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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re: RED ROSE INC., et al.,[1] Debtor.	CASE NO. 20-12814-mkn CHAPTER 11 **LIMITED OBJECTION OF CONTINENTAL CASUALTY COMPANY AND RESERVATION OF RIGHTS**

TO THE CLERK OF THE U.S. BANKRUPTCY COURT, THE DEBTOR, THE ATTORNEY OF RECORD, THE TRUSTEE, AND TO ALL PARTIES OF INTEREST

Continental Casualty Company ("***Continental***"), a party in interest in the above-captioned chapter 11 case (this "***Bankruptcy Case***"), hereby files this limited objection (this "***Limited Objection***") to the *Debtors' Motion to Dismiss Chapter 11 Cases* [Dkt. No.

[1] The debtors in these chapter 11 cases are: Beachhead Roofing and Supply, Inc.; California Equipment Leasing Association, Inc.; Fences 4 America, Inc.; James Petersen Industries, Inc.; PD Solar, Inc.; Petersen Roofing and Solar LLC; Petersen-Dean, Inc.; PetersenDean Hawaii LLC; PetersenDean Roofing and Solar Systems, Inc.; PetersenDean Texas, Inc.; Red Rose, Inc.; Roofs 4 America, Inc.; Solar 4 America, Inc.; Sonoma Roofing Services, Inc.; TD Venture Fund, LLC; Tri-Valley Supply, Inc. (collectively, the "***Debtors***").

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2676] (the "***Motion to Dismiss***"). In support of this Limited Objection, Continental respectfully states as follows:

I. BACKGROUND

On June 11, 2020 (the "***Petition Date***"), the above-named Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

Prior to the Petition Date, Continental issued to Petersen-Dean, Inc. insurance policy number 652103665, a claims-made management liability policy (the "***Policy***"). The Policy was issued for the policy period of April 30, 2019 to April 30, 2020. Petersen-Dean, Inc. subsequently paid an additional premium of $87,711 to purchase an extended reporting period of April 30, 2020 to April 30, 2023 (the "***ERP***").

Pursuant to the Court's February 23, 2021 *Order: (A) Confirming Auction Results; (B) Approving the Sale of Substantially all of Debtors' Commercial Division Assets to Solarjuice American, Inc., Including but Not Limited to the Pahrump Property, Free and Clear of Liens, Claims, Encumbrances, and other Interests as Provided in the Asset Purchase Agreement; (C) Authorizing the Assumption and Assignment of Certain of the Debtors' Executory Contracts and Unexpired Leases Related Thereto; and (D) Related Relief* [Main Case Docket No. 1704] (the ***Sale Order***"), SolarJuice American, Inc. purchased substantially all of Debtors' commercial division assets free and clear of liens claim, encumbrances, and other interests as provided in the Asset Purchase Agreement.[2]

Also pursuant to the Sale Order, Debtors' secured lender, ACF Finco I LP ("***ACF***"), purchased the Debtors' Chapter 5 Claims [Main Case Docket No. 1704, pg. 13, ¶ SS].

The premium payment for the purchase of the ERP is the subject of a recovery action initiated in this Court on June 8, 2022, by ACF against Continental [Docket No. 2397]. ACF

[2] Capitalized terms not otherwise defined in this Limited Objection are defined in the Debtors' Motion for Order: (A) Confirming Auction Results; (B) Approving Sale of Substantially All of Debtors' Commercial Assets to SolarJuice American, Inc. Free and Clear of Liens Claims, Encumbrances, and Other Interests as Provided in the Asset Purchase Agreement; (C) Authorizing the Assumption and Assignment of Certain of the Debtors' Executory Contracts and Unexpired Leases and Related Thereto; and (D) Related Relief [Main Case Docket No. 1642].

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alleges that the premium payment for the ERP is an avoidable transfer pursuant to 11 U.S.C. §§ 549 and 550 (the "***Recovery Action***").[3]

Barely six months later, on December 16, 2022, Debtors initiated an adversary proceeding against various of the Debtors' former directors and officers pursuant to 11 U.S.C. §§ 105, 542 and Federal Rule of Bankruptcy Procedure 7001(1) to recover funds belonging to the bankruptcy estate, asserting breaches of fiduciary duties [Docket No. 2560] (the "***D&O Proceeding***[4]," and collectively with the Recovery Action, the "***Adversary Proceedings***"). The Defendants in the D&O Proceeding are insureds under the Policy and, on March 1, 2023 and May 3, 2023, have tendered the D&O Proceeding to Continental for coverage under the Policy.

On June 30, 2023, the Debtors filed the Motion to Dismiss, seeking the dismissal of the jointly administered Bankruptcy Case.

On July 19, 2023, ACF filed its *Opposition to Debtors' Motion to Dismiss Chapter 11 Cases* [Docket No. 2697], asserting the Debtors have not met their burden in showing that dismissal, rather than conversion to a case under chapter 7, is in the better interests of its creditors.

II. LIMITED OBJECTION

Continental does not object to the Motion to Dismiss or the dismissal of the Bankruptcy Case. However, Continental objects to this Court's retention of jurisdiction over any adversary proceedings filed in this Bankruptcy Case, and more specifically, the Recovery Action and the D&O Proceeding, should the Motion to Dismiss be granted. To the extent the Court grants the Motion to Dismiss and is inclined to retain jurisdiction over the adversary

[3] The Recovery Action is captioned *ACF FinCo I LP vs. Continental Casualty Company*, Adv. Pro. No. 22-01107.

[4] The D&O Proceeding is captioned *PETERSEN-DEAN, INC., BEACHHEAD ROOFING AND SUPPLY, INC., CALIFORNIA EQUIPMENT LEASING ASSOCIATION, INC., FENCES 4 AMERICA, INC., JAMES PETERSEN INDUSTRIES, INC., PD SOLAR, INC., PETERSEN ROOFING AND SOLAR LLC, PETERSENDEAN HAWAII LLC, PETERSENDEAN ROOFING AND SOLAR SYSTEMS, INC., PETERSENDEAN TEXAS, INC., RED ROSE, INC., ROOFS 4 AMERICA, INC., SOLAR 4 AMERICA, INC., SONOMA ROOFING SERVICES, INC., TD VENTURE FUND, LLC, and TRI-VALLEY SUPPLY, INC. v. JAMES PETERSEN, an individual, TRICIA PETERSEN, an individual, MARK VOGEL, an individual, STEVE DOLL, an individual, GEORGE MILIONNIS, an individual, and DOE Individuals I-X and ROE Entities 1-10*, Case No. 22-01164.

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proceedings, Continental respectfully requests the opportunity to provide supplemental briefing and to be heard on the question of jurisdiction over the Recovery Action and D&O Proceeding.

A. Applicable Legal Standard

Bankruptcy court jurisdiction is governed by 28 U.S.C. §§ 1334 and 157. This Court has jurisdiction over all civil proceedings "arising under" title 11, or "arising in" or "related to" cases under title 11. 28 U.S.C. § 1334(b); *Harris v. Wittman* (*In re Harris)*, 590 F.3d 730, 737 (9th Cir. 2009). For a proceeding to "arise under" title 11, it must involve a cause of action created or determined by a statutory provision of title 11. *Battle Ground Plaza, LLC v. Ray* (*In re Ray)*, 624 F.3d 1124, 1131 (9th Cir. 2010). A proceeding is "related to" a bankruptcy case if the outcome of such proceeding "could conceivably alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) in such a way as to impact on the administration of the bankruptcy estate." *Linkway Inv. Co. v. Olsen* (*In re Casamont Inv'rs., Ltd*.), 196 B.R. 517, 521 (B.A.P. 9th Cir. 1996) (citing *Fietz v. Great W. Sav.* (*In re Fietz)*, 852 F.2d 455, 457 (9th Cir.1988)). Jurisdiction is determined at the commencement of the proceeding. *Id.* Importantly, a bankruptcy court does not have jurisdiction in controversies between third parties not involving the debtor or property of the estate unless such controversies are related to the underlying bankruptcy case. *In re Casamont Invs., Ltd.*, 196 B.R. at 525 (citing *Baker v. Taylor Drilling Co. v. Stafford*, 369 F.2d 551, 556 (9th Cir. 1953)).

When the underlying bankruptcy case is dismissed, proceedings related thereto are not automatically dismissed; however, the court should always consider that perhaps they should be. *Id.* at 526; *see also Carraher v. Morgan Elecs., Inc., (In re Carraher)*, 971 F.2d 327, 328 (9th Cir. 1992); *Menk v. Lapagalia (In re Menk)*, 241 B.R. 896, 906 (B.A.P. 9th Cir. 1999) ("[o]nce the administration of the bankruptcy estate has ended, the relation to the case becomes so attenuated that related to jurisdiction presumptively expires unless the court specifically retains jurisdiction."). At this point, the question becomes not whether jurisdiction was properly determined in the first place, but rather whether the court properly *retained*

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jurisdiction upon the underlying case's dismissal. *In re Casamont Invs., Ltd.*, 196 B.R. at 521.

In the Ninth Circuit, a bankruptcy court may exercise its discretion to retain jurisdiction over "related to" proceedings only upon consideration of four factors: (i) judicial economy, (ii) convenience; (iii) fairness, and (iv) comity. *Id.* at 523; *In re Carraher*, 971 F.2d, at 328. This analysis is similar beyond the bankruptcy context, and the weight given to each factor is left to the sound discretion of the court. *In re Casamont Invs., Ltd.*, 196 B.R. at 522; *In re Carraher*, 971 F.2d at 328; *see also Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991). As the Supreme Court noted in *Carnegie-Mellon University v. Cohill*, "[w]hen the balance of these factors indicates that a case properly belongs [outside of federal court], . . . the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." 484 U.S. 343, 350 (1988) (citing *Mine Workers v. Gibbs*, 383 U.S. 715 (1966)).

B. <u>An Analysis of the Appropriate Factors Establishes the Bankruptcy Court Should Not Retain Jurisdiction Over the Adversary Proceedings Following Dismissal of Debtors' Bankruptcy Proceeding</u>

Applying the analysis set forth by courts in this Circuit, the jurisdictional factors strongly support the conclusion that this Court should exercise its jurisdiction to relinquish jurisdiction over the Adversary Proceedings.

If this Court grants the Motion to Dismiss, the determination of either Adversary Proceeding could not conceivably alter the Debtors' "rights, liabilities, options, or freedom of action upon handing and administrating the bankruptcy estate." *See In re Fietz*, 852 F.2d at 457 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), *overruled on other grounds by Things Remebered, Inc. v. Petrarca*, 516 U.S. 124 (1995)); *In re Hanks*, 182 B.R. 930, 935 (Bankr. N.D. Ga. 1995) (there can be no "conceivable effect on the bankruptcy case [when] no case is in existence at that time"). Indeed, should dismissal of the main case be granted, there will no longer be a bankruptcy estate.

The Recovery Action was pending for over a year before Debtors filed the Motion to Dismiss, but no substantive motion practice has yet occurred, and the Court has yet to rule on any major issues. Consequently, dismissal will not result in a waste of judicial resources. Similarly, any inconvenience to the parties by dismissal would be inconsequential. This is not

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an instance where the parties have devoted years to litigating an issue in bankruptcy court. *Contra In re Carraher*, 971 F.2d at 328 (following six years of litigation, it would have been unfair and prejudicial to abstain from exercising jurisdiction).

Importantly, ACF's claim in the Recovery Action would not exist without the Bankruptcy Case. While one may argue this suggests a need for this court to retain jurisdiction over the Recovery Action, there is no bankruptcy estate for the underlying claims to benefit, and Continental reserves all defense and arguments in connection with whether a remedy can or should be granted to ACF under such circumstances. The analysis of the factors used by the Ninth Circuit heavily weigh in favor of this court declining to retain jurisdiction of the Recovery Action. *Harrell*, 934 F.2d at 205 (the decision to exercise or relinquish jurisdiction depends upon what best accommodates the court's values of economy, convenience, fairness, and comity").

The D&O Proceeding fares no better under the analysis. The D&O Proceeding asserts purely state law claims against the Debtors' former directors and officers, and constitutes a pure non-core proceeding.[5] Continental does not consent to entry of a final judgment in this proceeding. Much like the Recovery Action, the D&O Proceeding has been pending for over seven months. The case has not progressed beyond service of the complaint. There are no implications to judicial economy, convenience, or fairness. Whatever the ultimate merits and disposition of the claims, Bankruptcy Court is not the correct forum.

III. RESERVATION OF RIGHTS

Continental reserves the right to amend and/or supplement this Limited Objection and to raise other and further objections with respect to the Motion to Dismiss.

IV. CONCLUSION

Should the Motion to Dismiss be granted, Continental respectfully requests that the court decline to retain jurisdiction over the Adversary Proceedings or, in the alternative, afford Continental the opportunity to further brief and be heard on this issue. Continental further

[5] The Plaintiff takes the point of view that these claims are core, and Continental reserves all arguments, claims and positions on this issue.

requests that this Court grant such other and further relief as may be just and fitting under the circumstances.

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