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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

In re: AMERI-DREAM REALTY, LLC Debtor.	Case No.: 2:16-CV-00060-JAD-GWF Chapter 7 (MISTAKENLY FILED ON FEBRUARY 4, 2016 IN Adversary Proceeding No. 15-01183-led
VICTORIA NELSON, In Her Capacity As The Chapter 7 Trustee Of AMERI-DREAM REALTY, LLC, Plaintiff, v. XL AMERICA, INC.; XL INSURANCE AMERICA, INC.; XL SELECT PROFESSIONAL; PEARL INSURANCE GROUP, LLC; GREENWICH INSURANCE COMPANY; and DOES I through X; and ROE CORPORATE DEFENDANTS XI through XX, Defendants.	**REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO WITHDRAW THE REFERENCE OF THIS ADVERSARY PROCEEDING PURSUANT TO 28 U.S.C. § 157(d) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 5011**

XL AMERICA, INC., XL INSURANCE AMERICA, INC., XL SELECT PROFESSIONAL, PEARL INSURANCE GROUP, LLC, and GREENWICH INSURANCE COMPANY (collectively "Insurers" or "Defendants") by and through their counsel, WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, hereby submit this Reply Brief in support of their Motion to Withdraw the Reference of this Adversary Proceeding Pursuant to 28 U.S.C. § 157(d) and Federal

Rule of Bankruptcy Procedure 5011(a) ("Motion"). In support of their Motion, the Insurers respectfully state as follows.

I. INTRODUCTION

The Insurers respectfully submit that this Court should withdraw the reference to the Bankruptcy Court in this case now because: (1) Plaintiff's claims are non-core claims; (2) the Insurers have not consented to the entry of final orders or judgments by the Bankruptcy Court; and (3) the Insurers have made the Jury Demand contained herein. Further, the Insurers contend that: (1) withdrawing the reference is the more efficient use of judicial resources, and (2) failing to withdraw the reference will cause unnecessary delay and costs to the parties. Finally, the withdrawal of the Plaintiff's non-core and state law causes of action: (1) will not impact uniformity of bankruptcy administration; and (2) will not sanction forum shopping.

In opposition, the Plaintiff's primary argument is that the motion should be denied because it is premature. However, this argument is only a pretext to gloss over the Trustee's attempt at forum-shopping. The Insurers respectfully submit that the arguments below will clearly demonstrate that Plaintiff's contentions are without merit. In particular, the Insurers submit that in light of the Defendants' motions to dismiss and the Plaintiff's motion for summary judgment, the immediate withdrawal of the reference is clearly the more efficient use of judicial resources.

II. LEGAL ARGUMENT

A. THE INSURERS MOTION TO WITHDRAW THE REFERENCE MUST BE GRANTED BECAUSE WITHDRAWING THE REFERENCE ALLOWS FOR THE MORE EFFICIENT USE OF JUDICIAL RESOURCES.

As described in the Insurer's opening briefing, the Complaint alleges causes of action for Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, Breach of Fiduciary Duty, Violations of NRS 686A.310, and Declaratory Relief. The causes of action fall within the non-core, related-to jurisdiction of the Bankruptcy Court. The Insurers do not consent to bankruptcy court jurisdiction and have demanded a jury trial on all issues.

The Plaintiff argues that the Insurers' motion is **premature.** In support of this argument, the Plaintiff asserts that the Bankruptcy Court should conduct all pretrial matters because it is familiar

with the Debtor's Chapter 7 case and other adversary proceedings brought by the Trustee. The Plaintiff contends that these factors "will further judicial economy and bankruptcy administration." As is demonstrated below, the Plaintiff's arguments miss the mark.

1. Plaintiff Fails to Follow Controlling 9th Circuit Precedent and Attempts to Create a Heightened Standard for Withdrawal of the Reference.

First, Plaintiff attempts to argue that the Insurers must meet some sort of heightened standard by citing to non-binding cases from other jurisdictions and using terms like "heavy burden," "clear showing," or "overriding interest." Those terms are not applicable in the Ninth Circuit. In *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir.1999), the Court of Appeals simply held that "in determining whether causes exists" to withdraw the reference, the District Court should consider:

(1) the efficient use of judicial resources,

(2) delay and costs to the parties,

(3) uniformity of bankruptcy administration,

(4) the prevention of forum shopping, and other related factors.

(the *"Sec Farms Factors") Id. (citing In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir.1993)).

2. Many Courts Have Followed Sec. Farms in Similar Cases and Granted Immediate Withdrawal of the Reference

In *Sec. Farms*, several employers filed suit against certain unions in state court. *Id.* After the case was removed and transferred to bankruptcy court, the District Court granted a motion to withdraw the reference. *Id.* The Court of Appeals considered the four factors set forth above and affirmed the District Court's withdrawal of the reference. First, the Court determined that "efficiency was enhanced" because the Plaintiff's state law claims were non-core issues that predominated the litigation. *Id.* at 1008-09. The Court also reasoned that since these "non-core" matters were subject to *de novo* review, a single action in the District Court would avoid unnecessary costs to the parties. *Id.* at 1009.

In many cases, Courts have reviewed the factors set forth in *Sec Farms, supra*. and have

ordered immediate withdrawal of the reference. For example, in *SK Foods, L.P. v. Segal & Kirby*, 2013 WL 5494071 (E.D.C.A. 2013), the Court granted the Defendant's motion to withdraw the reference. In granting the Defendant's motion, the Court addressed the considerations set forth in *Sec. Farms, supra.* as follows:

> *No appreciable judicial resources have been expended in the Bankruptcy Court on this brand-new, stayed, adversary proceeding.* ***A duplication of judicial resources would likely occur if the Bankruptcy Court must first learn the case sufficiently to make it ready for trial, and then this court also must learn the case so that it can adjudicate the matter de novo.*** *Also, this court will be assisted in pretrial matters by a Magistrate Judge who can be assigned to the case to address any discovery disputes.* ***The court is not convinced by the Trustee's appeal to the uniform administration of bankruptcy laws. The Supreme Court and the Ninth Circuit have determined that these cases must be decided by the district court.*** *Any consequent effect on the administration of the bankruptcy laws is an unavoidable consequence of that mandate.* ***The court does not believe that delegating pretrial matters to the Bankruptcy Court will mitigate whatever harm the Trustee fears in this area***. (Emphasis added).

Similarly, in *In re Tamalpais Bancorp*, 451 B.R. 6 (2011), the Court granted the FDIC's motion to withdraw the reference where the Trustee had brought an adversary action alleging that tax refunds belonged to the bankruptcy estate. In granting the motion, the court stated:

> *While a bankruptcy court may hear certain non-core issues, its findings of fact and conclusions of law on such issues are subject to de novo review by a district court absent consent of both parties. 28 U.S.C. § 157(c). Because FDIC does not consent here, any findings of the bankruptcy court as to ownership of the Refunds will be subject to de novo review. Such concerns prompted the* ***Sec. Farms*** *court to note that judicial efficiency and costs were best served by withdrawing the reference so that the district court could address the claims in a single proceeding. 124 F.3d at 1008–09. Failure to withdraw the reference at this stage could lead to a future appeal in which a district court will be tasked with reviewing the bankruptcy court's decision de novo. The Court therefore concludes that (1) judicial resources would be most efficiently used by withdrawing the reference, and (2) unnecessary delay and costs to the parties can be avoided by withdrawing the reference. Id.*

Moreover, in a case very similar to the case at bar, United States District Court for the Eastern District of Michigan followed *Sec. Farms; supra* and granted the Defendant Insurer's motion for immediate withdrawal of the reference. In *Sweet v. Liberty Insurance Corporation* 2015 WL 9684724 (E.D. Mich. 2015) the Court granted Insurer's motion for immediate withdrawal of reference because: (1) Plaintiff's state law contract claim against Liberty Insurance was a non-core

proceeding; (2) the dispute turned on the interpretation of a generic contract, based on Michigan contract law; (3) the complaint did not appear to raise any claim that was dependent upon bankruptcy laws; and (4) the case's only connection to the bankruptcy proceeding was its potential that any recovery could increase the value of the estate.

The Insurers acknowledge that certain authority does support the notion that the immediate withdrawal of the reference is not required in all cases. *See e.g. In re Healthcentral.com, 504 F.3d 775 (2007).* In such cases, the Court can withdraw the reference; but refer the case to the bankruptcy court for pretrial proceedings. *See e.g. Calvert v. Berg*, 2013 WL 3407790 (W.D. Wash. 2013). Alternatively, the Court may deny a motion to withdraw without prejudice and allow the movant to file a renewed motion once the Bankruptcy Court has certified that the case is ready for trial. *See e.g. Hopkins Growth Fund, LLC* 2015 WL 6159470 (D. Idaho 2015). Notwithstanding these authorities, the Insurers respectfully submit that immediate withdrawal of the reference is appropriate in this case. The pending motions to dismiss and motion for summary judgment support the immediate withdrawal of the record.

3. The Sec Farms Factors Support the Immediate Withdrawal of the Reference in the Case at Bar.

The Insurers submit that the circumstances surrounding this case support the immediate withdrawal of the reference. The *Sec Farm Factors* favor immediate withdrawal of the reference.

a. <u>The Efficient Use of Judicial Resources.</u>

The case at bar is very similar to the cases where the court granted immediate withdrawal of the reference. Like the claims against Liberty Insurance in *Sweet, supra.*, the Plaintiff's claims against the Insurers in this case are based on a generic contract governed by Nevada law. Thus, similar to the circumstances in *Sec. Farms, supra., SK Foods, supra.,* and *Tamalpais supra.*, judicial efficiency and costs are best served by the immediate withdrawal of the reference so that the district court can address the Plaintiff's state law contract claims in a single proceeding.

In this regard, it is important to note that the parties have filed similar dispositive motions in this case. These motions reveal that there are no material facts in dispute and that the case is ripe for a dispositive ruling. Since a dispositive ruling can only be made by the District Court, it is clear that

judicial efficiency and costs are best served immediate withdrawal of the reference.

b. The Delay and Costs to the Parties.

In *Sec Farms,* the Court reasoned that since the "non-core" matters in that case were subject to de novo review, a single action in the District Court would avoid unnecessary costs to the parties. *Id.* at 1009. That same logic applies in the case at bar. Again, both parties have filed dispositive motions and the case is ripe for a decision. If the reference is not immediately withdrawn, the parties will likely have to brief the matter twice; once in bankruptcy court and again in District Court. The immediate withdrawal of the reference mitigates this risk and avoids unnecessary costs to the parties.

c. Uniformity of Bankruptcy Administration.

This consideration also supports the immediate withdrawal of the reference. This case will have minimal impact on uniform bankruptcy administration. The Plaintiff's claims are based on non-core state law. The only relationship to the bankruptcy case is that the Trustee is trying to marshal more funds for the estate.

d. The Plaintiff's Opposition is Only a Pretext to Gloss Over the Trustee's Attempted Forum Shopping.

The Plaintiff's Opposition creates somewhat of a paradox for the Plaintiff. On the one hand, the Plaintiff contends that the Insurers' motion is premature. At paragraph 22 of the Opposition, the Plaintiff asserts:

> *The Motion should be denied as premature because the instant adversary proceeding was just commenced. Further, the bankruptcy court should be permitted to conduct all pre-trial activity, as it is familiar with the Debtor's bankruptcy case, the related adversary proceeding and judgment against Peladas-Brown, and the complexity of the underlying litigation.*

However, this position does not square with the fact that the Plaintiff has filed a Motion for Summary Judgment. If the Plaintiff expects its summary judgment motion to be granted, then the only pre-trial activity would likely be a hearing and ruling on the Plaintiff's motion for summary judgment. There should be no need for discovery, pretrial management, and other similar tasks. These inapposite positions all lead to one conclusion; the Plaintiff wants the bankruptcy court to rule on the Plaintiff's motion for summary judgment.

The Plaintiff attempts to play down the attempted forum-shopping by claiming that the

bankruptcy court is "familiar with the Debtor's bankruptcy case" and the other adversary action. However, any familiarity with the Debtor's bankruptcy, or the other adversary action, is irrelevant to the current case at bar. The current case is simply a matter of contract interpretation. There is no material dispute about the underlying facts. The only issue is whether the policy issued by the Insurers covers the alleged claims. The Defendants have filed Motions to Dismiss that clearly demonstrate that the claims are not covered by the contract/policy. The Bankruptcy court's familiarity with the Debtor's bankruptcy or the other adversary action does not (and should not) have any bearing whatsoever on the outcome of this matter. As the Supreme Court stated in *Stern v. Marshall*, 131 S.Ct. 2594, 2615 (2011), "[t]he 'experts' in the federal system at resolving common law [claims] ... are the Article III courts." Thus, the Insurers respectfully submit that the motion to withdraw the reference must be granted.

B. PLAINTIFF'S ARGUMENT THAT CLAIMS AGAINST THE POLICY CONSTITUTE A CORE PROCEEDING MUST BE REJECTED.

The majority of Plaintiff's 42 Paragraph Opposition focuses on permissive withdrawal of non-core claims. However, it must be noted that Plaintiff has dedicated three paragraphs (31 through 33) to its conclusory assertion that the claims against the policy are "core."

The Plaintiff asserts that the claims are "core" because they "directly affect the Trustee's administration of the bankruptcy estate." Plaintiff contends that the claims against the policy fit squarely within 28 U.S.C. § 157(b)(2)(A); which states that core proceedings include "matters concerning administration of the estate." Plaintiff also contends that the claims fit within 28 U.S.C. § 157(b)(2)(O); which states that core proceedings include "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims." The Plaintiff then makes the unsupported conclusory statement that the Adversary Proceeding is a core proceeding and should be adjudicated by the bankruptcy court. The Plaintiff cites no supporting case authority.

28 U.S.C. § 157(b)(2)(A) and (O) are often referred to as "catch-all" provisions and they have been the subject of debate. *See In re Daewoo Motor America, Inc.*, 302 B.R. 308 (2003). However, the *Daewoo* court recognized that the 9th Circuit has strictly construed these provisions. *Id. (citing In*

re Castlerock Properties, 781 F.2d 159, 162 (9th Cir.1986)). In the 9th Circuit, the test for determining whether a claim is a core claim is as follows: "Actions that do not depend on bankruptcy laws for their existence and that could proceed in another court are considered 'non-core.'" *Id. citing Security Farms,* 124 F.3d at 1008. Like the Plaintiff in this case, the Plaintiff in *Daewoo,* sued an Insurer to recover amounts due under an insurance policy. *Id.* As part of its analysis, the Court had to determine whether the claim was a core claim. *Id.* The Court determined that the claim against the Insurer did not depend on the bankruptcy laws for its existence and, therefore, determined that the claim was a non-core claim. *Id.* at 313.

The Court's analysis in *Daewoo* is applicable in this case. Thus, this court must determine whether the Plaintiff's claims against the Insurers depend on bankruptcy laws for their existence. In this case, it is clear that the Plaintiff's claims are based on state law and do not depend on bankruptcy laws for their existence. Accordingly, the Plaintiff's argument that this Adversary Proceeding is a core matter is without merit.

CONCLUSION

The Defendants respectfully request that the Court should immediately grant the Insurers' motion to withdraw the reference of this Adversary Proceeding.

DATED this 3rd day of February, 2016

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 3rd day of February, 2016, I served a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO WITHDRAW THE REFERENCE OF THIS ADVERSARY PROCEEDING PURSUANT TO 28 U.S.C. § 157(d) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 5011** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Samuel A. Schwartz, Esq.
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Attorney for Chapter 7 Trustee, Victoria L. Nelson

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date:

BY: /s/Annemarie Gourley
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