

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

STONEX COMMODITY SOLUTIONS, LLC,

Plaintiff,

v.

Adv. Proc. No. 23-1047-j

THOMAS BUNKLEY, III,

Defendant.

MEMORANDUM OPINION AND ORDER
STRIKING NOTICE OF REMOVAL

THIS MATTER comes before the Court on two motions following a Notice of Removal (the “Notice of Removal” – Doc. 1) filed by defendant Thomas Bunkley, III (“Defendant”) on October 5, 2023. The first motion is Defendant’s Motion to Transfer Venue of removed case (the “Motion to Transfer Venue” – Doc. 2). The second motion is Plaintiff’s Motion to Strike Notice of Removal, or alternatively for Remand or Abstention (the “Motion to Strike” – Doc. 13).

FACTS

(a) *Background*

On August 25, 2023, CapRock Land Company, LLC (“CapRock”) commenced a voluntary Chapter 11 case in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division (“Texas Bankruptcy Court”) assigned Case No. 23-20172-rlj-11 (the “CapRock Chapter 11 Case”). Six days later, on August 31, 2023, Plaintiff commenced a lawsuit entitled *StoneX Commodity Solutions, LLC v. Thomas Bunkley, III*, Case No. 1:23-CV-00735 (the “Lawsuit”) in the United States District Court for the District of New Mexico (the “NM District Court”).

(b) *The Notice of Removal*

Defendant initiated this adversary proceeding by filing the Notice of Removal, which purported to remove the Lawsuit pending in the NM District Court to this Court. This Court is in the same judicial district as the NM District Court. A copy of the Complaint filed in the Lawsuit is attached to the Notice of Removal as Exhibit A. The Complaint asserts one claim against Defendant for breach of a guaranty agreement (the “Guaranty”), which was executed in connection with an agreement between Plaintiff and CapRock. Both the Motion to Transfer Venue and the Motion to Strike were filed in this adversary proceeding following the Notice of Removal.

(c) *The Motion to Transfer Venue*

The Motion to Transfer Venue asks the Court to transfer venue of this adversary proceeding to the Texas Bankruptcy Court. Defendant asserts that venue should be transferred because the claims against Defendant in this adversary proceeding arise from the same or substantially same events, circumstances, and occurrences as Plaintiff’s claims against CapRock in the CapRock Chapter 11 Case pending before the Texas Bankruptcy Court. Plaintiff opposes a transfer of venue, wishes to have the Lawsuit heard and determined by the NM District Court, and asserts that transfer of venue would not promote convenience for the parties and witnesses.

(d) *The Motion to Strike*

In the Motion to Strike, Plaintiff argues that the Notice of Removal is improper and must be stricken. Alternatively, Plaintiff argues that the Court should remand this adversary proceeding back to the NM District Court or abstain from hearing the matter. In response, Defendant asserts that removal of the Lawsuit to this Court is appropriate pursuant to 28 U.S.C. § 1452(a) and Rule 9027 of the Federal Rules of Bankruptcy Procedure (“FRBP”). Alternatively,

Defendant argues that even if the Notice of Removal was procedurally improper, this proceeding was automatically referred to this Court pursuant to the NM District Court's administrative order referring to the United States Bankruptcy Court for the District of New Mexico (the "NM Bankruptcy Court") all cases under Title 11, all proceedings arising under Title 11, and all proceedings arising in or related to cases under Title 11 (the "Automatic Referral Order").¹

For the reasons set forth below, the Court will grant the request to strike the Notice of Removal and transfer the Lawsuit back to the NM District Court. Because the Lawsuit is not properly before it, the Court will not consider the Motion to Transfer Venue at this time. If the NM District Court determines the Lawsuit is referred to this Court and this Court has jurisdiction over this proceeding, the Court will decide the Motion to Transfer Venue.

DISCUSSION

(1) *Removal from U.S. District Court to Bankruptcy Court is Improper*

Removal of bankruptcy-related claims and causes of action is governed by 28 U.S.C. § 1452. Defendant relies on § 1452(a) in the Notice of Removal, which provides the authority for removal:

A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, 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 this title.

28 U.S.C. § 1452(a).² This Court agrees with the reasoning of the Ninth Circuit Bankruptcy Appellate Panel in *In re Curtis* in concluding that § 1452 does not permit removal of proceedings from federal district court to bankruptcy court. *Curtis*, 571 B.R. 441, 444-49 (9th Cir. BAP

¹ *In the Matter of Referral of Bankruptcy Matters to the Bankruptcy Judges*, Misc. No. 84-0324 (D.N.M. July 18, 1984).

² 28 U.S.C. § 1452(b) addresses a court's authority to remand removed claims and causes of action.

2017). The majority of courts which have considered the issue have reached the same conclusion. *Id.* at 445 (citing cases).

Section 1452 does not permit removal of proceedings from federal district court to the bankruptcy court in the same district for two reasons: (1) the plain language of the statute and (2) such an interpretation would “thwart the district courts’ power to refer matters to bankruptcy courts.” *Id.* at 445.

With respect to the first reason, § 1452(a) provides for removal “**to the district court** for the district where such civil action is pending.” 28 U.S.C. § 1452(a) (emphasis added). As *Curtis* explains, it is “illogical to interpret the bankruptcy removal statute to authorize removal **from** a district court **to** the district court in the same district.” 571 B.R. at 445 (emphasis in original).

Defendant relies on FRBP 9027 for authority that a proceeding may be removed *from* federal court. FRBP 9027(a)(1) provides that, “A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending.” However, consistent with FRBP 9027, the statute applies to removal to the district court “from state court and certain federal courts but not district courts.” *Curtis*, 571 B.R. at 449.

The second reason that § 1452 does not permit removal of proceedings from federal district court to the bankruptcy court is that such an interpretation would “unconstitutionally undermine the district courts’ referral power under 28 U.S.C. § 157(a).” *Curtis*, 571 B.R. at 443. Federal district courts have jurisdiction over bankruptcy cases and proceedings pursuant to 28 U.S.C. § 1334, and federal district courts may refer such matters to the bankruptcy court pursuant to 28 U.S.C. § 157(a). *In re Pettine*, 655 B.R. 196, 207-08 (10th Cir. BAP 2023).

Bankruptcy court jurisdiction is dependent on such referral and thus entirely derivative of district court jurisdiction. *Pettine*, 655 B.R. at 209; *Curtis*, 571 B.R. at 447. The *Curtis* court explains:

Any interpretation of a statute that would imply that the bankruptcy courts had jurisdiction of bankruptcy cases and proceedings separate and independent from, or even co-equal to, the jurisdiction granted the Article III courts, or that would interfere with the Article III courts' exercise of that jurisdiction and judicial power through the system of referral to the bankruptcy courts, or that, as here, would permit bankruptcy courts to dispose of matters originating in the district courts in apparent derogation of the power of those courts to control their own proceedings, would be . . . a constitutional non-starter.

Curtis, 571 B.R. at 447-48. Thus, the proper mechanism for transfer of a case from federal district court to bankruptcy court is referral, not removal.

Confusion may arise about the ability to remove matters to bankruptcy court because state court proceedings are often removed “directly” to bankruptcy court. Such removal to bankruptcy court has two components combined for procedural purposes into a removal directly to bankruptcy court: removal to the federal district court pursuant to § 1452 and the automatic referral of the removed proceeding by the federal district court to the bankruptcy court. This segues into Defendant’s alternative argument that, even if his Notice of Removal is not effective, this adversary proceeding was automatically referred to this Court by the Automatic Referral Order.

(2) *Referral to Bankruptcy Court*

Pursuant to 28 U.S.C. § 157(a), the NM District Court has issued the Automatic Referral Order, automatically referring to the NM Bankruptcy Court “any and all cases under Title 11 [of the United States Code], and any and all proceedings arising under Title 11, or arising in or related to a case under Title 11 . . . for consideration and resolution consistent with the law.” See footnote 1. The Lawsuit is not a “case under Title 11,” nor is it a proceeding “arising under

Title 11” or “arising in . . . a case under Title 11.” The Lawsuit may be “related to a case under Title 11”—the CapRock Chapter 11 Case.³

Given the nature and procedural history of this proceeding, it is not appropriate in this Court’s view to rely on the Automatic Referral Order without confirmation from the NM District Court that the automatic referral applies to the Lawsuit. Absent the improper filing of the Notice of Removal, an adversary proceeding would not have been initiated in the bankruptcy court without an order from the NM District Court confirming that the automatic referral applies to the Lawsuit or that otherwise refers the Lawsuit to the bankruptcy court. A party should not gain an advantage by invoking an improper notice of removal procedure. Procedures for transferring referred bankruptcy-related litigation to bankruptcy court were not set in motion here, because the Lawsuit is between two non-debtor parties⁴ and is not subject to removal to bankruptcy court because it was filed in the NM District Court (not in state court).

In light of the above, the Court will transfer the Lawsuit back to the NM District Court. If Defendant chooses, he may file a motion with the NM District Court to confirm that the

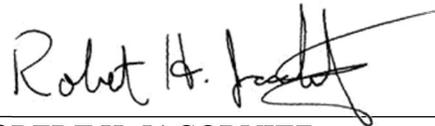
³ See footnote 4.

⁴ CapRock is not a party to this proceeding. The Automatic Referral Order applies only to proceedings over which bankruptcy courts have jurisdiction. Claims between non-debtors for breach of a guaranty of debt of a debtor in bankruptcy may not always be within the bankruptcy court’s “related to” jurisdiction. *Compare Endurance Am. Specialty Ins. Co. v. Victory Park Capital Advisors, LLC*, No. 18-C-08399, 2019 WL 2121118, at *5 (N.D. Ill. May 15, 2019) (explaining that there is no “related to” jurisdiction over a guaranty claim where the guarantor has subrogation rights because the guarantor would merely substitute for the original creditor in the debtor’s bankruptcy case) *with In re Boco Enterprises, Inc.*, 204 B.R. 407, 410 (Bankr. S.D.N.Y. 1997) (providing that an action by a creditor against a guarantor who is an insider of the debtor gives rise to “related to” jurisdiction because the outcome affects administration of the estate). The NM District Court may wish to decide whether the bankruptcy court has “related to” jurisdiction before deciding whether to trigger the Automatic Referral Order, may refer the Lawsuit to this Court without deciding that issue, or may keep the Lawsuit without deciding that issue (the Complaint filed in the NM District Court was predicated upon diversity jurisdiction, *see* Complaint at ¶ 4).

Automatic Referral Order applies to the Lawsuit or otherwise to ask the NM District Court to refer the Lawsuit pursuant to 28 U.S.C. § 157(a).⁵

IT IS HEREBY ORDERED:

1. The Motion to Strike is granted in part, and the Notice of Removal is hereby stricken. The Lawsuit is hereby transferred back to the NM District Court effective immediately.
2. Unless and until the NM District Court enters an order confirming that the automatic referral applies to the Lawsuit or otherwise refers the Lawsuit to this Court, the Court will take no further action in this adversary proceeding. In such event, if this adversary proceeding has been closed, it will be reopened.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: January 8, 2024

⁵ Because the Court is striking the Notice of Removal and transferring the Lawsuit back to the NM District Court, Plaintiff's alternative requests that this Court remand the proceeding to the NM District Court or abstain from hearing the matter are moot at this time. Further, the Court would be unable to remand the Lawsuit because it was not successfully removed. *See* 28 U.S.C. § 1452(b) (authorizing courts to remand removed claims and causes of action on equitable grounds).

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