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XL AMERICA, INC., XL INSURANCE AMERICA, INC.,
XL SELECT PROFESSIONAL, PEARL INSURANCE GROUP, LLC,
GREENWICH INSURANCE GROUP

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re:
AMERI-DREAM REALTY, LLC
Debtor.

Case No.: 15-10110-led
Chapter 7
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.

**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, JURY
DEMAND, AND SUPPORTING
MEMORANDUM OF LAW**

**Hearing Date: OST Requested
Hearing Time: OST Requested**

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, hereby submits this Motion to Withdraw Reference of this Adversary
Proceeding Pursuant to 28 U.S.C. § 157(d) and Federal Rule Of Bankruptcy Procedure 5011
 (“Motion”), Jury Demand, and Memorandum of Law in support of their Motion to Withdraw the

1 Reference of this Adversary Proceeding Pursuant to 28 U.S.C. § 157(d) and Federal Rule of
2 Bankruptcy Procedure 5011 and its Jury Demand. In support of their Motion and Jury Demand, the
3 Insurers respectfully state as follows.

4 INTRODUCTION

5 The Complaint alleges causes of action for Breach of Contract, Breach of Implied Covenant
6 of Good Faith and Fair Dealing, Breach of Fiduciary Duty, Violations of NRS 686A.310, and
7 Declaratory Relief. The Complaint alleges that the Insurers are required to reimburse the Debtor for
8 the loss of certain “Security Deposits” (as defined below). The causes of action asserted in the
9 Complaint arise out of state law. The causes of action fall within the non-core, related-to jurisdiction
10 of the Bankruptcy Court because they do not arise under the Bankruptcy Code and could arise
11 outside of a bankruptcy case. Contemporaneously herewith, the Insurers have filed a Motion to
12 Dismiss. The Motion to Dismiss also raises issues of state coverage law that fall within the
13 Bankruptcy Court’s non-core, related-to jurisdiction. Further, in the event the Motion to Dismiss is
14 denied, the Insurers hereby demand a jury trial on all issues. If the Motion to Dismiss is denied, the
15 Insurers intend to file an Answer and Counterclaim.

16 The Court should grant the Defendants’ Motion to Withdraw the Reference because the
17 Complaint sets forth causes of action for non-core matters and the Defendants can show cause for the
18 withdrawal of the reference because they have a right to a jury trial on all factual issues to be decided
19 in this case. The Insurers submit that the Court should withdraw the reference *now* because: (1) the
20 claims fall within the Bankruptcy Court’s non-core/related-to jurisdiction; (2) the Insurers have not
21 consented to the entry of final orders or judgments by the Bankruptcy Court; and (3) the Insureds
22 have made the Jury Demand contained herein. Thus, the Bankruptcy Court can only make proposed
23 findings of fact and conclusions of, which the District Court must review *de novo*. The Bankruptcy
24 Court does not possess any special knowledge or training with respect to the insurance coverage
25 issues in this case; which arise under Nevada state law. Thus, if the Motion to Withdraw the
26 Reference is not granted, the Bankruptcy Court and District Court could both be required to use their
27 limited resources decide this case. Such a duplication of effort contradicts the principles of judicial
28 economy. Further, if the Motion to Withdraw the Reference is denied, the Bankruptcy estate would

1 be required to use its limited resources to brief issues for the Bankruptcy Court, and to re-brief issues
2 for the District Court's *de novo* review. Thus, the Insurers submit that the Court should grant the
3 Motion to Withdraw the Reference, now.

4 **BACKGROUND**

5 On January 9, 2015, the Debtor filed voluntary petition for relief under Chapter 7 of Title 11
6 of the United States Code. ("Bankruptcy Code"). On October 29, 2015, the Trustee filed the
7 Complaint in the United States Bankruptcy Court for the District of Nevada against the Insurers. The
8 Complaint asserts five causes of action against the Insurers that are all related to that certain Real
9 Estate Professionals Errors and Omissions Policy, Policy No. PEG9145932-6 (the "Policy") for the
10 policy period of June 14, 2013, through June 14, 2014. The Policy was delivered in the State of
11 Nevada and is governed by Nevada law.

12 The Complaint is related to the actions of Ms. Pelada-Brown a licensed real estate agent. The
13 Complaint alleges that Ms. Pelada Brown was a member, manager, and property manager for the
14 Debtor. The Complaint alleges the Debtor managed residential real properties (the "Business") and
15 that the Debtor held certain security deposits (the "Security Deposits") on behalf of its customers'
16 tenants. The Security Deposits were held in a separate bank account (the "Security Deposit
17 Account"). The Complaint also alleges that Ms. Pelada-Brown orchestrated various unauthorized
18 transactions, which transactions included the wire transfers of the majority of the Security Deposits
19 to the Philippines in breach of her fiduciary duties.

20 The Complaint further alleges that the Policy constituted a contract between the Debtor and
21 the Insurers. The First Claim for Relief in the Complaint alleges that the Insurers breached the
22 contract by not reimbursing the Debtor for the loss of Security Deposits as required under the Policy.
23 The Complaint also alleges, that by not reimbursing the Debtor for the loss of the Security Deposits,
24 the Insurers: (1) breached the Implied Covenant of Good Faith and Fair Dealing with respect to the
25 Policy; (2) breached certain fiduciary duties to Debtor; and (3) engaged in unfair business practices
26 in settling claims in violation of NRS 686A.310. Finally, the Complaint seeks Declaratory Relief
27 and requests that the Court determine "whether the Policy requires the Insurers to reimburse the
28 [Debtor] for the actions of Ms. Pelada-Brown and the loss of the Security Deposits.

1 Contemporaneously with this motion, the Insurers have filed a Motion to Dismiss pursuant to
2 Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Insurers do not consent to a jury trial in
3 Bankruptcy Court and have made the Jury Demand set forth herein. If the Motion to Dismiss is
4 denied, the Insurers will file their Answer and Counterclaim. If the Insurers are required to file an
5 Answer and Counterclaim, they will seek a ruling that the Policy does not require the Insurers to
6 reimburse the Debtor for the loss of the Security Deposits.

7 **RELIEF REQUESTED**

8 The Insurers request that the Court grant the Motion to Withdraw the Reference of this
9 Adversary Proceeding and that it accept the Insured's Jury Demand contained herein.

10 **ARGUMENT**

11 "The district court may withdraw, in whole or in part, any case or proceeding referred under
12 this section, on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. §
13 157(d). The Motion is timely filed because it is being filed contemporaneously with the Rule
14 12(b)(6) Motions to Dismiss and the Jury Demand.

15 The Bankruptcy Code does not define what constitutes cause under 28 § 157(d). However,
16 courts have looked at a number of factors, including, (1) whether action is core or non-core; (2)
17 judicial economy, (3) uniform bankruptcy administration, (4) reduction of forum shopping, (5)
18 economical use of debtors' and creditors['] resources, (6) expediting the bankruptcy process, and (7)
19 the presence of a jury demand"). See *In re Access Insurance Services, Inc.* 2014 WL 6065641
20 (U.S.D.C Nev. 2014)(citing *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen &*
21 *Helpers*, 124 F.3d 999, 1008 (9th Cir.1999))(citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101
22 (2d Cir.1993)).

23 In the case at bar, cause exists to withdraw the reference because the Insurers would be
24 entitled to a jury trial on numerous factual issues if the Court denies the Insurers' Motion to Dismiss.
25 The Insurers submit that the Court should withdraw the reference, now, because the causes of action
26 set forth in the Complaint are non-core, and the Bankruptcy Court cannot enter final orders or
27 judgments on such matters without the Insurers' consent. The Insurers have not consented and will
28 not consent. Therefore, if this case proceeds in the Bankruptcy Court, the District Court would have

1 to review the Bankruptcy Court's findings and conclusions *de novo*. This would result in a
2 duplication of judicial effort. Withdrawing the reference now, promotes judicial economy and also
3 conserves the assets of the bankruptcy estate.

4 **I. The Motion Is Timely**

5 A motion for withdrawal of the reference pursuant to 28 § 157(d) must be timely filed in
6 accordance with Local Rule 5011. Local Rule 5011 provides that “[a] motion to withdraw the
7 reference of an adversary proceeding, in whole or in part, must be served and filed on or before the
8 date on which an answer, reply, or motion under Fed. R. Bankr. P. 7012 or 7015 is first due.” *See*
9 *also, In re McPherson*, 2014 WL 6611432 (USDC Nev. 2014) The Insurers were served on
10 November 25, 2015 and they have until December 26, 2015 to respond. Thus, the Court should find
11 that the Motion is timely filed.

12 **II. The Insurers' Right to a Jury Trial Is Sufficient Cause to Withdraw the Reference**

13 The Insurers have a right to a jury trial on factual issues in this Adversary Proceeding. That
14 fact alone provides cause for the Court to withdraw the reference.

15 **A. There Are a Number of Factual Issues that Might Be Raised in this Case**

16 The Complaint asserts several non-core causes of action arising under state law. If the
17 Insurers do not prevail on their Motion to Dismiss, then the Insurers would be required to contest
18 multiple factual issues. For example, the Insurers may be required to contest that the Trustee is
19 entitled to recover under an “Innocent Insured” theory. There would likely be factual issues of
20 whether Mr. Brown assisted Ms. Peladas-Brown. There would likely be factual issues of whether
21 Mr. Brown remained passive after having knowledge of the dishonest/fraudulent conduct of Ms.
22 Peladas-Brown.

23 **B. The Insurers Are Entitled to Jury Trial on Any Factual Issues in this Case**

24 The Insurers would be entitled to a jury trial on the factual issues discussed above, among
25 others. There can be no doubt that the Insurers are entitled to a jury trial on the Plaintiff's claims for
26 breach of contract, breach of fiduciary duty, and engaging in unfair business practices in settling
27 claims in violation of NRS 686A.310. *See e.g. In re PW Supermarkets, Inc.*, 2015 WL 4456213
28 (USBC N.D. Cal. 2015). As the Insurers have not consented to a jury trial in the Bankruptcy Court,

1 the jury trial must be conducted in the District Court and the case must be certified to the District
2 Court in accordance with Local Rule 9015.

3 **III. Because the Claims in this Case Are Non-Core, Withdrawal of the Reference, Now,
4 Would Serve Judicial Economy**

5 The claims in this case are non-core. Therefore, the Bankruptcy Court cannot enter final
6 order or judgments with respect to such claims, but only findings of fact and conclusions of law. 28
7 U.S.C. § 157(c)(1). This Court must review the Bankruptcy Court's findings and conclusions *de*
8 *novo*, *i.e.*, conduct its own independent assessment of the facts and provide its own independent
9 review of the law. *Id.* That duplication of judicial effort can be avoided if the Court withdraws the
10 reference at this time. Withdrawal of the reference, now, would eliminate the multiple rounds of
11 briefing that would be necessary should this case proceed in the Bankruptcy Court.

12 **A. The Claims at Issue in this Case Fall Within the Bankruptcy Court's Non-Core,
13 Related-To Jurisdiction**

14 One of the most important of the factors that courts use in determining whether there is cause
15 to withdraw the reference is whether the claims sought to be withdrawn are core or non-core. *In re*
16 *PW Supermarkets, Inc.*, 2015 WL 4456213 (USBC N.D. Cal. 2015).

17 Bankruptcy courts may issue final judgments and orders in connection with "core
18 proceedings." 28 U.S.C. § 157(b)(1). 28 U.S.C. § 157(b)(2)(A)-(P) contains a non-exhaustive list of
19 "core proceedings." The United States Supreme Court has held that in certain cases, bankruptcy
20 courts lack constitutional authority to enter final judgments on "core" claims. *Stern v. Marshall*, 131
21 S.Ct. 2594, 2608–20 (2011). A bankruptcy court may also hear "non-core" proceedings that are
22 otherwise related to the bankruptcy case. 28 U.S.C. § 157(c)(1). A bankruptcy court cannot,
23 however, enter a final order or judgment on non-core claims without the consent of all parties. 28
24 U.S.C. § 157(c)(2). In lieu of entering a final order on non-core claims that are otherwise related to
25 the bankruptcy case, a bankruptcy court "shall submit proposed findings of fact and conclusions of
26 law to the district court, and any final order or judgment shall be entered by the district judge after
27 considering the bankruptcy court's proposed findings and conclusions and after reviewing *de novo*
28 those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1).

1 The Complaint sets forth claims for relief that arise entirely under Nevada law and are non-
2 core. The Insurers have not consented to this court entering a final judgment herein. 28 U.S.C. §
3 157(e) authorizes the bankruptcy court to conduct a jury trial only with the express consent of the
4 parties, and the Insurers have not consented. The Insurers are entitled to a jury trial on each of the
5 claims set forth in the Complaint. Thus, the Insurers contend that the Motion to Withdraw the
6 Reference Must be Granted.

7 **B. Withdrawal of the Reference, Now, Would Promote Judicial Economy, Conserve**
8 **Judicial and Estate Resources, and Reduce Delay and Costs**

9 Because the claims in this case are non-core, prompt withdrawal of the reference would serve
10 judicial economy and conserve the bankruptcy estate's resources.

11 Because this is a non-core proceeding, the Bankruptcy Court cannot enter final orders or
12 judgments without the consent of the parties; it can enter only findings of fact and conclusions of
13 law that would be subject to *de novo* review by the District Court. 28 U.S.C. § 157(c); The Insurers
14 have not consented (and will not consent) to the entry of final orders or a judgment by the
15 Bankruptcy Court.

16 This case is only now beginning. The Bankruptcy Court has scheduled its first pre-trial
17 conference in this case for January 25, 2016. No discovery deadline has been set. No dispositive
18 motion deadline has been set. No final pretrial conference has been set. To date, no motion other
19 than this Motion and the Motion to Dismiss has been filed. Thus, the Bankruptcy Court has no
20 particular familiarity with the insurance coverage law at issue in this case, the facts relevant to
21 determining insurance coverage, or any of the issues that will be briefed by the parties. Moreover,
22 because there is no bankruptcy law at issue in this case, the Bankruptcy Court's expertise is not
23 required. Thus, there is nothing to be gained by delaying withdrawal in anticipation of Bankruptcy
24 Court rulings that will not be forthcoming for some time and which would be subject to *de novo*
25 review by this Court in any event. *Bulk Petroleum Corp.*, 2011 U.S. Dist. LEXIS 21495, *2 (citing
26 *Travelers Ins. Co. v. Goldberg*, 135 B.R. 788, 792 (D. Md. 1992); *In re CIS Corp.*, 172 B.R. 748,
27 760 (S.D.N.Y. 1994); *Coe-Truman Techs.*, 214 B.R. at 187)).

28 Several courts have granted motions to withdraw references in cases involving insurance

1 coverage issues and similar non-core matters. For example, in *In re ARCHDIOCESE OF*
2 *MILWAUKEE*, 2013 WL 660018 (USDC E.D. Wisc. 2013), the Court granted the Defendant
3 Insurer's motion to withdraw the reference. In so doing, the Court stated that it was better to
4 withdraw the reference early on in the case as opposed to awaiting the outcome of lengthy and
5 largely duplicative proceedings in bankruptcy court. *Id.* The Court also pointed out that the issues
6 presented by the underlying claims were separate and distinct from insurance coverage issues. *See,*
7 *e.g.*, *In re Allied Prods.*, No. 02 C 8436, 2003 WL 503805, at *2 (N.D.Ill. Feb. 24, 2003) ("the
8 bankruptcy court is in no better position to resolve the insurance dispute than a district court because
9 its familiarity with the bankruptcy case has no bearing on the insurance issues").

10 Similarly, in *INNOVASYSTEMS, INC., v. PROVERIS SCIENTIFIC CORPORATION*,
11 2013 WL 5539288 (U.S.D.C. Dist. NJ 2013), the Court promptly granted the Defendant's Motion
12 for Withdrawal of the Reference. In so doing, the Court primarily relied on two factors. First,
13 withdrawal was necessary to preserve Defendant's right to a jury trial, as bankruptcy courts are
14 prohibited from holding jury trials in non-core matters. *Id.* (citing *Orion Pictures Corp. v. Showtime*
15 *Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2d Cir.1993). Further, the Court
16 held that judicial resources "would be most efficiently allocated by withdrawal, given the expertise
17 and presence of magistrate judges in district court proceedings. Magistrate judges are well
18 experienced in the discovery issues that arise in non-core proceedings, and litigants and the Court are
19 well served by their involvement. Given the fact the Bankruptcy Court lacks this recourse,
20 withdrawal is appropriate."

21 As these cases demonstrate, withdrawing the reference now would mean that only one Court
22 must familiarize itself with the relevant facts and law in this case, rather than two, thus preserving
23 scarce judicial resources. Similarly, because this Court is required to review the Bankruptcy Court's
24 findings and conclusions *de novo*, withdrawing the reference now would preserve estate resources as
25 the parties would not have to re-litigate issues. Thus, the Court should grant the Motion at this time.

26 **C. The Other Factors Relied Upon by Courts in Determining Whether There Is**
27 **Cause to Withdraw the Reference Are Irrelevant Here**

28 The other factors used by courts in analyzing whether cause exists to withdraw the

1 reference are irrelevant here. The uniformity and efficiency of bankruptcy administration
2 would be unaffected by withdrawal, as this adversary proceeding addresses issues of state
3 law that would not otherwise be addressed in the bankruptcy case. Moreover, the fact that
4 the Insurers are not forum shopping, having not previously litigated any matters in front of
5 Judge Davis, should make that factor irrelevant to the Court's decision.

6 **CONCLUSION**

7 The Defendants respectfully request that the Court grant the Motion and withdraw the
8 reference to this Adversary Proceeding at this time.

9 DATED this 23rd day of December, 2015.

10 WILSON ELSER MOSKOWITZ EDELMAN &
11 DICKER LLP

12 /s/ Vernon A. Nelson, Jr.

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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 23rd day of December, 2015, I served a true and correct copy of the foregoing **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, JURY DEMAND, AND SUPPORTING MEMORANDUM OF LAW** 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.
Schwartz Flansburg PLLC
Email: sam@nvfirm.com
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/ Lani Maile
An Employee of
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP