 9

        8. This Case Will Have A Direct Impact On Estate Assets Because Thomason's Proof Of Claim Is Based On The Same Facts As The State Court Actions And This Action..... 10

    B. TRANSFER ALSO IS WARRANTED FOR THE CONVENIENCE OF THE PARTIES AND WITNESSES, AND IN THE INTERESTS OF JUSTICE..... 12

        1. Plaintiff Could Have Brought This Action In The Central District of California..... 12

        2. The Convenience of the Parties Favors Transfer of Venue to California. .... 12

3.	The Convenience of the Witnesses Favors Transfer of Venue to California. ....	13
4.	The Location of the Documentary Evidence Favors Transfer of Venue to California. ....	13
5.	Public Factors Also Favor Transfer To California. ....	13
III.	CONCLUSION.....	15

**TABLE OF AUTHORITIES**

**CASES**

*Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) .....3, 7, 10

*Dean v. Eli Lilly & Co.*, No. 06-1375, 2007 U.S. Dist. LEXIS 39603  
 (D.D.C. June 1, 2007).....13

*Deputy v. Long-Term Disability Plan of Sponsor Aventis Pharms.*, No. CO2-2010, 2002  
 WL 31655328 (N.D. Cal. Nov. 21, 2002) .....12

*Donsco Inc. v. Caspar Corp.*, 587 F.2d 602 (3d Cir. 1978) .....9

*Federal Ins. Co. v. Sheldon*, 167 B.R. 15 (S.D.N.Y. 1994).....6

*GE Capital Corp. v. Teo*, Civ. No. 01-CV-1686 (WGB), 2001 U.S. Dist. LEXIS 22266  
 (D.N.J. December 14, 2001).....7

*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) .....6

*Halper v. Halper*, 164 F.3d 830 (3d Cir. 1999) .....4

*In re Eastport Assocs.*, 935 F.2d 1071 (9th Cir. 1991) .....3

*In re E. W. Trade Partners, Inc.*, Civil No. 1:06-cv-01812 (RBK), 2007 U.S. Dist. LEXIS  
 29645 (D.N.J. April 23, 2007).....6

*In re First Alliance Mort. Co.*, 269 B.R. 449 (C.D. Cal. 2001) .....10

*In re Global Crossing, Ltd. Sec. Litig.*, 2003 WL 21659360 (S.D.N.Y. July 15, 2003) .....9

*In re Humphreys Pest Control Co.*, 35 B.R. 712 (Bankr. E.D. Pa. 1984) .....5

*In re Int'l Benefits Group, Inc.*, No. 06-2363, 2006 U.S. Dist. LEXIS 58487  
 (D.N.J. Aug. 21, 2006) .....7

*In re Kaonohi Ohana, Ltd.*, 873 F.2d 1302 (9th Cir. 1989).....11

*In re Keene Corp*, 182 B.R. 379 (S.D.N.Y. 1995).....7

*In re Lands End Leasing, Inc.*, 193 B.R. 426 (Bankr. D.N.J. 1996).....7

*In Re Lands End Leasing. Inc.*, 193 B.R. 426 (Bankr. D.N.J. 1996).....7

*In re Lion Capital Group*, 46 B.R. 850 (Bankr. S.D. N.Y. 1985) .....6

*In re Michigan Real Estate Ins. Trust*, 87 B.R. 447 (E.D. Mich. 1987) .....5

*In re Philadelphia Newspapers, LLC*, 407 B.R. 606 (E.D. Pa. 2009) .....9

*In re Resorts Int'l., Inc.*, 372 F.3d 154 (3d Cir. 2004).....3

*In re Titan Energy, Inc.*, 837 F.2d 325 (8th Cir. 1988).....3, 11

*In re Toledo*, 170 F.3d 1340 (11th Cir. 1999).....3

*In re Toy King Distributors, Inc.*, 256 B.R. 1 (Bankr. M.D. Fla. 2000) .....8

*In re: Walter M. Marsico, Sr., Debtor*, Bk. No. 01-12120-JMD, 2004 BNH 1; 2004  
Bankr. LEXIS 43 (D.N.H. January 5, 2004) .....4

*Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987),  
*cert. denied*, 485 U.S. 906 (1988).....6

*Langenkamp v. Culp*, 498 U.S. 42 (1990).....6

*Megliola v. Maxwell*, 293 B.R. 443 (N.D. Ill. 2003) .....10

*Owens-Illinois, Inc. v. Rapid Am. Corp.*, 124 F.3d 619 (4th Cir. 1997).....8, 10

*Mt. McKinley Ins. Co. v. Corning Inc.*, 02 Civ. 5835 (DLC), 2003 U.S. Dist. LEXIS 4295  
(S.D.N.Y. Mar. 20, 2003) .....11

*Steinberg v. Buczynski*, 40 F.3d 890, 891 (7th Cir. 1994) .....8

*Steinberg v. Kendig*, 2000 U.S. Dist. LEXIS 276 (N.D. Ill. 2000).....8

*Trager v. IRS*, 146 B.R. 514 (Bankr. S.D.N.Y. 1992) .....10

*U.S. v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985) .....9

*Waller v. Burlington N. R. Co.*, 650 F. Supp. 988, 991 (N.D. Ill. 1987).....13

*West Communications Intern., Inc.*, 529 F.3d 1839 (3d Cir. 2008).....12

**STATUTES**

11 U.S.C. § 541 .....3, 7

28 U.S.C. § 1334(b) .....3, 10

28 U.S.C. § 1404(a), .....1, 12, 14

28 U.S.C. § 152(b)(2)(E) .....3

28 U.S.C. § 157(b)(2)(H) .....3

28 U.S.C. § 157(b)(3).....6

28 U.S.C. §§ 1412 .....1, 12, 14

## I. INTRODUCTION

In a failed attempt to avoid transfer under 28 U.S.C. §§ 1412 and 1404(a), Plaintiff Thomason Auto Group LLC ("Thomason" or "Plaintiff") ignores the primary charging allegations of its own Complaint while misconstruing applicable law.

All of Thomason's claims stem from the implosion and ensuing bankruptcy of two Debtors -- China America Cooperative Automotive, Inc. ("CHAMCO) and ZX Automobile Company of North America, Inc. ("ZXNA") -- that are being jointly-administered by the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") as Case Nos. 8:08-13876-TA and 8:08-13065-TA (the "Bankruptcy Actions"). As this Court knows, the Defendants are former officers and directors of both Debtors. Thomason's claims here stem from its contracting with one of the Debtors; the Defendants<sup>1</sup> acted on behalf of, and in the best interests of, the Debtors. Thomason's claims against the officer/director Defendants therefore all are inextricably intertwined with allegations involving the Debtors, directly and substantively. The resolution of those claims will have a direct impact on the adversary claims asserted by the Debtor's Trustee as well as Thomason's and other creditors' bankruptcy claims. The resolution of Thomason's proof of claim,<sup>2</sup> the three State Court Action adversary proceedings,<sup>3</sup> and this action, are all fundamentally interconnected and necessarily impact the administration of the bankruptcy estates. Under applicable Third Circuit precedents, bankruptcy "related to" jurisdiction plainly exists here.

For instance, Plaintiff does not limit its request for relief in this action solely to monetary damages stemming from particularized injuries to it. Plaintiff also seeks the disgorgement of monies Defendants allegedly received from the Debtors as its officers/directors (*see, e.g.*, Cmpt. ¶ 327), and to obtain damages due to Defendants' alleged usurpation of corporate opportunities and intellectual property that belong to the Debtors. (*See, e.g.*, Cmpt. ¶ 41.) In support of these claims, Plaintiff also alleges that

---

<sup>1</sup> Defendant Alexander Keeler, a resident of upstate New York, played no role in the underlying transactions and occurrences. His residency does not favor New Jersey either.

<sup>2</sup> *See* Ex. A to Reply Certification of Mark Anchor Albert ("Albert Reply Cert.").

<sup>3</sup> Copies of the CHAMCO Action, the Ferla Action, and the Thomason State Court Action are attached as Exhibits C, D, and E, respectively, to the Certification of Brian J. McMahon, Esq. (Document # 42.4-42.5).

both CHAMCO and ZXNA were "RICO enterprises" (Cmpt. ¶¶ 222-225; 237-239; 246-249 [McMahon Cert., Ex. A]); that the CHAMCO/ZXNA Bankruptcy Actions were filed in bad faith as part of an alleged RICO conspiracy (*Id.* ¶¶ 33, 37, 41, 43, 97 & 200-213); that Defendants, acting in their official capacities as officers and directors of the Debtors, used the Debtors as the vehicles through which they perpetrated their alleged fraud upon Plaintiff (*Id.* ¶¶ 224, 239 & 248); and that the funds remaining in the jointly-administered estates belong to Plaintiff. (*Id.* ¶ 97 [discussing Defendants' supposed "plan to drive CHAMCO and ZXAUTO into involuntary bankruptcy and, ultimately, dissolution, in order to deprive Thomason Auto of the opportunity to recoup its \$6,000,000.00 investment"]).

In these circumstances, this action not only has a "conceivable effect" on the CHAMCO/ZXNA bankruptcies – which is all that is required to establish "related to" jurisdiction – its impact is and will be direct and substantial.

That Plaintiff claims to have a right to a jury trial on its RICO claims is no more of an impediment to transfer than was its right to a jury trial, if any, in the New Jersey State Court Actions that Judge Linares previously transferred to the Bankruptcy Court. Even if some issues ultimately required a jury trial, the Bankruptcy Court still is best suited to manage pre-trial proceedings in a coordinated fashion in conjunction with its estate administration oversight responsibilities. In any event, by submitting its proof of claim to the Bankruptcy Court, Thomason has submitted those claims to the Bankruptcy Court's core jurisdiction. A trial on any issue in all likelihood will never occur.

Transferring this action to the Central California Bankruptcy Court will afford a superior opportunity for the Debtors' Trustee to monitor this case and take appropriate steps should Plaintiff's pursuit for relief here unduly impede the pursuit of estate claims or assets. Transfer will permit efficient coordination between this action, the State Court Actions, Thomason's proof of claim, and the Bankruptcy Actions, since all of these related actions would be pending post-transfer in the same District. Retaining jurisdiction in New Jersey, conversely, will not promote economies or efforts already achieved because this year-old action remains in its most incipient stage, by Plaintiff's own strategic choice, having done nothing to prosecute it since its filing on April 1, 2008.

For these reasons, as explained below (and in Plaintiff's opening brief), this action should be transferred forthwith to California under 28 U.S.C. §§ 1412 and 1404(a).

## II. ARGUMENT

### A. THIS CASE ASSERTS CLAIMS THAT ARE SUBJECT TO THE CALIFORNIA BANKRUPTCY COURT'S JURISDICTION

Plaintiff's Opposition advocates a constrained jurisdictional standard that lacks support in applicable law. As shown in the opening brief and below, Plaintiff's claims include matters "arising in" and "relating to" the Debtors' bankruptcies under 28 U.S.C. § 1334(b). Civil proceedings "arising in" cases under Title 11 are cases that involve "core" matters. *In re Resorts Int'l., Inc.*, 372 F.3d 154, 162 (3d Cir. 2004). Core matters include "proceedings to determine, avoid or recover fraudulent conveyances" (28 U.S.C. § 157(b)(2)(H)), "orders to turn over property of the estate" (28 U.S.C. § 157(b)(2)(E)), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship." (28 U.S.C. § 157(b)(2)(O).) Non-core matters "related to" a bankruptcy case include: "(1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995).

Plaintiff fails to see that a lawsuit crosses the bankruptcy court's jurisdictional threshold if it could have any conceivable impact on the debtor's rights, liabilities, options, or freedom of action, or if it could conceivably have any effect on the administration of the bankruptcy cases. *Halper v. Halper*, 164 F.3d 830, 837 (3d Cir. 1999). With "related to" jurisdiction, Congress intended to grant bankruptcy courts "comprehensive jurisdiction" so that they could "deal efficiently and expeditiously" with matters connected with the bankruptcy estate. *Celotex Corp.*, 514 U.S. at 308 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Bankruptcy jurisdiction over related litigation is, for this reason, "extremely broad." *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999). "[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test articulated in *Pacor*." *In re Titan Energy, Inc.*, 837 F.2d 325, 330 (8th Cir. 1988).

This action is within the Bankruptcy Court's jurisdiction under § 1334(b) because it: (1) implicates core matters "arising in" the Bankruptcy Actions (§157(b)(2)(H) & (E)); (2) seeks to usurp causes of action and assets that belong to the Debtors' Trustee (*Celotex Corp.*, 514 U.S. at 308 n.5); and (3) asserts claims the outcome of which will have not



just a "conceivable effect" but a direct impact on the bankruptcy estates. *Id.*

**1. Plaintiff's Bad-Faith-Bankruptcy Claim Is A "Core" Matter**

Thomason's repeated mantra that Defendants put ZXNA and CHAMCO into involuntary bankruptcy in bad faith as part of their supposed RICO conspiracy implicates matters that are "core" to the Bankruptcy Actions. "A proceeding is core . . . if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case." *Halper*, 164 F.3d at 836. The Bankruptcy Court can issue final orders and judgments in "core" proceedings. 28 U.S.C. § 157(b)(1). The liability theory of Thomason's post-petition RICO claims turns on its bad-faith-bankruptcy contention. The filing of bankruptcy action -- whether done in bad faith or not -- can only arise in the context of a bankruptcy case. The determination of whether a bankruptcy action was filed in bad faith is, accordingly, a "core" proceeding. *In re: Walter M. Marsico, Sr., Debtor*, Bk. No. 01-12120-JMD, 2004 BNH 1; 2004 Bankr. LEXIS 43 (D.N.H. January 5, 2004).

**2. The Bankruptcy Court Has Rejected The Same Bad-Faith-Bankruptcy Allegations Supporting Thomason's RICO Claims And The Same Venue Arguments Asserted In His Opposition.**

The bad-faith-bankruptcy claim asserted in Thomason's Complaint and the venue arguments made in its present Opposition already have been repeatedly raised in the Bankruptcy Court, notably by Thomason itself, and squarely rejected by the Hon. Theodor Albert. Conflicting rulings of fact and law on these already-decided issues would adversely impact the administration of the Bankruptcy Actions.

In particular, in the ZXNA Bankruptcy Action, Thomason joined in a motion to dismiss the Bankruptcy Actions or, alternatively, to transfer them to New Jersey. (*See* Albert Reply Cert., Ex. B (Case No. 8:08-bk-13065-TA, Docket # 18 [Motion to Dismiss or Transfer Bankruptcy Actions (*see also* related notice of motion; Docket #17); *id.*, Ex. C; Docket # 30 [Thomason Joinder in Motion to Dismiss or Transfer].) The primary grounds for the Motion were the claims that the Bankruptcy Actions were filed in bad faith -- just as Thomason alleged in this action -- and that the ZXNA and CHAMCO-related matters were New Jersey-centric -- just as Thomason alleges in its Opposition to Plaintiff's Transfer Motion. Likewise, in Thomason's separate opposition to the Trustee/Fiscal Agent Settlement Agreement (*id.*, Ex. D; Docket # 62 [Motion to Approve Settlement Agreement]), Thomason made the same venue and bad faith bankruptcy

arguments it makes in this Court. (Albert Reply Cert., Ex. E; Docket # 71.) The Bankruptcy Court squarely rejected Thomason's arguments. (*Id.*, Ex. F; Docket # 158 [Order Approving Trustee/Fiscal Agent Settlement Agreement].) The Daspin Defendants also filed its own Motion to Dismiss or Transfer, based on the very same grounds (*id.*, Ex. G; Docket # 168). Again, the Bankruptcy Court rejected those arguments. (*Id.*, Ex. H; Docket # 205.) Permitting Thomason's bad-faith-bankruptcy claims to proceed here, and crediting its rehashed improper-venue arguments, in the face of the Bankruptcy Court's contrary orders, would risk inconsistent factual and legal rulings that would undermine the entire California bankruptcy proceedings, which have been underway for well over a year.

**3. "Related To" Jurisdiction Plainly Exists Here Because Thomason Alleges That The Debtors Are "RICO Enterprises."**

The Bankruptcy Actions are Chapter 11 proceedings in which the Trustee is operating CHAMCO and ZXNA as debtors-in-possession. The Trustee's ability to reorganize CHAMCO and ZXNA as viable entities obviously would be destroyed if Thomason's allegation in this action that CHAMCO and ZXNA are "RICO enterprises" is established. Accordingly, this action is directly related to the Bankruptcy Actions.

When, as here, a corporate debtor is alleged to have been involved in a RICO conspiracy with the debtor's former officers and directors, "related to" jurisdiction exists because the debtor's alleged conduct is inextricably intertwined with conduct of the debtor's former officers and directors. *In re Michigan Real Estate Ins. Trust*, 87 B.R. 447, 454 (E.D. Mich. 1987), is directly on point:

Although the complaint does not assert liability against the bankruptcy estate on grounds of RICO, negligence or misrepresentation, it is obvious that the named defendants' conduct is inextricably intertwined with the debtor. . . The RICO count alleges a conspiracy between the debtor by and through its former trustees and Penn General to defraud the plaintiff, and that the conspiracy was part of a pattern of racketeering activity. As the parties' only relationship with one another radiates from the debtor, the actions of the debtor are central in the determination of this cause of action. The negligence and misrepresentation theories also allege actions and omissions which arise from the parties' interrelationships with the debtor.

The RICO claims in this action cannot be prosecuted without directly challenging the Debtors' structure, purpose and operations; accordingly, the RICO claims are related to the Debtors' Bankruptcy Actions. *In re Humphreys Pest Control Co.*, 35 B.R. 712, 714 (Bankr. E.D. Pa. 1984) (RICO claims against debtor's former officers and directors held "related to" debtor's bankruptcy). Indeed, some courts have even deemed such RICO actions to be core proceedings. *See, e.g., In re Lion Capital Group*, 46 B.R. 850, 853-54, 861 (Bankr. S.D. N.Y. 1985) (RICO counterclaims of limited partners against general partners of debtor entities deemed core proceedings).

**4. Plaintiff's Purported RICO Jury Rights Do Not Alter The Bankruptcy "Related To" Or Venue Analysis.**

Thomason asserts that transfer is not warranted because the Bankruptcy Court supposedly cannot issue a final judgment in this action. (Mot. at 36.) Thomason's argument that the Bankruptcy Court lacks jurisdiction over Thomason's RICO claims because those claims may be triable to a jury is meritless.

First, Thomason's submission of a proof of claim based on the same allegations as it asserts in this action is sufficient to bring Thomason within the equitable jurisdiction of the Bankruptcy Court and, therefore, no Seventh Amendment right to a jury trial exists. *See Langenkamp v. Culp*, 498 U.S. 42 (1990); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (a party is entitled to a jury trial as long as no proof of claim is filed). Because the factual and legal issues raised in Thomason's proof of claim substantially and substantively overlap with the same or similar issues raised in this action, no jury trial may ever occur.

Second, "[t]hat the bankruptcy judge may have to submit proposed findings of fact and conclusions of law if he determines that the case is non-core but related to the title 11 case does not prevent referral of the action to the bankruptcy court . . . . The fact that the bankruptcy judge can only issue proposed findings and conclusions is irrelevant to the question of referral." *Federal Ins. Co. v. Sheldon*, 167 B.R. 15, 21 (S.D.N.Y. 1994) (citation and internal quotations omitted). The Bankruptcy Court may not be able to issue final judgments on some claims asserted in the State Court Actions either. But if a jury trial is required on any issue, the Central California District Court can simply withdraw the reference to the Bankruptcy Court and convene a jury. But first the Bankruptcy Court must make the core or non-core determination, which is a "threshold

factor" in the withdrawal analysis. 28 U.S.C. § 157(b)(3)("[t]he bankruptcy judge shall determine. . .whether a proceeding is a core proceeding . . ."); *In re E. W. Trade Partners, Inc.*, Civil No. 1:06-cv-01812 (RBK), 2007 U.S. Dist. LEXIS 29645, at \*3 (D.N.J. April 23, 2007) (stating rule); *see also In re Int'l Benefits Group, Inc.*, No. 06-2363, 2006 U.S. Dist. LEXIS 58487, 2006 WL 2417297, at \*2 (D.N.J. Aug. 21, 2006) (core/non-core determination is the "most important factor" in withdrawal analysis).

Finally, even when a district court must ultimately preside over a trial by jury in a bankruptcy-related matter, there is no reason why the bankruptcy court may not "preside over [an] adversary proceeding and adjudicate discovery disputes and motions only until such time as the case is ready for trial." *In re Lands End Leasing, Inc.*, 193 B.R. 426, 436 (Bankr. D.N.J. 1996), *citing In re Keene Corp.*, 182 B.R. 379, 385 (S.D.N.Y. 1995) (while an adversary proceeding carrying the right to a jury trial is in its initial stages, the bankruptcy judge "is fully equipped with the tools to proceed with [the] matter" until such time as the issues are ripe for submission to the jury); *In Re Lands End Leasing, Inc.*, 193 B.R. 426, 436 (Bankr. D.N.J. 1996) (bankruptcy court retained jurisdiction until trial when reference could be withdrawn); *GE Capital Corp. v. Teo*, Civ. No. 01-CV-1686 (WGB), 2001 U.S. Dist. LEXIS 22266 (D.N.J. December 14, 2001) (same).

**5. This Case Seeks To Recover Estate Property By Means Of Causes Of Action That Belong To The Debtor, Via Its Trustee.**

This case is one related to the Bankruptcy Actions because it asserts "causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541." *Celotex*, 514 U.S. at 308 n.5. Section 541(a) of the Bankruptcy Code provides that the filing of a bankruptcy "creates an estate" which "is comprised of ... all legal or equitable interests of the debtor in property at the commencement of the case." "The scope of [§ 541(a)] is broad. It includes all kinds of property, including . . . causes of action . . ." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 & n.9 (1983) (emphasis added). Here, Plaintiff seeks to recover damages based upon its claims -- reiterated throughout the Complaint -- that Defendants improperly put "CHAMCO and ZXAuto into involuntary bankruptcy . . . in order to misappropriate the intellectual property developed and belonging to CHAMCO and ZXAuto" and "in order to usurp for themselves the corporate opportunities belonging to ZXAuto West." (Cmpt. ¶¶ 264, 281 & 301 [McMahon Cert. Ex. A]) Further, Plaintiff claims that the "Defendants as officers,

directors and/or shareholders in the CHAMCO corporate entities owed Plaintiff fiduciary duties" (*Id.* ¶ 316) which they allegedly breached through "their orchestration of the CHAMCO and ZXAuto Petitions [designed] to misappropriate for themselves, corporate opportunities to which they were not entitled." (*Id.* ¶ 322.)

But claims that a debtor's officers and directors breached their fiduciary duties by usurping corporate opportunities and intellectual property belonging to a debtor are vested exclusively in the debtor's trustee, not in a creditor of the debtor like Thomason. One of the fundamental roles of a trustee in bankruptcy is to collect money and other assets that may be owing to the debtor. *See Steinberg v. Buczynski*, 40 F.3d 890, 891 (7th Cir. 1994). Among those powers, the trustee may bring claims against the debtor's fiduciaries. *See Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1343 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988) ("rights of action against officers, directors and shareholders of a corporation for breaches of fiduciary duties, which can be enforced by either the corporation directly or the shareholders derivatively before bankruptcy, become property of the estate which the trustee alone has the right to pursue after the filing of a bankruptcy petition"); *In re Toy King Distributors, Inc.*, 256 B.R. 1, 167 (Bankr. M.D. Fla. 2000) (same analysis).

Plaintiff does not allege that it provided monies to Defendants directly: it paid the money to ZXNA/CHAMCO, the Debtors. Plaintiff in effect is trying to circumvent the creditor queue by seeking the disgorgement of monies that properly belong to the ZXNA/CHAMCO estates generally, not to Plaintiff or any other individual creditor. But "[t]he Trustee is vested with the power to bring suit which represents the interests of the creditors as a class." *Steinberg v. Kendig*, 2000 U.S. Dist. LEXIS 276, \*20 (N.D. Ill. 2000).

Accordingly, Plaintiff's fiduciary breach and conversion claims regarding Defendants' purported usurpation of corporate opportunities and intellectual property belonging to the Debtors are fundamentally related to the Bankruptcy Actions: they are claims that are exclusively vested in the Trustee regarding property belonging to the Debtors' estates for the benefit of all creditors, not just Thomason.

**6. This Case Is Related To The Bankruptcies As A Result Of Defendants' Indemnity and Contribution Claims.**

Defendants have statutory indemnity rights against the Debtors with respect to the

claims against them. "Related to" jurisdiction also exists because any judgment in this action will transform the defendants' contingent indemnity and contribution claims into non-contingent and liquidated statutory claims. *Owens-Illinois, Inc. v. Rapid Am. Corp.*, 124 F.3d 619, 626 (4th Cir. 1997). In particular, apart from Defendants' common law indemnity rights, N.J.S.A. 14A:3-5(4) provides as follows:

Any corporation organized for any purpose under any general or special law of this State shall indemnify a corporate agent against expenses to the extent that such corporate agent has been successful on the merits or otherwise in any proceeding referred to in subsections 14A:3-5(2) and 14A:3-5(3) or in defense of any claim, issue or matter therein.

This is sufficient to confer "related to" jurisdiction: "[i]t seems settled that suits against principal or key-personnel indemnitees of the debtor may be within the bankruptcy court's related-to jurisdiction." *In re Federal-Mogul Global, Inc.*, 282 B.R. 301, 310 (Bankr. D. Del. 2002). *See also In re Global Crossing, Ltd. Sec. Litig.*, 2003 WL 21659360 \*1 and n.2 (S.D.N.Y. July 15, 2003) ("the possibility that litigation against an officer of a bankrupt corporation could lead to a claim against the corporation for contribution based on the wrongdoing of other corporate employees would certainly have a 'conceivable effect' on the bankrupt estate."). That some of the Defendants may not have filed proofs of claim for indemnity does not alter this conclusion. An indemnity claim under N.J.S.A. 14A:3-5(4) is not even ripe unless and until "such corporate agent has been successful on the merits . . . ."

**7. This Case Is "Related To" The Bankruptcies As A Result Of The Debtors' Potential Vicarious Liability Resulting From Plaintiff's Claims.**

Apart from the indemnity rights held by the Debtors' former officers and directors, "related to" jurisdiction exists because "[t]he fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior." *See Donsco Inc. v. Caspar Corp.*, 587 F.2d 602, 606 (3d Cir. 1978); *accord U.S. v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985) (corporation was collaterally estopped from denying its knowing participation in illegal dumpings as a result of corporate officer's conviction for same). Courts have found "related to" jurisdiction on this basis. *See, e.g., In re Philadelphia Newspapers, LLC*, 407 B.R. 606,



614 -615 (E.D. Pa. 2009) (finding related to jurisdiction based on "several common law theories which would make the [debtors] liable for any judgment against the Non-Debtors, including: respondeat superior, vicarious liability, and principal/agent theories"). "Related to" jurisdiction exists over actions between non-debtors where the debtor may be jointly and severally liable with other defendants outside any contractual obligations. *In re First Alliance Mort. Co.*, 269 B.R. 449, 454 (C.D. Cal. 2001) ("related to" jurisdiction extends to claims against non-debtor parties when "[Debtor] and the Individual Defendants could become joint and severally liable for the damages"). Moreover, "related to" jurisdiction also is predicated not only on claims between non-debtors, but also on claims by the Debtors against Thomason via the CHAMCO/ZXNA claims against Thomason in the CHAMCO Action that now are vested in the Trustee.

**8. This Case Will Have A Direct Impact On Estate Assets Because Thomason's Proof Of Claim Is Based On The Same Facts As The State Court Actions And This Action.**

"Related to" jurisdiction exists when a state court action impacts an estate's assets. *See, e.g., Celotex*, 514 U.S. 300 (related to jurisdiction exists because parties sought to execute on a bond secured by the debtor's cash collateral); *Trager v. IRS*, 146 B.R. 514, 519 (Bankr. S.D.N.Y. 1992) ("An action between nondebtors is regarded as related to a bankruptcy case if its outcome would affect the amount of property available for distribution to the [estate's] creditors"). "Under *Pacor*, federal jurisdiction exists pursuant to section 1334(b) when resolution of nondebtor litigation may directly affect the estate's obligations to creditors whose claims are currently before the bankruptcy court." *Kaonohi Ohana, Ltd. v. Sutherland*, 873 F.2d 1302, 1307 (9th Cir. 1989). A case is "related to" a bankruptcy proceeding if one or more parties to that suit have claims against the estate the may be affected by the outcome of the suit. *See, e.g., Owens-Illinois, Inc.*, 124 F.3d at 627 (noting plaintiff and defendant filed proofs of claim, "a link that was not present in *Pacor*").

This case is based upon the same alleged core of operative facts as is Plaintiff's proof of claim. The CHAMCO Action asserts claims in the name of CHAMCO and ZXNA against Thomason, and, therefore, those claims now belong to the Debtors and are vested in the Trustee. (*See* McMahon Cert. Ex. C.) Those claims obviously could impact Thomason's proof of claim against the bankruptcy estates. (*Id.*) The Ferla Action asserts

derivative claims against the Daspin Defendants that have been assigned to the Trustee pursuant to the Trustee/Fiscal Agent Settlement Agreement. (*Id.*, Ex. E.) And the Thomason State Court Action asserts claims against the Debtors. (*Id.*, Ex. D.) Thomason's proof of claim and the State Court Actions all raise numerous, identical or similar issues of fact and law as are asserted in the Complaint in this action, as shown by even a cursory review of the respective pleadings. (Compare Albert Reply Cert. Ex. A [Thomason proof of claim] with McMahan Cert. Ex. A [Thomason Federal Complaint] and Exs. C, D & E [State Court Complaints].)

Given that the Trustee has been assigned the Defendants' derivative claims in the Ferla Action against the Daspin Defendants, the Trustee is pursuing a parallel action against several of the same defendants sued by Plaintiff in the Thomason State Court Action that is the subject of its proof of claim. *See Mt. McKinley Ins. Co. v. Corning Inc.*, 02 Civ. 5835 (DLC), 2003 U.S. Dist. LEXIS 4295, at \*22-\*23 (S.D.N.Y. Mar. 20, 2003) ("The existence of a parallel proceeding in federal bankruptcy court, addressing the same issues and involving the same parties, supports retention of [bankruptcy 'related to'] jurisdiction"). If Thomason wins the race to judgment, the Debtors' Trustee may be unable to recover those funds on behalf of the estate. *See, e.g., Megliola v. Maxwell*, 293 B.R. 443, 445 (N.D. Ill. 2003) (staying class action by defrauded investors against former officers of debtor because "[b]oth the Class Action plaintiffs and the Trustee seek to satisfy potential judgments in their actions from the assets of [the debtor's] former directors and officers and from the proceeds of the insurance policies.").

"Related to" jurisdiction also exists because any judgment against the Defendants in this action also will automatically reduce the amount that Plaintiff may receive on his claims against bankruptcy estates, as both actions seek to recover the same \$6 million investment loss. *See In re Kaonohi Ohana, Ltd.*, 873 F.2d 1302, 1306-07 (9th Cir. 1989) (upholding "related to" jurisdiction over third-party action because specific performance remedy in third-party action would reduce damages in breach of contract claim against bankruptcy estate); *In re Titan Energy, Inc.*, 837 F.2d 325, 329-30 (8th Cir. 1998) (nondebtor claims against third-party insurance company "related to" the bankruptcy under *Pacor* because recovery would reduce liabilities of the estate); *In re Fulda*, 130 B.R. 967, 975 (Bankr. D. Minn. 1991) (related to jurisdiction where plaintiffs and



defendants filed claims based on same events that gave rise to the lawsuit because proofs of claims have prospect of providing a material and direct impact on the estate).

Moreover, as noted previously, the impact of theories of vicarious liability may affect the strength and viability of Plaintiff's claims against the Debtors' estates.

**B. TRANSFER ALSO IS WARRANTED FOR THE CONVENIENCE OF THE PARTIES AND WITNESSES, AND IN THE INTERESTS OF JUSTICE.**

**1. Plaintiff Could Have Brought This Action In The Central District of California.**

The fact that venue is proper in New Jersey does not alter the indisputable fact that venue also is proper in California under 28 U.S.C. § 1391(b). The argument that the RICO claims arose predominantly in New Jersey and, therefore, those claims supposedly could not be brought in California, is silly. (Opp. at 31-32.) The Distributorship Agreement at the heart of Plaintiff's Complaint, pursuant to which Plaintiff invested \$6 million in the Debtors, was negotiated and executed in California. Several Defendants reside in the California Central District; a substantial part of the events giving rise to the action occurred there, and the assets of the Debtors' estates are located there under the control of the Debtors' Trustee; and all of the records of the Debtors, which are central to Plaintiff's action, are located in California. (*See* Certification of Steve Saleen filed in support of Plaintiff's Motion , at ¶¶ 3-13 [verifying California-centric contacts].) Given that the gravamen of the Complaint turns on Defendants' supposed bad faith bankruptcy petitions in California, it is fanciful to argue that venue could not properly be laid there.

Finally, that venue is proper and "related to" jurisdiction exist in California is demonstrated by Thomason itself, by its repeated representations to this Court that it was willing to transfer this action consensually to California as part of a yet-to-be-consummated settlement with the Trustee. (*See* Albert Opening Brief Cert. Exs. P-S.) In the meantime, Thomason has allowed baseless RICO action to hover over the heads of the Defendants, who have had to sue their D&O insurance carrier in California to obtain defense coverage. It is time to transfer the case to California where "related to" jurisdiction exists, so that the Defendants can vindicate themselves once and for all.

**2. The Convenience of the Parties Favors Transfer of Venue to California.**

Thomason claims that its choice of forum is the "paramount consideration" in the

transfer analysis. (Opp. at 30.) That claim flies in the face of applicable law. Neither Thomason nor its owner (Scott Thomason) are New Jersey residents. Because Thomason is not a New Jersey resident (it is a California-formed and based Limited Liability Company), its foreign-state venue preference is not entitled to preference. *Deputy v. Long-Term Disability Plan of Sponsor Aventis Pharms.*, No. CO2-2010, 2002 WL 31655328, at \*3 (N.D. Cal. Nov. 21, 2002). "Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-256 (1981) *Id.* A foreign plaintiff must set forth a "strong showing of convenience" or present "considerable evidence of convenience" in order to be given deference to his chosen venue. *Windt v. Qwest Communications Intern., Inc.*, 529 F.3d 183, 188-189 (3d Cir. 2008). Given the centrality of the Debtors in the Complaint, Thomason cannot make that showing here. "Deference to the plaintiff's forum choice diminishes further when the defendant seeks transfer to a forum where the plaintiff resides." *Dean v. Eli Lilly & Co.*, No. 06-1375, 2007 U.S. Dist. LEXIS 39603, at \*7 (D.D.C. June 1, 2007). Indeed, including Plaintiff, more parties to this litigation are residents of or located in California than in all other locations combined. Not one. That is the consideration entitled to "paramount consideration" on this factor.<sup>4</sup>

### **3. The Convenience of the Witnesses Favors Transfer of Venue to California.**

As noted above, because most of the parties to this action reside or are located in California, the fact that some third-party witnesses may be located in New Jersey is not a controlling factor. Those witnesses would still have to come to California because the same facts to which their testimony relates are at the center of Thomason's proof of claim and the State Court Actions pending in the Central District. This also is true for third-party witnesses that reside outside of New Jersey or California.

### **4. The Location of the Documentary Evidence Favors Transfer of Venue to California.**

Whether or not the location of virtually all documentary evidence in California is entitled to "little weight" because those documents can be photocopied (Mot. at 34-35),

---

<sup>4</sup> Thomas Del Franco presently is living in California.

whatever weight the Court wishes to give to this factor favors transfer exclusively.

**5. Public Factors Favor Transfer of Venue to California.**

**(a) Judicial Economy Will Be Promoted By Transfer.**

Thomason claims that Defendants have failed to identify any "practical considerations that could make the trial easy, expeditious or inexpensive" and that "administrative difficulty resulting from court congestion" favors the retention of the case in New Jersey. (Mot. at 37.) This argument fails. Thomason has allowed this case to lie dormant for a year on this Court's docket, thereby belying any interest in proceeding expeditiously to trial in this matter. The administrative efficiency issue is not whether one district's courts are more congested than another's, but rather, which district has faster average disposition times. California and New Jersey District Courts have comparable disposition rates; so this aspect of the judicial-economy factor on balance is neutral. In general, "cases should be transferred to districts where related actions are pending." *Waller v. Burlington N. R. Co.*, 650 F. Supp. 988, 991 (N.D. Ill. 1987). The need for the orderly administration of the bankruptcy estates and the need to avoid duplicative proceedings and rulings favors transfer in the interests of judicial economy.

**(b) The Local Interests And Public Policies Of The Forums Favors Transfer.**

While New Jersey has a local interest in resolving this dispute because many of the transactions and occurrences giving rise to this action arose in New Jersey, California has a more powerful, countervailing local interest in this case. For Thomason to argue New Jersey's interest in holding New Jersey-incorporated businesses responsible for alleged misconduct occurring in substantial part in New Jersey is significant here is odd, considering Thomason sued no New Jersey-incorporated business. Moreover, any residual interest of New Jersey is counter-balanced by California's weightier interest in providing a forum for California companies (including Thomason) allegedly victimized by New Jersey-incorporated businesses doing business in California, and its interest in achieving a comprehensive, coordinated resolution of all related proceedings impacting the Bankruptcy Actions in that State. Indeed, Plaintiff's bad faith filing allegations is already *res judicata*, decided by a Federal court, per Judge Albert, months ago (when he approved the Trustee/Fiscal Agent Settlement Agreement and denied the Daspin Defendants' Motion to Dismiss or Transfer).

### III. CONCLUSION

For the foregoing reasons, this action should be transferred to the Bankruptcy Court in California's Central District under 28 U.S.C. §§ 1412 and 1404(a).

Dated this 15th day of September, 2009.

FAHY CHOI, LLC  
LAW OFFICES OF MARK ANCHOR ALBERT

By: */s/ Emad G. Iskaros*  
Emad G. Iskaros, Esq.  
FAHY CHOI, LLC  
Counsel for Defendants