Dated: July 30, 2012
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,
Debtors.

Case No. 08-28289-L
Chapter 7

CHURCH JOINT VENTURE,
a Limited Parthership; and
FARMERS & MERCHANTS BANK,
Adamsville;
Plaintiffs,

v.

Adv. Proc. No. 09-00482

EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,
Debtors/Defendants,

KATHERINE BLASINGAME and
EARL BENARD "BEN" BLASINGAME, JR.,
Necessary Parties,

BLASINGAME FAMILY BUSINESS INVESTMENT TRUST,
BLASINGAME FAMILY RESIDENCE GENERATION SKIPPING TRUST,
THE BLASINGAME TRUST,
Defendant Trusts,

FLOZONE SERVICES, INC.;
FIBERZONE TECHNOLOGIES, INC.;
BLASINGAME FARMS, INC.;
GF CORPORATION;
AQUA DYNAMICS GROUP CORPORATION;
Defendant Corporations.

RECOMMENDATION CONCERNING NON-DEBTOR DEFENDANTS' MOTION TO DISMISS COUNTS I, II, VI, VII, and VIII OF COMPLAINT

IN A PRIOR ORDER entered June 6, 2012, I ruled that the motion to dismiss filed by Defendants Blasingame Family Investment Trust, Blasingame Family Residence Generation Skipping Trust, The Blasingame Trust, Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms, Inc., GF Corporation, Aqua Dynamics Group Corporation, Katherine Blasingame Church, and Earl Benard "Ben" Blasingame, Jr. (collectively the "Non-Debtor Defendants") should be denied on the basis of lack of standing, but I reserved decision or recommendation on the question of whether the motion should be granted on the basis of lack of jurisdiction. I found that as the result of the sale of the Trustee's causes of action to Plaintiff Church Joint Venture ("Church JV"), federal bankruptcy jurisdiction no longer exists with respect to the causes of action against the Non-Debtor Defendants. I also found that the federal district court might nevertheless retain jurisdiction in the event that substantial prejudice would result from dismissal. Therefore, I asked the parties to brief the issue of prejudice that might result from dismissal of the adversary proceeding as to the Non-Debtor Defendants. I also asked that they clearly indicate whether they consented to my hearing the trial and entering a final judgment subject only to appellate review on the disputed counts of the complaint. The parties have filed their briefs, and the Non-Debtor Defendants have clearly indicated that they do not consent to my hearing the

trial and entering a final judgment. Therefore, I make the following recommendation to the district court.

The procedural background of this adversary proceeding is fully set forth in the prior order of June 6, 2012. As I stated in that order, the original complaint filed by the Trustee, Church JV, and Farmers & Merchants Bank sought two types of relief: (1) a declaration that the Debtors are not entitled to discharge of their debts, and (2) the augmentation of the bankruptcy estate by recovering assets from the Non-Debtor Defendants. As I explained in my prior order, although both types of causes of action arose under title 11, as the result of the sale of the causes of action against the Non-Debtor Defendants by the Trustee to Church JV, federal bankruptcy jurisdiction no longer exists with respect to those causes of action. I did find, however, that under certain circumstances it would be appropriate to retain federal jurisdiction, especially where one of the parties would suffer prejudice as a result of the dismissal. *See Peabody Landscape Contr., Inc. v. Schottenstein*, 371 B.R. 276, 281 (S.D. Ohio 2007). I noted that the factor of comity weighs heavily in favor of relinquishing jurisdiction in favor of the state courts because the issues raised in the causes of action against the Non-Debtor Defendants involve solely state-law issues, which in one instance – i.e., the doctrine of reverse piercing – has not been settled by the state courts.

Not surprisingly, Church JV urges the federal courts to retain jurisdiction of the causes of action against the Non-Debtor Defendants for several reasons. First, it asserts that in this case, diversity of citizenship gives an additional ground for federal subject matter jurisdiction. Second, it asserts that although no scheduling order has been entered in the present case, substantial discovery has been conducted and is virtually complete. Third, it asserts that additional costs will be incurred if the causes are dismissed or referred to the district court because of the additional

pleadings and time that will be required to bring the new court up to speed. Fourth, Church JV asserts that it would be more convenient to hold a trial before the bankruptcy court because of my trial schedule versus that of the district court. Fifth, Church JV asserts that fairness dictates that the action be retained because this case is not in its infancy. It claims that it would be unfair for it to have to now appear in another forum and educate another judge about the issues in this case. Sixth, Church JV asserts that comity does not require a hearing before a state court because I have already carefully considered the alter ego and reverse piercing issues raised in the complaint. Church JV notes that because the Trustee is no longer a party, it is likely that the complaint will be heard by a federal court on the basis of diversity of citizenship in any event. Because the bankruptcy judges are part of the federal court system, Church JV urges that I retain these causes of action because of my prior familiarity with the facts and law.

The Non-Debtor Defendants take the opposite position. First, they clearly state that they do not consent to my hearing and finally determining the issues raised by the complaint. Second, they note that no legal prejudice will result from the dismissal of the causes of action against them as the result of the savings statute, Tennessee Code Annotated § 28-1-115, which provides:

> **Dismissed federal court actions. –** Notwithstanding any applicable statute of limitations to the contrary, any party filing an action in a federal court that is subsequently dismissed for lack of jurisdiction shall have one (1) year from the date of such dismissal to timely file such action in an appropriate state court.

The Non-Debtor Defendants note that they have raised other statute of limitations defenses that they would continue to pursue in the event that the complaint is re-filed in a Tennessee court, but assert that the dismissal of the complaint as a result of their pending motion would not result in any additional prejudice to the defendants.

In connection with their statements concerning the statute of limitations, the Non-Debtor Defendants ask that I clarify prior statements indicating that Church JV was stayed from pursuing its individual alter ego claim against the Non-Debtor Defendants pursuant to 11 U.S.C. § 362. They point to the decision of the Sixth Circuit Court of Appeals, *In re RCS Engineered Products Co., Inc.*, 102 F.3d 223 (6th Cir. 1996), which holds that the automatic stay does not prevent a creditor from pursuing an alter ego claim that does not belong to the bankruptcy estate. In my prior decision, I said, "Even if Church JV may not pursue the rights of the Trustee, it may pursue its own rights, which were stayed by the filing of the bankruptcy petition." *In re Blasingame*, 2012 WL 2064417 at *6 (Bankr. W.D. Tenn. June 7, 2012). The reference to the automatic stay was not necessary to the decision and should be considered dicta. I express no opinion as to the application of the automatic stay to any causes of action that Church JV had at the commencement of the bankruptcy case.

The Non-Debtor Defendants also filed a reply brief. In response to Church JV's assertion that the factor of economy weighs in favor of retention, the Non-Debtor Defendants assert that the discovery that has been taken in this case relates to the discharge issues, not the issues involving the Non-Debtor Defendants. They assert that the cost to complete discovery will be the same wherever the case is decided, and they correctly note that the cost of discovery cannot outweigh a lack of subject matter jurisdiction. Of course, I am of the opinion that where subject matter jurisdiction is present at the filing of a complaint and later lost, it may be retained under appropriate circumstances.

With respect to the factor of convenience, the Non-Debtor Defendants assert that whether the case is heard in another Tennessee federal court or in a Tennessee state court, Church JV, an Ohio limited partnership, will be inconvenienced. If the case is filed in state court, however, the

Non-Debtor Defendants claim that venue will likely be in McNairy or Hardin County, Tennessee, which will be more convenient for the Non-Debtor Defendants.

With respect to the factor of comity, the Non-Debtor Defendants echo my prior finding that all of Church JV's claims against the Non-Debtor Defendants involve solely state law issues for which there is no settled state law. The Non-Debtor Defendants assert that comity favors dismissal of the causes of action against them.

With respect to fairness, the Non-Debtor Defendants point out that Church JV makes no argument that it will suffer legal prejudice if the claims against the Non-Debtor Defendants are dismissed. They also reiterate that my prior experience with these parties has focused primarily on issues related to discharge.

Although it seems that the Non-Debtor Defendants will ultimately have to face the claims of Church JV in some court, they have made clear their preference that it not be in the bankruptcy court. They are certainly within their rights in making that decision. *See* 28 U.S.C. § 157(c)(1), and my decision in *In re Davis,* 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011). In my prior opinion, I said that the federal courts might retain jurisdiction notwithstanding the strong presumption in favor of the state courts deciding state issues if Church JV could show that it would suffer substantial prejudice if the case were dismissed. Church JV has not shown such prejudice. As the Non-Debtor Defendants correctly point out, the Tennessee savings statute protects Church JV in the event that their complaint is dismissed. While I do have substantial experience with these parties, I will not be the one to try this case in any event, and the experience that I have relates primarily to the discharge issues.

I disagree with the Non-Debtor Defendants' assertion that the district court may not withdraw the reference with respect to this adversary proceeding. The adversary proceeding was properly referred to the bankruptcy court in the first instance because federal bankruptcy jurisdiction was present when the complaint was filed. Subsequent events – the sale of the causes of action against the Non-Debtor Defendants by the Trustee – have changed that analysis. That is why I have analyzed the case using the *Schottenstein* factors. I believe that the district court *could* withdraw the reference and hear the trial of these causes of action, but I do not *recommend* that it do so for the following reasons:

(1) The factor of cost is neutral. The actual adjudication of the causes of action against the Non-Debtor Defendants is in its infancy. Discovery is not complete with respect to those causes of action. I am familiar with some, but certainly not all of the facts that would be necessary to a decision concerning those issues and, even if I were, the Non-Debtor Defendants have not consented to my conducting the trial. Since some other judge *must* conduct the trial, whatever costs there will be when these causes of action are brought before an appropriate tribunal will simply have to be borne by the parties.

(2) The factor of convenience is mixed, but probably weighs in favor of the district court retaining jurisdiction. Church JV's argument concerning convenience is based on the hope that I could try the case. That is not possible because of the Non-Debtor Defendants' lack of consent. The Non-Debtor Defendants argue that a state court action brought in McNairy or Hardin County, Tennessee would be more convenient for them. I note that the Debtors are the trustees, principals, or managers of each of the Trust and Corporate Defendants. The Debtors chose to file their bankruptcy petition in Memphis rather than in Jackson. They have retained Memphis counsel on

behalf of themselves and the Non-Debtor Defendants, indicating that Memphis must be somewhat convenient for them. The Individual Non-Debtor Defendants do not live in McNairy or Hardin County, Tennessee, and they, too, have retained Memphis counsel. Church JV is an Ohio limited partnership, but it has retained Texas counsel. I think that it is safe to say that air travel to Memphis is more convenient than to Selmer or Savannah, Tennessee. I think that on the whole, Memphis would be a more convenient venue for the parties, based upon their choice of counsel, than either Selmer or Savannah, but for other reasons, I do not think that convenience should be the determining factor.

(3) The factor of fairness is directed to the question of legal prejudice. Church JV has shown no legal prejudice that it will suffer if the causes of action against the Non-Debtor Defendants are dismissed. This factor thus poses no obstacle to dismissal.

(4) The factor of comity weighs strongly in favor of dismissal. As I said in my prior opinion, the issues raised by the complaint against the Non-Debtor Defendants are solely issues of state law about which there is no settled law. Out of respect for state law and the state courts, these issues ought to be decided by the Tennessee courts. Church JV counters that if these causes of action are dismissed, it will likely re-file in federal district court on the basis of diversity of citizenship where the court would decide state law issues under the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). I express no opinion about Church JV's plans, but only note that in the event that it were to re-file in federal district court, the court could certify uncertain questions of state law to the Tennessee Supreme Court for decision. *See* Tenn. R. App. P. 23.

RECOMMENDATION

For the foregoing reasons, I recommend that the motion of the Non-Debtor Defendants to dismiss Counts I, II, VI, VII and VIII of the Complaint be **GRANTED**.

cc David J. Cocke, Attorney for Debtors/Defendants
Bruce W. Akerly, Attorney for Plaintiffs
Michael P. Coury, Attorney for Non-Debtor Defendants