IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

IN RE: TURNER GRAIN MERCHANDISING, INC., **Case No. 2:14-bk-15687J**
(Chapter 7)

Debtor.

TURNER GRAIN MERCHANDISING, INC. **PLAINTIFF**

VS. **AP No. 2:14-ap-01112**

ZERO GRADE FARMS, A PARTNERSHIP, d/b/a ISBELL FARMS; MARK ISBELL, INDIVIDUALLY; CHRIS ISBELL, INDIVIDUALLY; SHANE ISBELL, INDIVIDUALLY; JUDY ISBELL, INDIVIDUALLY; K&K FARM SERVICE, INC., ALSO d/b/a K&K FARM SERVICES; DON L. KITTLER, JR., INDIVIDUALLY; EDWARD SCHAFER & SONS, A PARTNERSHIP; RONALD SCHAFER, INDIVIDUALLY; DEANNE SCHAFER, INDIVIDUALLY; CLIFFORD SCHAFER, INDIVIDUALLY; RACHEL SCHAFER, INDIVIDUALLY; ROGER SCHAFER, INDIVIDUALLY; PAMELA SCHAFER, INDIVIDUALLY; DONALD SCHAFER, INDIVIDUALLY; DONNA SCHAFER, INDIVIDUALLY; GARY HARDKE FARMS, A PARTNERSHIP; GARY HARDKE, INDIVIDUALLY; MELODIE HARDKE, INDIVIDUALLY; AND BIGFOOT AG, INC. **DEFENDANTS**

ORDER

The issues before the Court are whether the Court should abstain from hearing an action removed to this Court from the Circuit Court of Lonoke County, Arkansas, remand the removed action to the state court, or exercise jurisdiction over the removed action. The matter was heard on February 5, 2015. After the hearing, the Court took the matter under advisement. The issues have been fully briefed by the parties. For the reasons stated below, the Court will abstain and remand the removed action to the Circuit Court of Lonoke County, Arkansas. The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. BACKGROUND

A. State Court Lawsuit

On August 22, 2014, a Complaint was filed commencing a lawsuit (the **"State Court Lawsuit"**) in the Circuit Court of Lonoke County, Arkansas, Case No. 43CV-14-410. (Compl., AP Doc. Nos. 1-3, 1-4).[1] The Complaint was amended on October 20, 2014.[2] (Am. Compl., AP Doc. Nos. 1-55 to 1-57). There are twenty-two plaintiffs (the **"Farmer Plaintiffs")** and twenty defendants named in the Amended Complaint.

The Farmer Plaintiffs listed in the Amended Complaint included seventeen individuals: Mark Isbell, Chris Isbell, Shane Isbell, Judy Isbell, Jeremy Jones, Don L. Kittler, Jr., Edward Schafer, Ronald Schafer, Deanne Schafer, Clifford Schafer, Rachel Schafer, Roger Schafer, Pamela Schafer, Donald Schafer, Donna Schafer, Gary Hardke, and Melodie Hardke. (Am. Compl. ¶¶ 4-8, 10, 12-20, 22-23). All the individual plaintiffs are residents of the State of Arkansas. (Am. Compl. ¶¶ 4-8, 10, 12-20, 22-23). Three of the Farmer Plaintiffs are Arkansas partnerships, namely, Zero Grade Farms also d/b/a Isbell Farms, Edward Schafer & Sons, and Gary Hardke Farms. (Am. Compl. ¶¶ 3, 11, 21). The remaining two Farmer Plaintiffs are

[1] References to "AP Doc." shall refer to documents filed in the instant adversary proceeding, AP No. 2:14-ap-01112. References to "Bankr. Doc." shall refer to documents filed in the underlying bankruptcy case, Case No. 2:14-bk-15687.

[2] The State Court Lawsuit, as amended, is styled *Zero Grade Farms, A Partnership, also d/b/a Isbell Farms; Mark Isbell, Individually; Chris Isbell, Individually; Shane Isbell, Individually; Judy Isbell, Individually; Jeremy Jones, Individually; K & K Farm Service, Inc., also d/b/a K & K Farm Services; Don L. Kittler, Jr., Individually; Edward Schafer & Sons, A Partnership; Edward Schafer, Individually; Ronald Schafer, Individually; Deanne Schafer, Individually; Clifford Schafer, Individually; Rachel Schafer, Individually; Roger Schafer, Individually; Pamela Schafer, Individually; Donald Schafer, Individually; Donna Schafer, Individually; Gary Hardke Farms, A Partnership; Gary Hardke, Individually; Melodie Hardke, Individually; and Bigfoot Ag, Inc. vs. Agri-Petroleum Sales, LLC; Agribusiness Properties, LLC; Brinkley Truck Brokerage, LLC; Christopher Taylor, Individually; Coleman Duck Club, LLC; Coleman Transportation, LLC; Dale Bartlett, Individually; Ivory Rice, LLC; Jason T. Coleman, Individually; K.B.X., Inc.; LJTC, LLC; NEA Truck Brokers, LLC; Neauman Coleman, Individually; Neauman Coleman & Co – LLC; Rice America, Inc.; Rice Arkansas, Inc.; Turner Commodities, Inc.; Turner Grain Merchandising, Inc.; Turner North, LLC; and Turner Grain, Inc. d/b/a Turner Grain*. (Am. Compl. at 1-2). Although Jeremy Jones and Edward Schafer were both named individually in the Amended Complaint, they were not included in the style of the case on the Notice of Removal filed with this Court on November 24, 2014. (Notice of Removal, AP Doc. No. 1).

Arkansas corporations, K & K Farm Service, Inc. also d/b/a K & K Farm Services and Bigfoot Ag, Inc. (Am. Compl. ¶¶ 9, 24).

The twenty defendants include Jason T. Coleman, Dale Bartlett, Christopher Taylor, and Neauman Coleman, who are all individuals and residents of the State of Arkansas. (Am. Compl. ¶¶ 35, 39-40, 43). The defendants also include ten Arkansas limited liability companies, namely, Agri-Petroleum Sales, LLC; Agribusiness Properties, LLC; Ivory Rice, LLC; LJTC, LLC; Neauman Coleman & Co – LLC; Turner North, LLC; Brinkley Truck Brokerage, LLC; Coleman Duck Club, LLC; Coleman Transportation, LLC; and NEA Truck Brokers, LLC. (Am. Compl. ¶¶ 25-29, 32, 36-38, 42). Four of the remaining defendants are corporations organized under the laws of the State of Arkansas, including Rice America, Inc.; Rice Arkansas, Inc.; K.B.X., Inc.; and Turner Commodities, Inc. (Am. Compl. ¶¶ 30-31, 41, 44).

Also named as defendants are Turner Grain Merchandising, Inc., and Turner Grain a/k/a Turner Grain, Inc. (Am. Compl. ¶¶ 33-34). Turner Grain Merchandising, Inc., is described in the Amended Complaint as an Arkansas corporation. (Am. Compl. ¶ 34). Turner Grain a/k/a Turner Grain, Inc., is identified as "a business operated by Dale Bartlett and Jason Coleman with its principal offices at 411 North Main, Brinkley, AR 72021." (Am. Compl. ¶ 33). The phrase "**TG Entity"** will be used to refer to the entity described by the Amended Complaint as "Turner Grain a/k/a Turner Grain, Inc." The Farmer Plaintiffs allege that because neither "Turner Grain" nor "Turner Grain, Inc." was a licensed corporation engaged to do business in Arkansas, the TG Entity was actually a partnership between individuals including Dale Bartlett and Jason Coleman. (Am. Compl. ¶ 70).

The Farmer Plaintiffs are all rice farmers. (Am. Compl. ¶ 1). In the Amended Complaint, the Farmer Plaintiffs allege they, or certain of their entities, conducted business with an unincorporated entity, the TG Entity, which acted as the broker between the Farmer Plaintiffs as sellers of grain and K.B.X., Inc. (**"KBX"**) as the purchaser of grain. (Am. Compl. ¶¶ 66-68, 87-90). Specifically, the Farmer Plaintiffs assert that the TG Entity and KBX "created a business practice wherein KBX would notify [the TG Entity] of its guaranteed and unilateral offer to purchase rice from any farmer or other entity that [the TG Entity] could broker," that the TG Entity would then "contact potential sellers of rice to inform them of the daily offer," and that "[i]f a seller of rice wished to accept KBX's unilateral offer, [the TG Entity] would immediately call KBX to inform them of the acceptance of the unilateral offer." (Am. Compl. ¶¶ 49, 52-53). The Farmer Plaintiffs further assert that "[o]nce the seller completed his obligations under the contract, KBX used [the TG Entity] as its payment agent to pay the seller of rice pursuant to the agreed upon contract," but that the TG Entity would have to wait for KBX to deliver funds to it before it could pay the seller. (Am. Compl. ¶¶ 56, 59).

The Farmer Plaintiffs also allege in the Amended Complaint that they, or certain of their entities, agreed to sell and deliver grain to KBX with the TG Entity acting as broker and as agent for KBX. (Am. Compl. ¶¶ 65-68). The Farmer Plaintiffs contend KBX owes them for rice they sold to KBX through the TG Entity, and that the amount owed to the Farmer Plaintiffs is the amount due for the rice less any commission and costs owed to the TG Entity. (Am. Compl. ¶ 91).

Additionally, the Farmer Plaintiffs allege in the Amended Complaint that KBX "knew of the financial problems and questionable activities" of defendants "Jason Coleman, Dale Bartlett and Neauman Coleman, through Agri-Petroleum Sales, LLC; Agribusiness Properties,

LLC; Brinkley Truck Brokerage, LLC; Coleman Transportation, LLC; Ivory Rice, LLC; LJTC, LLC; NEA Truck Brokers, LLC; Turner Grain Merchandising, Inc.; Turner Commodities, Inc.; Coleman Duck Club, LLC; Turner North, LLC; Rice Arkansas, Inc.; Rice America, Inc.; Neauman Coleman & Co – LLC; and Turner Grain, Inc. d/b/a Turner Grain" (referring to the entities together as the "Alter Egos"), but failed to inform the Farmer Plaintiffs of the financial problems. (Am. Compl. ¶¶ 92-94). The Amended Complaint also alleges that the "Alter Egos" are "affiliated entities by common ownership, common control, or other interrelated activities." (Am. Compl. ¶ 104).

In the State Court Lawsuit, the Farmer Plaintiffs assert nine causes of action against the defendants: (1) breach of contract by KBX in failing to fulfill its obligations under the contracts with the Farmer Plaintiffs for rice it agreed to purchase through its broker, the TG Entity; (2) alternatively, breach of contract by all other defendants under the alter ego theory for failure to fulfill their obligations under the contracts with the Farmer Plaintiffs; (3) conversion for the value of the rice defendants received with "actual or constructive knowledge" that the Farmer Plaintiffs would not be paid; (4) fraud through false representations made to induce the Farmer Plaintiffs to enter the contracts; (5) theft by deception in the defendants' dealings with the Farmer Plaintiffs; (6) violation of the Arkansas Deceptive Trade Practices Act; (7) civil conspiracy; (8) declaratory judgment as to whether title to the rice passed from the farmers to the end users of the rice or remains with the Farmer Plaintiffs; and (9) unjust enrichment. (Am. Compl. ¶¶ 108-61).

The Farmer Plaintiffs seek monetary damages, including punitive damages, against all defendants; the imposition of a lien[3] on the commodities the Farmer Plaintiffs delivered to the defendants even if the defendants sold the commodities to third parties; an accounting from the defendants of funds received and disgorgement of money and property in the possession or control of the defendants arising from allegations of the Amended Complaint; a restraining order prohibiting the defendants from disposing of any records, receipts, or written documentation pertaining to the transactions related to the State Court Lawsuit; return of the property; imposition of a lien on rice delivered no matter where it has been transported; and damages pursuant to the Uniform Commercial Code. (Am. Compl. ¶¶ 162-71). The Farmer Plaintiffs also seek a declaration that those in possession of the rice are not bona fide purchasers and that the Farmer Plaintiffs are entitled to reclaim the rice. (Am. Compl. ¶ 170). The Farmer Plaintiffs also demand a trial by jury. (Am. Compl. ¶ 172).

B. Bankruptcy Proceedings

On October 23, 2014, Turner Grain Merchandising, Inc., one of the defendants to the State Court Lawsuit, filed for protection under the provisions of Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Petition was filed by Kevin P. Keech, as the court appointed receiver for the debtor.[4] (Petition, Bankr. Doc. No. 1). On the petition page, under "All Other Names used by the Debtor in the last 8 years" the petitioner listed "DBA Turner Grain, Inc."[5]

[3] At the hearing, the Farmer Plaintiffs stated that while they once sought a lien on the grain, which had been loaded on barges at the time the Amended Complaint was filed, the grain has since been shipped, and, therefore, the Farmer Plaintiffs are left with seeking monetary damages instead of a lien. (Tr. at 28-29, Feb. 5, 2015).

[4] Mr. Keech was appointed receiver of Turner Grain Merchandising, Inc. on September 11, 2014, by the United States District Court for the Eastern District of Arkansas in Case No. 2:14-CV-111-JM, which case was referred to this Court on January 27, 2015, and is currently pending as AP No. 2:15-ap-01008.

[5] The Farmer Plaintiffs' use of the names Turner Grain Merchandising, Inc. and Turner Grain a/k/a Turner Grain, Inc. in the Amended Complaint and the receiver's reference to Turner Grain Merchandising Inc. as also doing

(Petition at 1, Bankr. Doc. No. 1). The term "**Debtor**" will refer to **"**Turner Grain Merchandising, Inc." as well as "Turner Grain Merchandising, Inc. DBA Turner Grain, Inc." as listed on the Bankruptcy Petition.

On November 24, 2014, a Notice of Removal was filed by the Debtor removing the State Court Lawsuit to this Court. (Notice of Removal, AP Doc. No. 1). On December 17, 2014, the Farmer Plaintiffs filed a Motion for Determination of Abstention and in the Alternative to Remand the Removal of the State Court Case (Mot. for Abstention, AP Doc. No. 8) and brief in support of same (Br. in Supp. Mot. for Abstention, AP Doc. No. 9), asking this Court to abstain or remand the State Court Lawsuit to the Circuit Court of Lonoke County, Arkansas. On December 31, 2014, KBX filed a response and objection to the motion, requesting this Court deny the motion and hear the State Court Lawsuit. (KBX Resp., AP Doc. No. 34).

On January 21, 2015, the Debtor also filed a response to the motion. (Debtor Resp., AP Doc. No. 38). Interestingly, although the Debtor was the party removing the State Court Lawsuit to this Court, the Debtor stated in its response that it had "determined the best course of action at this time [was] to allow remand of the [State Court Lawsuit] back to the Circuit Court for Lonoke County" as the Debtor and Farmer Plaintiffs had agreed that after remand, the Farmer Plaintiffs would voluntarily nonsuit the Debtor from the State Court Lawsuit. (Debtor Resp. ¶¶ 3-4, AP Doc. No. 38). It is not clear if the "Debtor" in this agreement was meant to be only Turner Grain Merchandising, Inc., or Turner Grain Merchandising, Inc., as well as Turner Grain Merchandising, Inc. d/b/a Turner Grain, Inc.

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business as Turner Grain, Inc. on the bankruptcy petition make it difficult to determine the true identities of the entities involved.

In its response KBX argues that this Court has "arising under" or "arising in" jurisdiction and the State Court Lawsuit is a core proceeding. The Farmer Plaintiffs argue that the State Court Lawsuit is not a core proceeding and that this Court must mandatorily abstain under 28 U.S.C. § 1334(c)(2) and remand the case to the Circuit Court of Lonoke County, Arkansas. In the alternative, the Farmer Plaintiffs argue that permissive abstention is appropriate under 28 U.S.C. § 1334(c)(1) as is remand under 28 U.S.C. § 1452(b).

II. JURISDICTION

This Court has jurisdiction over the removed action. Section 1452(a) of title 28 of the United States Code provides that a "party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a) (2012). Section 1334(b) of title 28 provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (2012). District courts may refer these proceedings to bankruptcy judges pursuant to 28 U.S.C. § 157(a) (2012). In Arkansas, the United States District Courts for the Eastern and Western Districts of Arkansas have referred all cases and proceedings arising under title 11 of the United States Code or arising in or related to a case under title 11 to the bankruptcy judges for the districts as provided in 28 U.S.C. § 157(a). E.D., W.D. Ark. R. 83.1 I.

A proceeding "arises under" title 11 of the United States Code "if a claim asserted is created by or based on a provision of the bankruptcy code." *Frelin v. Oakwood Homes Corp.*, 292 B.R. 369, 376 (Bankr. E.D. Ark. 2003) (citing *Nat'l City Bank v. Coopers & Lybrand*, 802 F.2d 990, 994 (8th Cir. 1986)). A proceeding "arises in" a case under title 11 of the United

States Code "if it is not based on any right expressly created by the bankruptcy code but has no existence outside the bankruptcy case." *Id*. at 377 (citing *In re Chambers*, 125 B.R. 788, 793 (Bankr. W.D. Mo. 1991) (citing *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding is "related to" a case under title 11 of the United States Code if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action and which in any way impacts upon the handling and administration of the bankrupt estate." *Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir. 1987) (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

Proceedings that "arise under" the bankruptcy code or "arise in" a bankruptcy case are classified as core proceedings, and proceedings that are merely "related to" the bankruptcy case are classified as noncore proceedings. 28 U.S.C. § 157(b)-(c); *C & B, L.L.C. v. Grubbs Emergency Servs., Inc. (In re Grubbs Constr. Co.)*, 305 B.R. 476, 481 (Bankr. W.D. Ark. 2003) (citing *Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773-74 (8th Cir. 1995)).

The Farmer Plaintiffs argue that the State Court Lawsuit does not "arise under" or "arise in" the bankruptcy case, but rather is merely "related to" the bankruptcy case, as the outcome could conceivably have an effect on the estate being administered. (Br. in Supp. Mot. for Abstention at 5-6, AP Doc. No. 9). The Farmer Plaintiffs argue that the State Court Lawsuit is therefore a noncore proceeding. They further state that all the causes of action asserted in the State Court Lawsuit are based on Arkansas statutes or Arkansas common law. (Br. in Supp. Mot. for Abstention at 3, AP Doc. No. 9). At the hearing, the Farmer Plaintiffs explained that the purpose of the State Court Lawsuit is to determine whether a debt exists and who incurred it.

(Tr. at 9).[6] They further explained that the primary focus of the State Court Lawsuit is to determine the liability of KBX and nondebtor individuals. (Tr. at 10).

KBX argues that the claims in the State Court Lawsuit "arise under" or "arise in" the bankruptcy case and are therefore core proceedings because they involve a determination of whether certain rights to payment and contract rights are property of the Debtor's bankruptcy estate.[7] (KBX Resp. at 8, AP Doc. No. 34). KBX explains that the Farmer Plaintiffs allege in the State Court Lawsuit that an agency relationship existed between KBX and "Turner Grain."[8] (KBX Resp. at 7, AP Doc. No. 34). Because of this purported agency relationship, the Farmer Plaintiffs allege certain contracts were not contracts between "Turner Grain" and the Farmer Plaintiffs, but rather, were contracts between KBX and the Farmer Plaintiffs, and that the Farmer Plaintiffs are therefore entitled to payment from KBX on those contracts. (KBX Resp. at 7, AP Doc. No. 34). KBX argues that accordingly, the Farmer Plaintiffs are seeking a determination of the Farmer Plaintiffs' right to payment under the contracts, which requires a determination of "Turner Grain's" right to payment under the contracts. (KBX Resp. at 8, AP Doc. No. 34). KBX argues that such a determination would be a core proceeding because it involves a determination of what is property of the estate. (KBX Resp. at 8, AP Doc. No. 34).

The Court understands but disagrees with KBX's argument that the claims in the State Court Lawsuit arise under or arise in the bankruptcy case. In the State Court Lawsuit, the

[6] "Tr." refers to the transcript of the hearing held before this Court on February 5, 2015 on the Farmer Plaintiffs' Motion for Determination of Abstention and in the Alternative to Remand the Removal of the State Court Case.

[7] Proceedings to determine whether property is property of the bankruptcy estate are core proceedings. *See, e.g., All Am. Laundry Serv. v. Ascher (In re Ascher)*, 128 B.R. 639, 643 (Bankr. N.D. Ill. 1991) (citing *Heritage Bremen Bank & Trust Co. v. Chicago Cement Co., Inc. (In re Chicago Cement Co.)*, 1990 WL 168950 (N.D. Ill. 1990)).

[8] In KBX's Response, "Turner Grain" is defined to be the Debtor, Turner Grain Merchandising, Inc., as opposed to the unincorporated entity referenced by the Farmer Plaintiffs in their Amended Complaint.

Farmer Plaintiffs bring claims against the defendants for breach of contract, conversion, fraud, theft by deception, violation of the Arkansas Deceptive Trade Practices Act, civil conspiracy, declaratory judgment, and unjust enrichment. None of these asserted claims are created by or based on a provision of the bankruptcy code, and, therefore, do not "arise under" the bankruptcy code. Likewise, the claims in the removed action are not dependent on the existence of a bankruptcy case; they existed prior to the bankruptcy and could continue to exist outside of the bankruptcy case. Therefore, they do not "arise in" the bankruptcy case. Although the claims in the State Court Lawsuit do not arise under the bankruptcy code or arise in the Debtor's bankruptcy case, the outcome of the State Court Lawsuit could conceivably have an effect on the Debtor's bankruptcy estate. The outcome could alter the Debtor's rights and liabilities and could affect the administration of the bankruptcy estate. This Court therefore has "related to" jurisdiction over the State Court Lawsuit and the State Court Lawsuit is a noncore proceeding. Having determined that the Court has jurisdiction over the removed action, it must next determine whether it should abstain from hearing the matter or remand the case to the Circuit Court for Lonoke County, Arkansas.

III. ABSTENTION AND REMAND

Abstention is governed by 28 U.S.C. § 1334(c). There are two types of abstention: mandatory and permissive. A split of authority divides the courts regarding whether abstention applies to removed cases. One view is that "abstention does not apply to a removed case because there is no parallel proceeding in state court from which to abstain (because the proceeding has been removed to federal court)." *Frelin*, 292 B.R. at 380 (discussing *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1010 (9th Cir. 1997)). However, this Court will follow the reasoning in *Frelin*, which held that the abstention

provisions continue to apply to removed cases. *Id*. at 381; *see also In re Grubbs Constr. Co.*, 305 B.R. at 482-83 (declining to follow the line of cases holding that abstention does not apply to removed cases). The Court will also evaluate whether the State Court Lawsuit should be remanded to the Circuit Court for Lonoke County, Arkansas. Remand is governed by 28 U.S.C. § 1452(b).

A. Mandatory Abstention

Section 1334(c)(2) of title 28 of the United States Code governs mandatory abstention. It provides:

> Upon timely motion of a party 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 this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2) (2012). Stated differently, this Court *must* abstain from hearing the State Court Lawsuit if:

> (1) a timely motion is made; (2) the claim or cause of action is based upon state law; (3) the claim or cause of action is 'related to' a bankruptcy case, but did not 'arise in' or 'arise under' the bankruptcy case; (4) such action could not have been commenced in federal court absent § 1334 jurisdiction; (5) such action is commenced in state court; and (6) such action can be timely adjudicated in state court.

In re Grubbs Constr. Co., 305 B.R. at 481 (quoting *Frelin*, 292 B.R. at 381 (citing *Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325, 333 n. 14 (8th Cir. 1988))). The moving party has the burden of proving that abstention is required under Section 1334(c)(2). *Frelin*, 292 B.R. at 381 (citing *All Am. Laundry Serv. v. Ascher (In re Ascher)*, 128 B.R. 639, 644 (Bankr. N.D. Ill. 1991)).

The Farmer Plaintiffs argue that all elements of Section 1334(c)(2) are met and this Court must abstain from hearing the State Court Lawsuit. (Br. in Supp. Mot. for Abstention at 8, AP Doc. No. 9). KBX argues that mandatory abstention is not warranted because the second, third, and fourth elements are not met. In addition to arguing that the claims "arise under" or "arise in" the bankruptcy case, KBX argues that because the Farmer Plaintiffs seek a declaration that title to the rice was not transferred from the plaintiffs, but remained the property of the plaintiffs, the State Court Lawsuit may potentially involve application of the "Clear Title Provision" of the Federal Food Security Act of 1985, 7 U.S.C. § 1631(e). (KBX Resp. at 9, AP Doc. No. 34). Because of the potential application of this federal act, KBX argues the State Court Lawsuit could have been commenced or removed to federal court based upon federal question jurisdiction, and, consequently, the matter is not based solely on state law. (KBX Resp. at 9-10, AP Doc. No. 34). At the hearing, the Farmer Plaintiffs reiterated that their lawsuit is based only on state law. They further explained that at the time the State Court Lawsuit was filed, they claimed a lien on rice loaded on barges docked in West Memphis, Arkansas, and that the rice has since been shipped to unknown destinations. Therefore, the Farmer Plaintiffs no longer claim a lien, but seek monetary damages instead. (Tr. at 7, 28-29).

The Court finds that four of the six elements for mandatory abstention are easily met in this case. The first element is met as there is no dispute that the motion to abstain was made in a timely manner. It was filed on December 17, 2014, twenty-three days after the matter was removed to this Court on November 24, 2014. The third element is also met as stated in Part II, above, as the State Court Lawsuit is "related to" the bankruptcy case, but did not "arise under" the bankruptcy code, or "arise in" the bankruptcy case. The fifth and sixth elements are

likewise satisfied as the State Court Lawsuit was unquestionably commenced in state court and there was no dispute that the State Court Lawsuit could be timely adjudicated in state court.

As to the remaining two elements that the claim or cause of action is based upon state law and the action could not have been commenced in federal court absent Section 1334 jurisdiction, the analysis is less clear. On its face, the Amended Complaint does not refer to a federal statute or other federal law. KBX cites the case of *Cullipher v. Lindsey Rice Mill, Inc.*, 706 F. Supp. 35 (W.D. Ark. 1989), for the proposition that federal question jurisdiction exists where 7 U.S.C. § 1631(e)[9] must be applied to determine if there is a federally created security interest in crops. In *Cullipher*, however, the plaintiffs, who initiated the action in federal court,

[9] 7 U.S.C. § 1631(e) provides:

> (e) Purchases subject to security interest. A buyer of farm products takes subject to a security interest created by the seller if-- (1)(A) within 1 year before the sale of the farm products, the buyer has received from the secured party or the seller written notice of the security interest organized according to farm products that-- (i) is an original or reproduced copy thereof; (ii) contains, (I) the name and address of the secured party; (II) the name and address of the person indebted to the secured party; (III) the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and (IV) a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable, crop year, and the name of each county or parish in which the farm products are produced or located; (iii) must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated and transmitted, to reflect material changes; (iv) will lapse on either the expiration period of the statement or the transmission of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first; and (v) contains any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest; and (B) the buyer has failed to perform the payment obligations, or (2) in the case of a farm product produced in a State that has established a central filing system-- (A) the buyer has failed to register with the Secretary of State of such State prior to the purchase of farm products; and (B) the secured party has filed an effective financing statement or notice that covers the farm products being sold; or (3) in the case of a farm product produced in a State that has established a central filing system, the buyer-- (A) receives from the Secretary of State of such State written notice as provided in subsection (c)(2)(E) or (c)(2)(F) that specifies both the seller and the farm product being sold by such seller as being subject to an effective financing statement or notice; and (B) does not secure a waiver or release of the security interest specified in such effective financing statement or notice from the secured party by performing any payment obligation or otherwise.

7 U.S.C. § 1631(e) (2012).

specifically alleged that 7 U.S.C. § 1631 created a security interest in their crops. *Cullipher*, 706 F. Supp. at 37 n. 2. Here, the Farmer Plaintiffs do not argue they have a security interest in the grain under 7 U.S.C. § 1631, or any other federal statute, and have repeatedly insisted that the State Court Lawsuit involves only state law claims. For this reason, the second and fourth elements of mandatory abstention may likely be met in this case. The Court need not decide the issue, however, because for the reasons stated below, the Court will permissively abstain from hearing the State Court Lawsuit.

B. Permissive Abstention and Remand

Section 1334(c)(1) of title 28 of the United States Code governs permissive abstention. It provides: "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1) (2012). In determining whether permissive abstention is appropriate, courts examine the following factors:

> (1) the effect or lack thereof on the efficient administration of the estate if the court recommends abstention;
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> (2) the extent to which state law issues predominate over bankruptcy issues;
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> (3) the difficult or unsettled nature of the applicable law;
>
> (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court;
>
> (5) the jurisdictional basis, if any, other than Section 1334 of title 28 of the United States Code;
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> (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
>
> (7) the substance rather than the form of an asserted "core" proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden on the bankruptcy court's docket;

(10) the likelihood that the commencement of the proceeding involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence of nondebtor parties in the proceeding.

Frelin, 292 B.R. at 383 (quoting *Williams v. Citifinancial Mortg. Co. (In re Williams)*, 256 B.R. 885, 894 (B.A.P. 8th Cir. 2001)). In addition, where most of the factors for mandatory abstention are met, '"bankruptcy courts should give careful consideration whether it would be appropriate to exercise their discretion to abstain [permissively] under section 1334(c)(1)."' *In re Titan Energy, Inc.*, 837 F.2d at 333 n. 14 (quoting *In re Futura Indus., Inc.*, 69 B.R. 831, 834 (Bankr. E.D. Pa. 1987)).

Section 1452(b) of title 28 of the United States Code governs remand. It provides: "[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." 28 U.S.C. § 1452(b) (2012). In evaluating whether equitable remand is proper under Section 1452(b), the Court uses nearly the same analysis used to determine whether permissive abstention is appropriate. *Frelin*, 292 B.R. at 383 (the analysis is "virtually identical"). In addition to the twelve permissive abstention factors, the bankruptcy court should also consider: "(1) whether remand serves principles of judicial economy; (2) whether there is prejudice to unremoved parties; (3) whether remand lessens the possibilities of inconsistent results; and (4) whether the court where the action originated has greater expertise." *Id*. at 383-84.

The Farmer Plaintiffs argue the factors weigh in favor of abstention and remand for the following reasons. Remand will not negatively affect the efficient administration of the estate, but may in fact assist administration if the Farmer Plaintiffs are successful and their claims are paid by nondebtor parties. There are no bankruptcy issues and accordingly, state court issues predominate. The Farmer Plaintiffs will pursue their claims to judgment in state court and if the claims are not satisfied by nondebtor defendants they will then present their claims to this Court for administration. The burden on this Court would be minimized if the case is remanded. The plaintiffs have demanded a jury trial, and there are claims against several nondebtor defendants. (Br. in Supp. Mot. for Abstention at 10-11, AP Doc. No. 9).

KBX argues that permissive abstention is not warranted because the State Court Lawsuit ultimately involves the determination of what is property of the estate, a core proceeding; the issues are not too complex for this court to determine; the plaintiffs are seeking to circumvent the bankruptcy process; and several other state court lawsuits have been removed to this Court in connection with the Debtor's bankruptcy filing. (KBX Resp. at 11-12, AP Doc. No. 34).

The Court finds that taken together, the factors weigh in favor of abstention and remand. Specifically, the Court finds that while the outcome of the State Court Lawsuit may have an effect on the administration of the bankruptcy estate (thus giving the Court "related to" jurisdiction), abstention will not affect the *efficient* administration of the bankruptcy estate, and as pointed out by the Farmer Plaintiffs, may aid administration if their claims are paid by nondebtor defendants. Furthermore, the Court finds that state law issues predominate over bankruptcy issues. The Farmer Plaintiffs bring nine causes of action in the State Court Lawsuit, all of which they insist exist solely under Arkansas law. In addition, while the nature of the applicable law is not difficult or unsettled, the state court is the better forum to adjudicate state law issues. Likewise, as stated

above, it is questionable whether the federal courts have jurisdiction to hear the State Court Lawsuit, absent Section 1334(b). Moreover, the State Court Lawsuit is not a core proceeding, as stated in Part II, above.

Additionally, abstention is supported by the fact that the state court may hear and decide the issues involved in the State Court Lawsuit, while enforcement of any state court decision, at least to the extent it involves the Debtor or property of the bankruptcy estate, may be left to this Court. The Farmer Plaintiffs have conceded they will present their claims to this Court for enforcement in the event the claims are to be paid by the Debtor. Further, the Court does not find that commencement of the State Court Lawsuit involved forum shopping or misconduct by the plaintiffs as the action was commenced in state court pre-petition, and was only removed to this Court by the Debtor post-petition. The Farmer Plaintiffs have also requested a trial by jury, and jury trials are atypical in bankruptcy proceedings. Additionally, the State Court Lawsuit, which names twenty-two plaintiffs and twenty defendants, involves numerous nondebtor parties. It is also noteworthy that the Debtor, who removed the State Court Lawsuit to this Court, did not object to abstention due to an agreement the Debtor and Farmer Plaintiffs had at one time to voluntarily nonsuit the "Debtor" from the matter in the event the matter was remanded to the state court.

This Court acknowledges the existence of several other lawsuits removed from various state courts to this Court in connection with the Debtor's bankruptcy case. [10] This factor weighs

[10] Included in the various state court actions removed to this Court in connection with the Debtor's bankruptcy case is an interpleader action originally filed in the Circuit Court of Lonoke County, Arkansas, by KBX and styled as *K.B.X., Inc. v. Zero Grade Farms, a Partnership, et al.*. The Debtor removed the case to this Court where the case is styled *Turner Grain Merchandising, Inc. v. KBX, Inc.* and assigned adversary proceeding number 2:14-ap-01115 (the "**Interpleader Action**"). In the Interpleader Action, KBX seeks to deposit funds in the registry of the Court arising out of invoices KBX owed to "Turner Grain, Inc., d/b/a Turner Grain." (Compl. for Interpleader ¶¶ 34, 62, 68, AP 2:14-ap-01115, Doc. No. 1-4).

against abstention and remand, as hearing all of the removed matters in one forum would serve the principles of judicial economy and lessen the possibilities of inconsistent results. Nevertheless, all of the factors taken as a whole weigh in favor of abstention and remand in this case. In addition, because most, if not all, of the factors for mandatory abstention are met in this case, the Court finds that abstention is proper. For all of these reasons, the Court finds that permissive abstention is appropriate under Section 1334(c)(1) as is remand under Section 1452(b).

IV. CONCLUSION

For the foregoing reasons, the Court concludes it should abstain from hearing the State Court Lawsuit and remand the State Court Lawsuit to the Circuit Court of Lonoke County, Arkansas. Accordingly, it is hereby

ORDERED that the Farmer Plaintiffs' Motion for Determination of Abstention and in the Alternative to Remand the Removal of the State Court Case is **GRANTED**, and this cause is hereby **REMANDED** to the Circuit Court of Lonoke County, Arkansas.

IT IS SO ORDERED.

Phyllis M. Jones
United States Bankruptcy Judge
Dated: 09/04/2015

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