UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	CHAPTER 11
	:	(Jointly Administered)
IMMC LIQUIDATING ESTATE (f/k/a, IMMC CORPORATION)	:	
et al.	:	Case No. 08-11178 (KJC)
Debtors	:	
	:	
ROBERT F. TROISIO, as Liquidating, Trustee of IMMC CORPORATION, f/k/a IMMUNICON CORPORATION	:	Adv. Pro. No. 10-53063 (KJC)
Plaintiff,	:	
v.	:	
	:	
EDWARD L. ERICKSON, BYRON HEWETT, LEON TERSTAPPEN, JAMES L. WILCOX, ELIZABETH E. TALLETT, J. WILLIAM FREYTAG, ZOLA P. HOROVITZ, JAMES G. MURPHY, BRIAN GEIGER, JONATHAN COOL, and ALLEN J. LAUER,	:	Re: docket no. 35, 36
Defendants	:	

MEMORANDUM AND ORDER

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

Background

By Memorandum and Order dated December 29, 2011 (D.I. 33), I determined that this Court is without jurisdiction to decide the claims asserted in this adversary proceeding. *See Troisio v. Erickson (In re IMMC Corp.),* Adv. No. 10-53063, 2011 WL 6832900 (Bankr.D.Del. Dec. 29, 2011), *Shandler v. DLJ Merchant Bank, Inc. (In re Insilco Tech., Inc.)*, 330 B.R. 512 (Bankr.D.Del. 2005). Plaintiff, Robert F. Troisio, as Liquidating Trustee of IMMC Corporation

(the "Trustee"), asked this Court to transfer the adversary proceeding to the District Court for the Eastern District of Pennsylvania (the "E.D.Pa. Court") pursuant to 28 U.S.C. §1631, rather than dismiss it for want of jurisdiction. *See* Fed.R.Bankr.P. 7012(h)(3). In the December 29, 2011 Memorandum and Order, I invited the parties to file written submissions addressing the Trustee's transfer request. The parties filed their briefs on January 19, 2012 and oral argument on this limited issue was held on January 26, 2012.

Discussion

The issue before the Court is whether this Court can transfer the adversary proceeding to the E.D.Pa. Court pursuant to 28 U.S.C. §1631, which provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

The Trustee argues that transfer of this adversary proceeding under §1631 is appropriate because (i) the transfer is in the interests of justice to preserve valuable claims belonging to the Liquidating Trust that might otherwise be lost if they are deemed barred by the applicable statute of limitations, and to conserve time and judicial resources from initiating another action in the Eastern District of Pennsylvania; and (ii) the action could have been brought in the Eastern District of Pennsylvania based on diversity jurisdiction under 28 U.S.C. §1332.

In response, the Defendants argue that the Bankruptcy Court lacks authority to transfer the adversary proceeding under §1631 because it is not a "court" as defined in 28 U.S.C. §610.

Moreover, the Defendants argue that the action could not have been filed in E.D.Pa. Court because there is no basis for federal jurisdiction over the claims set forth in the adversary proceeding complaint (D.I. 1)(the "Complaint"). The Defendants argue that there is no federal question jurisdiction under 28 U.S.C. §1331 and no diversity of citizenship under 28 U.S.C. §1332 because complete diversity does not exist between the plaintiff and defendants.[1]

(1) "Courts" as defined in 28 U.S.C. §610

The Defendants contend that §1631 provides authority only to "courts" as defined in 28 U.S.C. §610 to transfer actions. Section 610 provides:

> As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade.

Bankruptcy courts are not included in the express language of 28 U.S.C. §610. The Defendants contend that the legislative history demonstrates Congressional intent to limit the transfer power of §1631, since an early draft of the proposed language allowed for a transfer between any two courts of the United States to cure defects in venue as well as jurisdiction; but "[t]he final version enacted by Congress is more narrow and permits transfer between any two federal courts, *as defined in 28 U.S.C. § 610 (1986)*, to cure a defect in jurisdiction, and eliminates any reference to a transfer to cure a defect in venue." Tayon, J., *The Federal Transfer Statute: 28 U.S.C. §1631,*

[1]The Defendants also argue that diversity jurisdiction is lacking because the Trustee failed to allege diversity jurisdiction in the Complaint. The Trustee's original Complaint asserted jurisdiction under 28 U.S.C. §1334(b) and, upon a determination of lack of jurisdiction under that statute, there exists authority in this Circuit suggesting that the Trustee should be permitted to amend his complaint to assert diversity jurisdiction. *Scattergood v. Perelman*, 945 F.2d 618, 627 (3d Cir. 1991)(remanding an action to allow the plaintiff to amend the complaint to allege diversity after the court dismissed the federal claims).

29 S.Tex.L.Rev. 189, 199 n. 58 (1987)(emphasis added).

The Defendants also claim that a review of the legislative history of 28 U.S.C. §610 likewise demonstrates Congressional intent to exclude bankruptcy courts from its definition of "courts." The "Historical and Statutory Notes" to 28 U.S.C. §610 advise that Congress amended §610 in 1978 by substituting *"district courts, and bankruptcy courts"* for the phrase *"and district courts"* (the "1978 Amendment").[2] However, due to extensions of this provision's effective date, the 1978 Amendment was valid for only a 12-day period (from June 28, 1984 to July 10, 1984) because a 1984 statute provided that the 1978 Amendment "shall not be effective."[3] These legislative gymnastics ultimately kept bankruptcy courts from express inclusion in §610, supporting the view that the failure to include bankruptcy courts in §610 was not an oversight, but a purposeful act.

The Trustee argues, however, that the Third Circuit has recognized a bankruptcy court's authority to transfer cases pursuant to §1631 in *In re Seven Fields Dev. Corp.*, 505 F.3d 237 (3d Cir. 2007), in which it wrote:

> [W]hen a civil action is filed with a district court (of which the bankruptcy court is a unit) with a want of jurisdiction the court shall in the interest of justice transfer the case to the court in which it could have been filed originally. Thus, if the bankruptcy clerk thought that the removal should have been to the district court, he almost certainly would have sent the removal notice to that court which then would have referred it back to the bankruptcy court pursuant to the general

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[2]28 U.S.C.A. §610 "Historical and Statutory Notes," referencing Pub.L. 95-598, Title II, §226, Nov. 6, 1978, 92 Stat. 2665 (emphasis added).

[3]Pub.L. 95-598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, provided that the effective date for the 1978 Amendment was April 1, 1984, later extended to June 28, 1984. *See* Pub.L. 98-249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub.L. 98-271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub.L. 98-299, § 1(a), May 25, 1984, 98 Stat. 214; Pub.L. 98-325, § 1(a), June 20, 1984, 98 Stat. 268. In 1984, P.L. 98-353, Title I, §113, July 10, 1984, 98 Stat. 343 *eliminated* the 1978 Amendment by substituting the language "shall not be effective" for "shall take effect on June 28, 1984."

referral order.

Seven Fields, 505 F.3d at 247 n.8. The foregoing language, however, appears as *dicta* in a footnote.[4] While *dicta* in the higher court's opinions is often instructive and persuasive, the exclusion of bankruptcy courts from the express language of §§1631 and 610, together with the legislative history discussed above, casts doubt about this Court's authority to transfer an action.

At the January 26, 2012 argument, anticipating that the Court might so conclude, the Trustee requested an opportunity to file a motion with the United States District Court for the District of Delaware seeking withdrawal of the reference of this adversary proceeding for the limited purpose of asking the District Court, invested with such authority under §1631, to transfer this adversary proceeding.

(2) Diversity Jurisdiction

The Defendants also argue that it is futile to transfer the adversary proceeding to another federal court due to lack of jurisdiction. However, the Trustee asserts that the Complaint could have been brought in the E.D.Pa. Court under 28 U.S.C. §1332(a)(1) because there is complete diversity between the plaintiffs and defendants, and the Complaint seeks damages in excess of $75,000.[5] The Trustee alleges that he is a citizen and resident of Delaware, while the Defendants

[4]The *Seven Fields* Court considered the appeal of a district court's decision not to remand a state court action, then dismissing the complaint. The appellant argued that the district court should have remanded the case to the state court because, among other things, the appellee had wrongfully removed the action from the state court directly to the bankruptcy court under 28 U.S.C. §1452(b). The Third Circuit held that 28 U.S.C. §1452(b) prevented the Third Circuit from reviewing an order remanding, or deciding not to remand, an action. *Seven Fields*, 505 F.3d at 247. The *Seven Fields* Court then wrote in a footnote that, if it had jurisdiction to review the matter, and if it vacated the district court and bankruptcy court opinions, the Third Circuit Court "had no doubt" that the erroneous removal could be corrected because the bankruptcy court would transfer the erroneously removed action to the district court pursuant to §1631. *Seven Fields,* 505 F.3d at 247 n.8.

[5]The Complaint seeks damages in excess of $250 million. (*See* Complaint, p.110).

are residents of Pennsylvania, California, Colorado, New York, New Jersey, and Virginia. *Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart Mgt., Inc.*, 316 F.3d 408, 410 (3d Cir. 2003) citing *Carden v. Arkoma Assocs.,* 494 U.S. 185, 187, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) ("Jurisdiction under 28 U.S.C. §1332(a)(1) requires complete diversity of the parties; that is, no plaintiff can be a citizen of the same state as any of the defendants.").

The Defendants contend that the Trustee is asserting the causes of action on behalf of the IMMC Liquidating Estate, which is a trust. (*See* Complaint, ¶8; Liquidating Estate Agreement, Art. 2.1, D.I. 316).[6] The Defendants argue that there is no diversity here pursuant to the Third Circuit's "dual trustee-beneficiary rule," which looks to the citizenship of both the trustee and the beneficiary in determining the citizenship of a trust. *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 205 (3d Cir. 2007). The "Beneficiaries" of the Liquidating Trust are defined in the Liquidating Estate Agreement as "each entity that holds an Allowed Claim or Existing Common Stock." (D.I. 316, §1.1(c)). The Defendants argue that the "holders of Existing Common Stock," includes several Defendants and, since those individuals are both on the plaintiff and defendant side of the action, complete diversity cannot possibly exist.[7]

The Trustee argues in response that diversity is satisfied pursuant to the United States

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[6]The "Fourth Amended Plan of Liquidation of IMMC Corporation, *et al.*, Under Chapter 11 of the Bankruptcy Code" (D.I. 269)(the "Plan") was confirmed by Order dated November 7, 2008. (D.I. 335). The Liquidating Estate Agreement dated October 31, 2008 (D.I. 316) was attached as Exhibit A to the Plan, and provided in Art. 2.1 "[T]he Debtors and the Liquidating Trustee, hereby create a trust as of the Effective Date, which is the Liquidating Estate contemplated by the Plan . . . ."

[7]The Plan defines "Existing Common Stock" as "the shares of the common stock of the Debtor IMMC issued and outstanding on August 29, 2008." (The Plan at 5). The Defendants assert that Brian Geiger, Byron Hewett, Elizabeth Tallet, J. William Freytag, Jonathan Cool and Zola Pl Horovitz, who were identified on the list of equity security holders filed with the chapter 11 petition in June 2008, fall within the definition of holders of "Existing Common Stock."

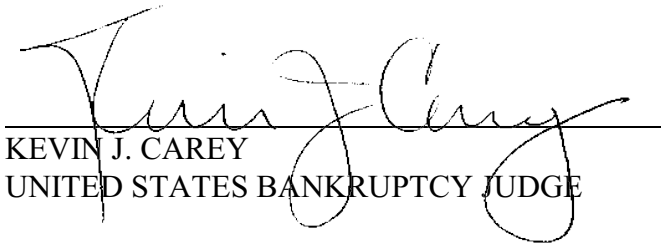
Supreme Court's decision *Navarro Savings Assoc. v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). The *Navarro* Court determined that "a trustee is a real party to the controversy when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Navarro*, 446 U.S. at 464 citing *Bullard v. City of Cisco, Tex.,* 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254 (1933). Such trustees are authorized to sue parties in their own right, without regard to the citizenship of the trust beneficiaries. *Navarro*, 446 U.S. 465-66. In *Emerald*, the Third Circuit Court of Appeals acknowledged that its duel trustee-beneficiary rule did not contradict the precedent of *Navarro*, writing: "*Navarro* is not implicated because it dealt with a situation in which the trustees brought the action in their own names, a situation different from that here in which the trust is the plaintiff." *Emerald*, 492 F.3d at 203.

The Liquidating Estate Agreement grants a number of rights and powers to the Trustee, including the right, power, privilege, and obligation to "accept, preserve, receive, collect, manage, transfer, invest, supervise, protect and liquidate the Liquidating Estate Assets in accordance with the Plan and this Agreement," and "sue, defend and participate, as a party or otherwise, in any judicial, administrative, arbitrative, or other proceeding relating to this Agreement, the Liquidating Estate or the Liquidating Estate Assets." (Liquidating Estate Agreement, D.I. 316, §3.11(b) and (n)). Accordingly, at this stage of the proceeding, it appears that this action falls within the *Navarro* rule rather than the *Emerald* dual trustee-beneficiary rule. Therefore, the Trustee argues that if he had leave to file an amended complaint, he could properly allege the existence of diversity jurisdiction in the E.D.Pa. Court.

Conclusion

Under these circumstances, there is sufficient cause to afford the Trustee a brief opportunity to seek withdrawal of the reference to the District Court for the District of Delaware for determination of whether the adversary proceeding should be transferred. Therefore, it is **ORDERED** that the Trustee's request for transfer of the adversary proceeding by this Court under 28 U.S.C. §1631 is **DENIED**, but it is further **ORDERED** that the Trustee shall have until **March 1, 2012** to file a motion to withdraw the reference related to this adversary proceeding, failing which, this adversary proceeding will be dismissed.

BY THE COURT:



KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: February 14, 2012

cc: Jason C. Powell, Esquire[8]

[8]Counsel shall serve a copy of this Memorandum and Order upon all interested parties and file a Certificate of Service with the Court.