



**Dated: January 25, 2019**  
**The following is ORDERED:**

*Jennie D. Latta*

**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**WESTERN DIVISION**

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In re:  
PERFORMA ENTERTAINMENT  
REAL ESTATE, INC.,  
Debtor.

Case No. 10-26100-L  
Chapter 11

City of Memphis,  
Plaintiff,

v.  
Beale Street Development Corporation,  
Defendant.

Adv. Proc. No. 18-00242

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**ORDER DENYING MOTION FOR MANDATORY ABSTENTION**

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THE MOTION OF DEFENDANT, Beale Street Development Corporation (“BSDC”) came on for hearing on January 24, 2019. The motion asks that this bankruptcy court abstain from hearing the dispute raised in this adversary proceeding either pursuant to 28 U.S.C. § 1334(c)(1) (discretionary abstention) or § 1334(c)(2) (mandatory abstention). A timely objection was filed by the Plaintiff, City of Memphis (the “City”). BSDC asks that the court abstain from hearing this proceeding in favor of a pleading it filed in the Chancery Court of Shelby County, Tennessee,

titled, “In Rem Application to Adjudicate Status of Res” in a case styled, “In the Matter of: Purported Effective January 1, 2014 Assignment and Assumption of Lease, of Sublease, Merchant Subleases and Ancillary Property Located in Beale Street Historic District,” Case No. CH-18-1139-3, filed August 1, 2018. The Application seeks a determination that the transfer of possession and leasehold obligations and rights from the Debtor, Performa Entertainment Real Estate, Inc. (“PERE”), to the City is void because BSDC did not consent to the assignment. The transfer was made pursuant to an order of this bankruptcy court approving the assumption and assignment of a sublease between PERE and BSDC and related tenant leases, and pursuant to a court-approved settlement between PERE and the City, both of which were incorporated into PERE’s confirmed Amended Plan of Liquidation.

More than four years after the transfer, BSDC launched a collateral attack upon its validity by way of the Chancery Court action. The City responded by commencing this adversary proceeding on September 28, 2018, with its “Complaint for Injunctive Relief to Enforce Orders of the Court and Plan of Liquidation.” The City seeks to permanently enjoin BSDC from interfering in the implementation, execution, performance, and consummation of the Amended Plan of Liquidation, relying upon 11 U.S.C. §§ 105 and 1142(b).<sup>1</sup> Pursuant to the motion of the City, which was not opposed by BSDC, the court has issued a preliminary injunction preventing BSDC from pursuing the Chancery Court action pending trial in this proceeding.

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<sup>1</sup> Section 105 provides in pertinent part that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

Section 1142(b) provides that “[t]he court may direct the debtor and any other necessary part to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

Abstention is appropriate and required when a party files a timely motion “in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under [28 U.S.C. § 1334(a)], ... if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.” 28 U.S.C. § 1334(c)(2). For mandatory abstention to apply, a proceeding must:

1. be based on a state law claim or cause of action;
2. lack a federal jurisdictional basis absent the bankruptcy;
3. be commenced in a state forum of appropriate jurisdiction;
4. be capable of timely adjudication; and
5. be a non-core proceeding.

*In re Lowenbraun*, 463 F.3d 314, 320 (6th Cir. 2006), citing, *In re Dow Corning Corp.*, 86 F.3d 482, 497 (6th Cir. 1996). A simple comparison of the Complaint for Injunctive Relief with the Chancery Court In Rem Application shows that abstention is not required. The Complaint for Injunctive Relief seeks to enforce orders of the bankruptcy court related to the confirmation of a plan of liquidation in a Chapter 11 case. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S. Ct. 2195, 2205 (2009) (Bankruptcy Court plainly has jurisdiction to interpret and enforce its own prior orders.). While the In Rem Application attempts to avoid the appearance of interfering with the orders of the bankruptcy court, in substance it seeks a declaration that a transaction concerning property of the bankruptcy estate approved by the bankruptcy court after lengthy hearings is somehow void. Both the Complaint for Injunctive Relief and the In Rem Application seek interpretation of bankruptcy law, specifically the effect of section 365(f) of the Bankruptcy

Code upon an unexpired lease that requires approval for assumption and assignment, and the effect of confirmation of a bankruptcy plan upon creditors (which is specified at 11 U.S.C. § 1141(a)).<sup>2</sup> The present adversary proceeding is not based on a state law claim or cause of action; it is a core bankruptcy proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2) (core proceedings include, but are not limited to ... (A) matters concerning the administration of the estate; ... (L) confirmations of plans; (M) orders approving the use or lease of property.” Abstention is not required.

A district court (or bankruptcy court, if applicable) may abstain from hearing a proceeding “in the interest of justice, or in the interest of comity with State courts or respect for State law.” 28 U.S.C. § 1334(c)(1); *In re Premiere Hotel Dev. Group*, 270 B.R. 243, 255-56 (Bankr. E.D. Tenn. 2002). The Complaint for Injunctive Relief asks this bankruptcy court to interpret bankruptcy law and its own orders. No question of comity or respect for state law is raised by the

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<sup>2</sup> Section 365(f) provides (1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if— (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

11 U.S.C. § 1141(a) provides in pertinent part that “the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Complaint because it is based exclusively on questions of bankruptcy law. Abstention is not appropriate.

For the foregoing reasons, the Motion for Mandatory Abstention is **DENIED**.

cc: Debtor  
Attorney for Debtor  
Plaintiff  
Attorney for Plaintiff  
Defendant  
Attorneys for Defendant