

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

824 MARKET STREET
WILMINGTON, DE 19801
(302) 252-2925

August 23, 2004

William E. Steffes
Steffes, Vingiello &
McKenzie, LLC
3029 S. Sherwood Forest Blvd.
Suite 100
Baton Rouge, LA 70816

Robert R. Rainer
Rainer, Anding & McLindon
8480 Bluebonnet Blvd. Suite D
Baton Rouge, LA 70810

Attorneys for the Parishes of
Ascension and West Baton Rouge

Otha "Curtis" Nelson, Jr.
Louisiana Department of Revenue
P.O. Box 4064
Baton Rouge, LA 70821-4064

Attorney for the State of
Louisiana

Michael R. Lastowski
Duane Morris LLP
1100 North Market Street
Suite 1200
Wilmington, DE 19801

Neil P. Olack
Duane Morris LLP
1180 West Peachtree Street
Suite 700
Atlanta, Georgia 30309-3448

Special Counsel for BCP
Liquidating LLC

**Re: In re Borden Chemicals and Plastics Operating Limited
Partnership, et al.
Case No. 01-1268**

Dear Counsel:

This ruling is with respect to the motion for
modification of discharge injunction and abstention, or
alternatively, to transfer venue (Doc. # 2159) filed by the State

of Louisiana Department of Revenue ("LDOR").¹ For the reasons set forth below, the Court will grant LDOR's request to transfer venue.

On April 3, 2001 the Debtors filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et. seq.² LDOR filed its claims on August 15, 2002, in the amount of \$1,310,868.20 as unsecured priority claims for sales and use taxes allegedly owed for the period from January 1997 to December 1999. This Court entered its Findings of Facts, Conclusions of Law and Order Confirming the Third Amended Joint Plan of Liquidation ("the Plan") on February 5, 2003. The Plan provided for the dissolution of the Debtors and for the formation of BCP Liquidating L.L.C. ("BCP"). On June 11, 2003 BCP filed its objection to LDOR's \$1,310,868.20 claim. The instant motion was filed on August 11, 2003 and BCP's objection was filed on July 14, 2004.³

LDOR has requested this Court to "modify the discharge injunction and abstain from adjudicating only the tax claims arising under the tax laws of Louisiana" (Doc. # 2160 at

¹ The original motion, in addition to LDOR, was filed by the Parish of Ascension Sales & Use Tax Authority ("Ascension") and the Parish of West Baton Rouge, Department of Revenue ("WBR"). Ascension and WBR have settled their claims.

² Individual sections of the Bankruptcy Code will be cited herein as "§ ____".

³ BCP's delay in filing its objection was apparently the result of a failed effort of the parties to reach a settlement on the matter.

9.) Permissive abstention allows "a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, [to] abstain[] 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) (1993). There are several factors for courts to consider in determining whether to abstain from a proceeding. See 9 Collier on Bankruptcy ¶ 5011.02[1] (15th ed. rev. 2004) (setting forth ten factors for consideration).

As BCP correctly notes, however, section XII of the Plan provides for the retention of jurisdiction by this Court. The Plan specifically states:

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court will retain such jurisdiction over the Chapter 11 Cases after the Effective Date as is legally permissible, including jurisdiction to:

* * *

5. Decide or resolve any motions, adversary proceedings, contested or litigated matters and any other matters . . . that may be pending on the Effective Date or brought thereafter;

* * *

14. Determine matters concerning any state, local and federal Taxes in accordance with sections 346, 505 and 1146 of the Bankruptcy Code, including any Disputed Claims for any such Tax.

Plan, XII. at 49-51.

Abstention would not be appropriate in this case, since the Plan specifically provides for retention of jurisdiction by the bankruptcy court over matters such as the disputed LDOR claim.

In the alternative, LDOR has requested a transfer of venue to the Middle District of Louisiana. "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412 (1993) (emphasis added).

There is a strong presumption in favor of maintaining the plaintiff's chosen forum, specifically maintaining venue where the bankruptcy case is pending. Hechinger Investment Co. of Del., Inc. v. M.G.H. Home Improvement, Inc., (In re Hechinger Investment Co. of Del.), 288 B.R. 398, 402 (Bankr. D. Del. 2003) (citing Windsor Communications Group, Inc. v. Five Towns Stationery, Inc. (In re Windsor Communications Group, Inc.), 53 B.R. 293, 296 (Bankr. E.D. Pa. 1985)). "The burden of proof is on the party requesting the transfer." Hechinger, 288 B.R. at 402 (citing Windsor, 53 B.R. at 296).

In determining the appropriate venue, bankruptcy courts generally take the following eight factors into account:

- 1) the location of the plaintiff and defendant;
- 2) the ease of access to the necessary proof;
- 3) the availability of subpoena power for the unwilling witnesses;
- 4) the expense related to obtaining willing witnesses;

- 5) the enforceability of any judgment rendered;
- 6) the ability to receive a fair trial;
- 7) the state's interest in having local controversies decided within its borders, by those familiar with its law; and
- 8) the economics of the estate administration.

Hechinger, 288 B.R. at 402-03 (citing Southwinds Assocs., Ltd. v. Reedy (In re Southwinds Assocs., Ltd.), 115 B.R. 857, 862 (Bankr. W.D. Pa. 1990)).

I find that LDOR has satisfied its burden. The following factors, taken as a whole, support this finding: (1) the Debtors' principal place of business was in Louisiana and two of its three manufacturing facilities were located in Louisiana; (2) potential witnesses, including former employees of the Debtors, reside in Louisiana and would be beyond subpoena power if the case were to remain in Delaware; (3) while BCP points out that the Debtors' former president and former chief financial officer reside in Texas, I would simply note that Louisiana is obviously closer to Texas than Delaware; (4) the law applicable to the case is Louisiana tax law and a court sitting in Louisiana will likely have familiarity with some of the complexities of applying that law to the facts, i.e., the Debtors' manufacturing operations; (5) relevant evidence and documents are located in Louisiana; (6) all transactions that gave rise to the tax liabilities, including the sale and purchase of goods and/or services, occurred in Louisiana; and (7) this Court's docket is already overburdened and I am advised by the bankruptcy judge sitting in the Middle District of

Louisiana that an early trial date for this dispute is available.

BCP claims that venue should not be transferred because LDOR "could not find any case where a claims objection or other contested matter was transferred to a state or federal court." (Doc. # 2438 at 19.) I do not agree. For example, in In re Texaco Inc., 89 B.R. 382 (Bankr. S.D.N.Y. 1988), the court granted the motion to transfer venue of an objection to a proof of claim on facts strikingly similar to those here.

For the reasons set forth above, the Court will grant LDOR's motion. The attached order has been entered.

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter J. Walsh", with a long, sweeping horizontal line extending to the right.

Peter J. Walsh

PJW:ipm

Enc.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:)
) Chapter 11
BORDEN CHEMICALS AND PLASTICS)
OPERATING LIMITED PARTNERSHIP,) Case No. 01-1268 (PJW)
a Delaware limited partnership,)
et al.,)
)
Debtors.)

ORDER

For the reasons set forth in the Court's letter ruling of this date, the motion for modification of discharge injunction and abstention, or alternatively, to transfer venue (Doc. # 2159) is **GRANTED** to the extent that its dispute relating to the claim of the Louisiana Department of Revenue is transferred to the United States Bankruptcy Court for the Middle District of Louisiana.



Peter J. Walsh
United States Bankruptcy Judge

Dated: August 23, 2004