SO ORDERED.
SIGNED this 28th day of April, 2025

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
CHIEF UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

CARICO CONSTRUCTION, INC.

Debtor

AL BLANKENSHIP ENTERPRISES, LLC

Plaintiff

v.

CARICO CONSTRUCTION, INC. and 9600, LLC

Defendants

Case No. 3:24-bk-31122-SHB
Chapter 7

Adv. Proc. No. 3:24-ap-3027-SHB

MEMORANDUM AND ORDER ON MOTION TO CONSOLIDATE ADVERSARY PROCEEDINGS AND MOTION FOR ABSTENTION AND/OR REMAND

This adversary proceeding was commenced by the Notice of Removal of *Al Blankenship Enterprises, LLC v. Carico Construction, Inc. and 9600, LLC*, No. 209016-2 ("ABE Lawsuit") from the Chancery Court for Knox County, Tennessee, filed by F. Scott Milligan, Chapter 7 Trustee ("Trustee") on October 18, 2024 [Doc. 1]. Presently before the Court are two motions,

both of which are supported by a brief as required by E.D. Tenn. LBR 7007-1(a): (1) the Motion to Consolidate Adversary Proceedings ("Motion to Consolidate") filed jointly by Plaintiff Al Blankenship Enterprises, LLC ("ABE") and the Trustee on December 27, 2024 [Docs. 10, 11], seeking to consolidate this adversary proceeding with *DRS Electric, LLC v. Carico Construction, Inc., 9600, LLC, Home Federal Bank of Tennessee, and Investor's Trust Company*, Adv. Proc. No. 3:24-ap-03026-SHB ("DRS Lawsuit"); and (2) the Motion for Abstention and/or Remand ("Motion to Abstain") filed by Defendant 9600, LLC ("9600") on January 3, 2025 [Docs. 14, 15[1]], asking the Court to abstain from hearing this adversary proceeding, to remand it back to the Knox County Chancery Court ("Chancery Court"), and to award it attorneys' fees pursuant to 28 U.S.C. § 1447(c).[2]

9600 timely filed its Opposition[3] to the Motion to Consolidate on January 17, 2025 [Doc. 17], and the Trustee and ABE timely filed their Objection to the Motion to Abstain with a supporting brief on January 24, 2025 [Docs. 19, 20]. Because the Motion to Consolidate cannot

[1] The Certificates of Service for the Motion to Abstain and the supporting brief do not comply with the requirements of E.D. Tenn. LBR 9013-3(b) because they do not "include a description of the paper served . . . and with respect to each person or entity being served . . . , the name [and] service address . . . ." Nevertheless, because ABE received actual service, as evidenced by its Objection filed on January 24, 2025 [Doc. 19], the deficiency is excused; however, all future documents filed by 9600 shall comply with the Local Rules of this Court.

[2] Subsection (c) provides in material part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 U.S.C. § 1447(c).

[3] Although E.D. Tenn. LBR 7007-1(a) requires an objection or response to "be supported by a brief setting forth the facts and the law in opposition to the motion, because 9600's Opposition to Motion to Consolidate Adversary Proceedings included authority and argument [Doc. 17], the Court excuses the failure of 9600 to file a separate brief.

be decided without first determining the Motion to Abstain, the Court will address them in that order.[4]

I. FACTUAL BACKGROUND

The Trustee relied on 28 U.S.C. §§ 1334 and 1452 and Federal Rule of Bankruptcy Procedure 9027 for the removals. The removed lawsuits were initiated in state court by unpaid subcontractors arising from the construction project for which Debtor was the prime contractor and 9600 was the property owner. When it was removed on October 18, 2024, the DRS Lawsuit had been pending in the Chancery Court for more than twenty months,[5] and the following had been filed in that time: (A) an amended complaint; (B) a cross-complaint by Debtor against 9600 and the other defendants for breach of contract, unjust enrichment, the Prompt Pay Act, and to foreclose materialman's and mechanic's liens; (C) a cross-complaint by 9600 against Debtor for breach of contract, bad faith attorneys' fees under the Prompt Pay Act, defective construction, breach of warranty, negligent supervision and negligent misrepresentation, and violation of the Tennessee Consumer Protection Act; and (D) the voluntary dismissal of the original plaintiff, DRS Electric, LLC, from the lawsuit. [*See* 3:24-ap-03026-SHB, ECF Nos. 1, 1-2, 1-3, 1-4, 1-5, 1-6.] Only the cross-clams asserted by Debtor and 9600 remain pending and unresolved in the DRS Lawsuit. [*See* 3:24-ap-03026-SHB, ECF No. 1 at 2.] As stated by ABE and the Trustee and reflected on the state court's Rule Docket for the DRS Lawsuit attached to their brief:

> Prior to Debtor filing bankruptcy, there were multiple filings made by the parties to [the DRS Lawsuit] in the Knox County Chancery Court, including a motion for partial summary judgment filed by 9600 and a motion filed by Debtor to amend its answer to 9600's crossclaim. However, the Knox County Chancery Court had not

[4] In deciding these motions, the Court takes judicial notice of all documents of record in this adversary proceeding, the underlying bankruptcy case, and the DRS Lawsuit. *See* Fed. R. Evid. 201.

[5] The DRS Lawsuit was filed on February 13, 2023. [Doc. 20-1 at 4.]

> ruled upon these motions prior to Debtor's petition date. Despite the passage of over a year since the original filing, the activity at the state court level in [the DRS Lawsuit] was almost entirely consumed by disputes over written discovery. No depositions were taken, and written discovery was not complete as of the date that the Trustee removed [the DRS Lawsuit] to this Court.

[Doc. 20 at 3; *see* Doc. 20-1.]

The ABE Lawsuit was filed in the Chancery Court on June 10, 2024. [*See* Doc. 1 at 2.] As of the removal on October 18, 2024, ABE had accomplished service of process, but neither defendant had filed an answer or responsive pleading, although 9600 had filed a motion to dismiss. [Doc. 1-3; Doc. 15 at 5; Doc. 20 at 4.] ABE also had filed a motion to consolidate the two related lawsuits before removal. [Doc. 1-3 at 1-2.] The motion to consolidate was partially[6] resolved by the Order to Transfer Case to Knox County Chancery Part I ("Transfer Order") entered less than one month before removal,[7] which transferred the ABE Lawsuit to the chancellor before whom the DRS Lawsuit was pending because of the perceived "likelihood that there will be substantial overlap in the factual and legal questions presented within the two lawsuits." [Doc. 1-3 at 4.]

II. MOTION TO ABSTAIN

This Court has "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); *see also* 28 U.S.C. § 157(a) (authorizing district courts to refer bankruptcy cases to the bankruptcy court). The Trustee removed both lawsuits based on the Court's "related to" jurisdiction, which is not "limitless" but "must be read to give district courts (and bankruptcy courts under § 157(a))

[6] The Chancery Court expressly reserved the question of procedural consolidation. [Doc. 1-3 at 4-5.]

[7] Both lawsuits were stayed when Debtor filed its bankruptcy case on June 28, 2024. This Court entered an Agreed Order on Motion for Limited Relief From Stay on August 23, 2024, which granted ABE stay relief to allow for service to be effectuated on Debtor and for the Chancery Court to resolve the consolidation motion pending in the ABE Lawsuit. [3:24-bk-31122-SHB, ECF No. 12.] The Transfer Order was entered on September 23, 2024. [Doc. 1-3 at 4-5.]

jurisdiction over more than simple proceedings involving property of the debtor or the estate."

Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995). As recently restated by the Sixth Circuit,

> The "usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn.* (*In re Dow Corning Corp*.), 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). In other words, there is "related to" jurisdiction if the outcome of the proceeding could conceivably "alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)" or otherwise impact "the handling and administration of the bankrupt estate." *Id*. (quoting *Pacor*, 743 F.2d at 994). A proceeding need not be against the debtor or the debtor's property to be within the "related to" jurisdiction, but "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of [§ 1334(b)]." *Id*. (quoting *Pacor*, 743 F.2d at 994). Rather, "there must be some nexus between the 'related' civil proceeding and the title 11 case." *Id*. (quoting *Pacor*, 743 F.2d at 994).

In re HNRC Dissolution Co., 761 F. App'x 553, 559-60 (6th Cir. 2019); *see also In re Greektown Holdings, LLC*, 728 F.3d 567, 577 (6th Cir. 2013) ("The grant of jurisdiction over proceedings 'related to' the bankruptcy case is quite broad.").

9600 seeks both mandatory and permissive abstention under 28 U.S.C. § 1334(c), which provides as follows:

> (c)(1) Nothing 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.
>
> (2) 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). In its brief, 9600 argues that "[t]his Court must abstain from hearing [this adversary proceeding] because all five conditions for mandatory abstention are met," or, "[a]lternatively, this Court should abstain from hearing [this adversary proceeding] under the doctrines of permissive abstention and equitable rem[a]nd." [Doc. 15 at 3, 7.] For the reasons discussed below, the Court finds that it is not required to abstain under § 1334(c)(2) and that permission abstention under § 1334(c)(1) is unwarranted.

A. Mandatory Abstention

Under § 1334(c)(2), the Court "must abstain on a timely motion of a party when the proceeding: (1) is based on a state law claim or cause of action; (2) lacks a federal jurisdictional basis absent the bankruptcy; (3) is commenced in a state forum of appropriate jurisdiction; (4) is capable of timely adjudication; and (5) is a "non-core" proceeding." *In re HNRC Dissolution Co*., 761 F. App'x at 561 (citing *Lowenbraun v. Canary* (*In re Lowenbraun*), 453 F.3d 314, 320 (6th Cir. 2006) (quoting *In re Dow Corning Corp*., 86 F.3d at 497)). The party seeking abstention bears the burden of proving by a preponderance of the evidence that each element has been satisfied. *Seven Talents, LLC v. Neugebauer* (*In re With Purpose, Inc*.), 654 B.R. 715, 729 (Bankr. N.D. Tex. 2023); *Redstone Advance, Inc. v. Big Daddy Guns, Inc.* (*In re Big Daddy Guns, Inc*.), 651 B.R. 817, 826 (Bankr. N.D. Fla. 2023). Although 9600 argues that each of the foregoing requirements is satisfied, the Court disagrees that 9600 has met its burden of proving the fourth requirement: that the proceeding is capable of timely adjudication in the state court.

Timely adjudication of a dispute "such that the Debtor's efforts to return to financial health in bankruptcy are not placed in jeopardy" is a "paramount" factor. *In re STAR Dynamics Corp*., 504 B.R. 894, 898-99 (Bankr. S.D. Ohio 2014). "Typical considerations include the length of time the state court has expended on the case, the proximity to trial and ultimate

resolution, and whether allowing the case to remain in state court will have any negative impact upon the bankruptcy proceeding." *Id*. (citing *Balcor/Morristown Ltd. P'ship v. Vector Whippany Assocs*., 181 B.R. 781, 793 (D.N.J. 1995)). Because "when a party legitimately contests the state court's ability to timely adjudicate a case, the federal court must honestly assess whether the state court can[,] . . . '[t]he burden of proving timely adjudication is on the party seeking abstention.'" *In re Nat'l Century Fin. Enters., Inc. Inv. Litig*., 323 F. Supp. 2d 861, 881 (S.D. Ohio 2004) (quoting *Personette v. Kennedy* (*In re Midgard Corp*.), 204 B.R. 764, 778 (B.A.P. 10th Cir. 1997)).

Although it bears the burden of proving that abstention is mandated by satisfaction of the required factors, 9600 asserts only the following concerning timely adjudication:[8]

> Capable of Timely Adjudication. Prior to the automatic stay and removal, the Carico Defendant case [this adversary proceeding] was proceeding adequately in Knox County Chancery Court. It would be capable of timely adjudication upon remand. Factor four for mandatory abstention is met.

[Doc. 15 at 6.] Such "[a] naked assertion that the matter can be timely adjudicated in the state court, without more, is insufficient to satisfy this requirement." *Arrow Oil & Gas, Inc. v. J. Aron & Co*. (*In re Semcrude, L.P*.), 442 B.R. 258, 274 (Bankr. D. Del. 2010) (citation omitted)); *see also Kelly v. Power Home Solar, LLC*, No. 1:24-cv-00209, 2025 WL 712747, at *10 (S.D. Ohio Mar. 5, 2025) (finding that the movant's providing "[n]o evidence on whether this case can be timely adjudicated in state court . . . [was] especially detrimental to any request for mandatory abstention because the party seeking mandatory abstention bears the burden of demonstrating that each requirement is satisfied"); *Burgess v. Liberty Sav. Ass'n* (*In re Burgess*), 51 B.R. 300,

[8] The Court notes that sole argument of ABE and the Trustee in opposition to mandatory abstention is that 9600 "fail[ed] to present any evidence" in support of the timely-adjudication element. [Doc. 19-1 at 7.] Notwithstanding that 9600 could have elaborated on its naked assertion by filing a reply brief [*see* E.D. Tenn. LBR 7007-1(a)], 9600 remained silent.

302 (Bankr. S.D. Ohio 1985) ("Defendant here has timely moved as required by section 1334(c)(2) for abstention. Apart, however, from a naked assertion that the matter can be timely adjudicated in the state court, no specific showing is offered by defendant to substantiate this assertion.").

Although the moving party bears the burden of establishing this element, the focus is not on whether "the case will be tried sooner in the state court than the federal court [but] . . . on whether allowing the case to proceed in the state court will have an unfavorable effect on the administration of the bankruptcy case." *Lennar Corp. v. Briarwood Cap., LLC*, 430 B.R. 253, 265 (Bankr. S.D. Fla. 2010). The timeliness factor "is a case- and situation-specific inquiry that requires a comparison of the time in which the respective state and federal forums can reasonably be expected to adjudicate the matter," *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 580 (2d Cir. 2011), and "must be determined with respect to the needs of the title 11 case and not solely by reference to the relative alacrity with which the state and federal court can be expected to proceed." *Stoe v. Flaherty*, 436 F.3d 209, 219 (3d Cir. 2006). To determine the timeliness question, courts evaluate the following four factors:

> (1) the backlog of the state court's calendar relative to the federal court's calendar; (2) the complexity of the issues presented and the respective expertise of each forum; (3) the status of the title 11 bankruptcy proceeding to which the state law claims are related; and (4) whether the state court proceeding would prolong the administration or liquidation of the estate.

Parmalat Cap. Fin. Ltd., 639 F.3d at 580.

1. Backlog of the State Court's Calendar Relative to the Federal Court's Calendar

9600 presented no proof whatsoever as to the calendar for the state court, and the Court will not presume to estimate whether there is a backlog for decisions within the Chancery Court. Nevertheless, the parties do not dispute that the ABE Lawsuit, which was filed in the Chancery Court on June 10, 2024, pre-dated Debtor's bankruptcy petition by only eighteen days. At that

time, process had been accomplished, 9600 had filed a motion to dismiss, and ABE had filed a motion to consolidate with the DRS Lawsuit, which was preliminarily resolved post-petition by transfer of the ABE Lawsuit to Chancery Court Part 1, in which the DRS State Court Lawsuit had been pending for more than twenty months. No responsive pleading had been filed, and discovery had not commenced. As for the related DRS Lawsuit, in addition to cross-complaints filed between the parties and answers thereto, a number of discovery motions had been filed, as had motions for summary judgment; however, as reflected on the Rule Docket from the Chancery Court, as of the date the bankruptcy was filed – June 28, 2024 – no orders resolving any of the motions[9] had been entered, and various hearings had been continued a number of times. [Doc. 20-1.]

With respect to the bankruptcy court's calendar and its ability to hear matters timely, the Court notes that many events have occurred and progressed since the June 28, 2024 petition date. The Trustee has held a meeting of creditors and filed a notice of assets. He has removed both the DRS Lawsuit and the ABE Lawsuit to this Court. He also successfully negotiated and argued before the Court the merits of a settlement with ABE in the underlying bankruptcy case. [No. 3:24-bk-31122-SHB, ECF No. 42.] In conjunction with the Trustee's motion to compromise, after notice and a hearing and less than one month after the contested matters were ripe, the Court decided both the motion to settle with ABE and the application to employ the law firm representing ABE, as well as the objections to both filed by 9600, approving both as stated in the Court's detailed, fourteen-page Memorandum and Order on Motion to Compromise and

[9] The oldest motion pending in the DRS Lawsuit was a discovery motion filed on September 1, 2023, more than thirteen months before removal.

Application to Employ Counsel for Special Purpose entered on December 18, 2024 [No. 3:24-bk-31122-SHB, ECF No. 43.]

Additionally, the Trustee has employed an accountant [No. 3:24-bk-31122-SHB, ECF No. 47]; the Court has scheduled a status conference as to both the DRS Lawsuit and this adversary proceeding for May 1, 2025;[10] and the bankruptcy case is progressing forward. Given the state of the record in the bankruptcy case and the state of the record in the state-court case before removal, this factor weighs against timely adjudication by the state court.

2. The Complexity of the Issues Presented and the Respective Expertise of Each Forum

The Court finds that this factor also weighs against the timely-adjudication element. The alternative claims raised in the ABE Lawsuit are breach of contract, violation of the Prompt Pay Act, and unjust enrichment/quantum meruit for which ABE seeks actual damages of $324,614.05, together with statutory damages, attorneys' fees, interest, and costs. [Doc. 1-1.] Similar issues were raised in the DRS Lawsuit, within which no motion to abstain and/or remand has been filed. In that action, the following counterclaims by Debtor (now controlled by the Trustee) against 9600 remain: breach of contract, unjust enrichment, violations of the Prompt Pay Act, and enforcement of materialman's and mechanic's liens. [Adv. No. 3:24-ap-03026-SHB, ECF No. 1-1.] Similarly, 9600's claims against Debtor are breach of contract, "bad faith attorneys' fees" under the Prompt Pay Act, defective construction, breach of warranty, negligent supervision and negligent misrepresentation, and violations of the Tennessee Consumer Protection Act. [Adv. No. 3:24-ap-03026-SHB, ECF No. 1-2.]

[10] The status conference originally was scheduled for December 12, 2024, by an Order entered on October 23, 2024. [Doc. 3.] The status conference was originally continued to a date after the extended deadline for 9600 to file a motion to abstain and/or remand. [*See* Docs. 7, 13.] After the Motion to Abstain was filed on January 3, 2025, the Court again rescheduled the status conference to allow for time to resolve the instant motions.

In its brief, 9600 emphasizes that ABE, as a subcontractor, seeks a modification of current Tennessee law concerning its claim for unjust enrichment/quantum meruit against 9600, as the owner, without first exhausting its remedies against the offending contractor, i.e., Debtor. Therefore, 9600 argues, "[t]his Court cannot afford ABE the relief it requests. Only the Tennessee Supreme Court can change the binding precedent put down [in] *Paschall's Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966). This Court should not insert itself into a dispute regarding the modification of existing state law." [Doc. 15 at 5.]

The Tennessee Court of Appeals recently affirmed that "until such time as a plaintiff receives a judgment against a contractor and *is unable to collect upon it*, the unjust enrichment cause of action is premature." *Anderson Poured Walls, Inc. v. Clark*, No. E2022-01271-COA-R3-CV, 2024 WL 50232, at *4 (Tenn. Ct. App. Jan. 4, 2024) (brackets and internal quotation marks omitted). The Complaint filed in the ABE Lawsuit acknowledges both cases and makes the following allegations concerning them:

> 63. In light of the paid-when-paid or pay-if-paid clauses within ABE's Contracts and 9600, LLC's attempt to avoid further payment to [Debtor] (and thereby deprive ABE of any payment) for reasons which are primarily unrelated to the material and labor furnished by ABE, ABE asserts that this case is distinguishable from the Tennessee Court of Appeals holdings in *Anderson Poured Walls, Inc. v. Clark*, Case No. 1:2022-01271-COA-R3-CV, 2024 WL 50232 (Tenn. Ct. App. Jan. 4, 2024), and *Paschall's Inc. v. Dozier*, 407 S.W.2d 150 (Tenn. 1966), and this claim is asserted for the express purpose of extending, modifying, or reversing existing Tennessee precedent(s), law(s), or regulation(s).
>
> 64. Because 9600, LLC is currently asserting and has taken the position in the pending case DRS Electric LLC v. Carico Construction, Inc. et al., Knox County Chancery Court Case No. 206264-1, that no further payment is due from 9600, LLC to [Debtor] on the basis of [Debtor]'s alleged failure to perform and breach of the prime contract between [Debtor] and 9600, LLC, 9600, LLC is estopped from denying liability to ABE under the theory that ABE has not yet exhausted its remedies against [Debtor] as set forth in *Anderson Poured Walls, Inc. v. Clark*, Case No. 1:2022-01271-COA-R3-CV, 2024 WL 50232 (Tenn. Ct. App. Jan. 4, 2024), and *Paschall's Inc. v. Dozier*, 407 S.W.2d 150 (Tenn. 1966).

> 65. Any requirement for ABE to exhaust its remedies against [Debtor] would be futile in light of the paid-when-paid and/or paid-if-paid language in ABE's Contracts with [Debtor].

[Doc. 1-1 at 7 ¶¶ 63-65.]

The Court acknowledges that all three of ABE's claims are determined by application of Tennessee law. Although one of those claims concerns a potential modification of state law, the two remaining claims – breach of contract and the Prompt Pay Act – are well-settled and straightforward areas of law familiar to this Court. With respect to the alternative claim for unjust enrichment/quantum meruit, Tennessee Supreme Court Rule 23 authorizes the Court to certify the question of law directly to the Tennessee Supreme Court if needed, thus bypassing any potential appeals that a contrary decision by the Chancery Court would precipitate.

Moreover, resolution of this adversary proceeding will be determined based on the same facts underlying the DRS Lawsuit. The Court agrees with the Trustee and ABE that

> [g]iven the substantial overlap in the factual and legal questions between the two lawsuits as fund by the Knox County Chancery Court, [the ABE Lawsuit] and the instant proceeding should be litigated together. Both cases relate to the same Project for improvement of the same Property. All of the witnesses and testimony which can be expected in [the ABE Lawsuit] – which are expected to relate to the concrete work of ABE, and defects or delays therewith claimed by 9600, and repairs or retention of that work without payment for the same – will all necessarily also be present in . . . any trial of [the DRS Lawsuit]. Thus, keeping [the ABE Lawsuit] separate from [the DRS Lawsuit] will result in a 100% duplication of cost, time, and proof.

[Doc. 20 at 9-10.] Likewise, remanding only the ABE Lawsuit and not the DRS Lawsuit would "cause significant duplication due to the substantial overlap in topics of discovery, witness and expert testimony, and the overall evidentiary record." [*Id*. at 11-12.] The Court agrees that it would be a waste of judicial resources to have this Court resolve the DRS Lawsuit while the ABE Lawsuit proceeds separately in the Chancery Court.

3-4. The Status of the Title 11 Bankruptcy Proceeding to Which the State-Law Claims are Related and Whether the State-Court Proceeding Would Prolong the Administration or Liquidation of the Estate

The third and fourth factors operate together here. For the third factor, the court "must consider whether the litigants in a state proceeding need the state law claims to be quickly resolved as a result of the status of the ongoing title 11 bankruptcy proceeding." *Parmalat Cap. Fin. Ltd.*, 639 F.3d at 581. Similarly, as to the fourth factor, "[a] matter cannot be timely adjudicated in state court if abstention and remand of the state law claims will unduly prolong the administration of the estate." *Id*. As eloquently explained by the bankruptcy court for the Southern District of New York:

> A bankruptcy case is different from a lawsuit between one or more plaintiffs and defendants brought in a court of plenary jurisdiction. In such a lawsuit, the parties are the only ones affected by the litigation. If there is delay, the parties are the only ones harmed, or benefitted, by it. In many if not most courts of plenary jurisdiction, the parties are given wide latitude in terms of the time to be expended in pretrial practice, such as the pleadings, discovery proceedings, motion practice of all kinds, etc. Interlocutory appeals are permitted in many states . . . . In many courts of first instance, particularly state courts, there may be little if any judicial supervision or pressure to bring cases to trial expeditiously and court calendar practice or judicial assignment of cases may result in lengthy delay . . . .
>
> By contrast, litigation in the bankruptcy court implicates the interests of a far broader spectrum of parties than the particular parties named in an adversary proceeding. In a bankruptcy case, whether liquidation under Chapter 7 or reorganization under Chapters 11 and 13, an adversary proceeding to determine claims by or against the debtor affects all parties in interest in the bankruptcy case, including all creditors and all equity holders in a corporate debtor. The normal delays incident to a lawsuit in a court of plenary jurisdiction are intolerable in a bankruptcy case where the rights of a host of parties in interest beyond the parties to the adversary proceeding itself may be affected and may be irrevocably compromised by delay. . . .
>
> In this Chapter 11 case the factor of delay does not threaten the viability of the debtor's reorganization, because traditional business reorganization has already been precluded by events. But the possibility of uncontrolled delay and litigation costs most certainly does pose a threat to this debtor's right to have its day in court on its claims in this adversary proceeding, which constitute its only assets of substance. The debtor has a limited fund with which to pay administrative claims,

> including the costs of litigation. The estate cannot afford the potential costs attendant upon unrestrained delaying tactics, discovery disputes, motion practice and the like which common experience has shown are the often inevitable lot of litigants in many trial courts of general jurisdiction, whether State or Federal. Of course, it may be that the [state court] might be able to try the issues which are capable of litigation in that court to a speedy conclusion, perhaps even by the end of the year. But that is a matter of dubious speculation, and neither the parties nor this Court would be in a position to control that process. Nor can the debtor well afford the luxury of duplicative litigation of state law claims in the State Court Action and core jurisdiction claims in this Court—a wasteful and unsound procedure to be avoided wherever possible.

AHT Corp. v. Bioshield Techs., Inc. (*In re AHT Corp.*), 265 B.R. 379, 389-90 (Bankr. S.D.N.Y. 2001).

Here, the same concerns and considerations weigh against timely adjudication by the state court. The claims of both the Trustee and 9600 in this adversary proceeding and the DRS Lawsuit, which are based on the same facts and are so inter-related that they should be tried together, need to be resolved as quickly as possible so that the administrative expenses that will be paid first from any assets collected can be kept to a minimum, thus affording creditors the timeliest and highest distribution available. The underlying bankruptcy case here is Chapter 7 liquidation, and a Notice of Need to File Proof of Claim Due to Recovery of Assets was sent by the Clerk to all creditors on October 9, 2024 [No. 3:24-bk-31122-SHB, ECF No. 26], at the request of the Trustee. Creditors of Debtor will receive a distribution from any potential recovery from 9600 under the settlement between the Trustee and ABE so that the timely resolution of this adversary proceeding is imperative for creditors to receive a distribution without incurring substantial administrative expenses to litigate in state court.

Accordingly, after consideration of the applicable factors, because the Court finds that 9600 has not met its burden of proving that the ABE Lawsuit can be timely adjudicated in the

state court, it has not satisfied the elements required for mandatory abstention under § 1334(c)(2).

B. Permissive Abstention and Equitable Remand

Although abstention is not required here, the Court still may abstain from hearing this proceeding pursuant to § 1334(c)(1) or "may remand such claim or cause of action on any equitable ground." 28 U.S.C. § 1452(b). In exercising its sound discretion, the Court's "analyses of each are 'essentially identical.'" *In re Murray Energy Holdings Co*., 662 B.R. 604, 633 (Bankr. S.D. Ohio 2024) (citation omitted). "Because federal courts have an obligation to exercise the jurisdiction properly given to them, there is a presumption in favor of the exercise of federal jurisdiction and against abstention." *Id*. (citation omitted). Therefore, "[p]ermissive abstention under § 1334(c)(1) is 'an extraordinary and narrow exception to the duty of the federal courts to adjudicate controversies which are properly before it.'" *Meritage Homes Corp. v. JPMorgan Chase Bank, N.A*., 474 B.R. 526, 572 (Bankr. S.D. Ohio 2012) (citation omitted). As with mandatory abstention, the party requesting abstention "bears the burden of establishing that permissive abstention is warranted." *In re Murray Energy Holdings Co*., 662 B.R. at 633 (citation omitted).

Bankruptcy courts within the Sixth Circuit have based permissive abstention on the following factors:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty 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 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than 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 of the bankruptcy court's docket; (10) the likelihood that the

> commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties.

Id.; *see also Henry v. Casey* (*In re River City Resort, Inc.*), Adv. No. 1:18-ap-1029-SDR, 2019 WL 2482871, at *2-3 (Bankr. E.D. Tenn. May 17, 2019) (quoting *Beneficial Nat'l Bank USA v. Best Reception Sys, Inc.* (*In re Best Reception Sys., Inc.*), 220 B.R. 932, 953 (Bankr. E.D. Tenn. 1998)) (declining to abstain because "[a]bstention would not assist in the efficient administration of the estate"). The factors that courts consider for equitable remand are similar:

> (1) [d]uplicative and uneconomical use of judicial resources in two forums, (2) prejudice to the involuntarily removed parties, (3) forum non conveniens, (4) the state court's ability to handle a suit involving questions of state law, (5) comity considerations, (6) lessened possibility of an inconsistent result and (7) the expertise of the court in which the matter was originally pending.

In re Murray Energy Holdings Co., 662 B.R. at 633 (quoting *Meritage Homes Corp.*, 474 B.R. at 573).

Under either analysis, the Court need not consider or rely on all factors, nor must the Court "'discuss[] . . . each factor in the laundry lists developed in prior decisions.'" *Id.* (citations omitted).

> "[I]n determining whether to exercise permissive abstention under § 1334(c) courts have considered *one or more* (not necessarily all) of twelve factors." *Cody, Inc. v. Cnty. of Orange* (*In re Cody, Inc.*), 281 B.R. 182, 190 (S.D.N.Y. 2002) (emphasis in original). The factors largely ask the Court to balance the federal interest in efficient bankruptcy administration against the interest of comity between the state and federal courts. *Fried v. Lehman Bros. Real Estate Assocs. III, L.P.*, 496 B.R. 706, 712–13 (S.D.N.Y. 2013). The analysis "is not a mechanical or mathematical exercise" and the court "need not plod through a discussion of each factor in the laundry lists developed in prior decisions." *In re Janssen*, 396 B.R. 624, 636 (Bankr. E.D. Pa. 2008). "'Ultimately, the pursuit of "equity," "justice" and "comity" involves a thoughtful, complex assessment of what makes good sense in the totality of the circumstances.'" *Id.* (quoting *Kerusa Co LLC v. W10Z/515 Real Estate Ltd. P'ship*, No. 04 Civ. 708(GEL), 04 Civ. 709(GEL), 04 Civ. 710(GEL), 2004 WL 1048239, at *3 (S.D.N.Y. May 7, 2004)); *see also Winstar Holdings, LLC v. Blackstone Group L.P.*, No. 07 Civ. 4634(GEL), 2007 WL 4323003 at *16 (S.D.N.Y. Dec. 10, 2007) ("Under all these circumstances, common sense dictates

> the conclusion that the Bankruptcy Court is the proper forum for resolving these disputes.").

Waleski v. Montgomery, McCracken, Waller & Rhoads, LLP (*In re Tronox*), 603 B.R. 712, 726 (Bankr. S.D.N.Y. 2019).

9600 fails to refer to the factors that courts within this circuit generally examine for permissive abstention.[11] Instead, 9600 references only the factors for equitable remand, arguing that "[t]his contested, adversarial proceeding will require an uneconomical effort of judicial resources" and that "[t]he removed case is centered around laws unique to Tennessee." [Doc. 15 at 8, 9.] Specifically concerning judicial resources, 9600 argues that this adversary proceeding "will uneconomically 'require an enormous expenditure of scarce judicial resources' from the bankruptcy court and divert the Court's attention from more 'pressing matters.'" [*Id*. at 8 (quoting *In re Best Reception Sys., Inc*., 220 B.R. at 954).] This argument, however, ignores the fact that this Court must address the same facts and similar claims in the DRS Lawsuit. As previously stated herein, it would be a waste of judicial resources and an undue burden on the parties for this Court and the state court to each adjudicate a lawsuit that is based on nearly identical facts and legal issues.

9600 next argues that but for the bankruptcy case, this adversary proceeding would not be in federal court because all of the claims arise out of Tennessee law and all of the actions occurred exclusively in Tennessee. Here again, 9600 relies on its argument that ABE's claim for unjust enrichment seeks a modification of existing law that must be decided by the Tennessee Supreme Court. 9600 also asserts that "Tennessee courts have demonstrated a strong interest in

[11] Although 9600 does not advance any arguments concerning the factors, the Court denies the request to permissively abstain based on its reasons stated with respect to the timely adjudication prong of the mandatory abstention analysis, as well as a balancing of the equities of keeping the two adversary proceedings in the same forum, and the reasons stated herein as to why the Court declines the request to equitably remand. Here, the efficient administration of the bankruptcy case and equitable-distribution principles associated with the agreement between the Trustee and ABE predominate over other factors that courts generally consider when deciding whether to permissively abstain.

the resolution of Tennessee construction disputes, especially those involving the Prompt Pay Act." [*Id*. at 9.]

These arguments, however, ignore the Bankruptcy Code's directives requiring this Court to often rely on, analyze, and make its decisions based on applicable nonbankruptcy law (i.e., Tennessee law). This Court has regularly applied Tennessee law in construction cases and is capable of researching and fully analyzing the various aspects of Tennessee law. As noted, to the extent it may be necessary, the Court may certify a question to the Tennessee Supreme Court. Moreover, as frequently stated within this Memorandum and Order, no party in interest has sought to remand or asked the Court to abstain from hearing the DRS Lawsuit, which must be resolved by this Court on nearly identical facts and similar state-law issues.

As to the remaining factors, the Court finds that they also weigh against permissive abstention and equitable remand. First, neither of the "involuntary removed parties" (i.e., 9600 or ABE) will suffer prejudice by this Court's adjudication of this action. Indeed, because both are involved in the DRS Lawsuit,[12] either or both might be prejudiced by abstention and remand merely by having to litigate the same facts and legal issues in two fora. For the same reason, *forum non conveniens* works against 9600's Motion to Abstain. Finally, trying both adversary proceedings in this Court increases the likelihood of consistent results, which will better foster the speedy and efficient administration of the bankruptcy estate. Accordingly, for these reasons as well as those discussed in detail as to why mandatory abstention is not required, the Court, in

[12] Although ABE is not a party to the DRS Lawsuit, after the settlement with the Trustee, ABE has an interest in that action, and in any event, ABE's representatives will be key witnesses in the DRS Lawsuit in which 9600 raised the quality of ABE's work as a defense to Debtor's claims and as grounds for 9600's own cross-claims.

its discretion, denies 9600's request that the Court permissively abstain from hearing or equitably remand the ABE Lawsuit to the Chancery Court.[13]

III. MOTION TO CONSOLIDATE

"If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions . . . ." Fed. R. Civ. P. 42(a) (applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7042). "The purpose of consolidation is to 'administer the court's business with expedition and economy while providing justice to the parties.'" *Wade v. Foremost Ins. Co. Grand Rapids, Mich*., No. 2:18-cv-2120-JPM,-cgc, 2019 WL 13153217, at *2 (W.D. Tenn. Sept. 3, 2019) (quoting *Advey v. Celotex Corp*., 962 F.2d 1177, 1180 (6th Cir. 1992)). Nevertheless, "[f]or purposes of Rule 42 consolidation, questions of law and fact need not be identical . . . as long as there are some common questions of law or fact." *Ponder v. Orsini*, No. 2:24-CV-03742, *et al.*, 2024 WL 3819848, at *2 (S.D. Ohio Aug. 13, 2024). The party seeking consolidation "bears the burden of proving the two cases involve common questions of law and fact." *Wade*, 2019 WL 13153217, at *2.

Consolidation is within the "broad discretion" of the bankruptcy court "so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *State Bank of Florence v. Miller* (*In re Miller*), 459 B.R. 657, 670 (B.A.P. 6th Cir. 2011) (citations omitted). "[T]he decision to consolidate is one that must be made thoughtfully," in consideration of the following factors:

> [1] whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, [2] the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, [3] the length of time required to conclude multiple suits as against a single one, and [4] the relative expense to all concerned of the single-trial, multiple-trial alternatives.

[13] Because the Court declines to remand this case to the Chancery Court, 9600's request for fees and costs pursuant to § 1447(c) is moot.

Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993) (citations omitted). Furthermore, "[c]are must be taken that consolidation does not result in unavoidable prejudice or unfair advantage. Conservation of judicial resources is a laudable goal. However, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny." *Id*.

The Trustee and ABE seek consolidation of this adversary proceeding with the DRS Lawsuit, arguing:

> [The cases] share commons questions of both law and fact. Both cases relate to the same Project for improvement of the same Property. The primary parties in interest in both suits are the same: ABE, Debtor, and 9600 . . . ; [and b]oth suits involve the same work performed by ABE on the same Project at the same Property.

[Doc. 11 at 6.] "There is also substantial overlap in legal theories raised [by] Debtor and ABE in that both assert claims against 9600 for unjust enrichment/quantum meruit and violations of the Tennessee Prompt Pay Act." [*Id*.]

> In ruling on these state law claims, this Court will be required to analyze and determine the parties' respective rights and obligations, which will necessarily raise common questions of law such as whether 9600's conduct related to payment and retainage has violated the Tennessee Prompt Pay Act and whether 9600 by retaining completed work without payment to Debtor and ABE has been unjustly enriched by the value of that work.

[*Id*.]

Importantly, the Court has approved the settlement between the Trustee and ABE under which the bankruptcy estate and ABE were "effectively granted a partial interest in the claims of the other against 9600." [*Id*.] Concerning the two parties to the DRS Lawsuit that are not parties to this adversary proceeding – Home Federal Bank and Investor's Trust of Tennessee – the Trustee and ABE argue that they "are only included because their interests in the Property to

which Debtor's mechanic's lien attached makes them necessary and appropriate parties to Debtor's cause of action seeking to enforce its mechanic's and materialman's lien." [*Id*. at 7.]

9600 opposes consolidation because, "though each case arises out of the same construction project, the parties and their relationships to one another are varied and the legal issues are different. As a result of these tangled relationships, there will be discrete questions of law and fact that are specific to each case and significantly different discovery tasks to be undertaken in each case." [Doc 17 at 3.][14] Specifically, 9600 argues that the cases have the following "stark" differences:

> • The parties and their roles in [the DRS Lawsuit] and [the ABE Lawsuit] are different. [The DRS Lawsuit] involves claims between the general contractor, [Debtor] (as Defendant, Cross-Plaintiff, and Cross-Defendant) and, the owner, 9600 (as Defendant, Cross-Defendant, and Cross-Plaintiff), Home Federal Bank of Tennessee (as Defendant and Cross-Defendant), and Investor's Trust of Tennessee (as Defendant and Cross-Defendant). [The ABE Lawsuit] involves only claims between [ABE] (as Plaintiff) and 9600 (as Defendant).
>
> • The claims in [the DRS Lawsuit] and [the ABE Lawsuit] are distinct. In [the DRS Lawsuit], there are claims and cross claims asserted that relate to the contract for construction work. For example, 9600's claims for Defective Construction, Breach of Warranty, Negligent Supervision and Negligent Misrepresentation. [ABE]'s claims in [the ABE Lawsuit] are limited to issues of payment, through its claims for Breach of Contract, Unjust Enrichment, and the Prompt Pay Act.
>
> • [The DRS Lawsuit], **filed sixteen months prior in February of 2023**, is significantly more progressed than [the ABE Lawsuit]. In contrast [the ABE Lawsuit] has just begun.
>
> • Many of the claims in [the DRS Lawsuit] are built upon the parties' privity of contract (e.g. 9600 and [Debtor] entered into a contract). No such privity of contract exists in [the ABE Lawsuit] to support [ABE's] claims against 9600.

[*Id*.]

[14] 9600 also argued that the consolidation request was premature because its motion to dismiss filed in the state court and its Motion to Abstain filed in this adversary proceeding had not been adjudicated. The state-court motion to dismiss is stayed by the filing of the bankruptcy case, and stay relief to proceed in the ABE Lawsuit has not been granted. Further, the Motion to Abstain is denied by this Memorandum and Order.

The Court finds that each of the *Cantrell* factors weighs in favor of consolidation. First, deciding the adversary proceedings together will not prejudice or place an additional burden on the parties, witnesses, or available judicial resources. To the contrary, trying the adversary proceedings together likely will decrease the relative time and expense to all parties involved, including common witnesses. Clearly, a single trial will increase efficiency and lower costs, which is a significant consideration given the fact of bankruptcy and the interest of the bankruptcy estate in the litigation.

9600's argument that the DRS Lawsuit "is significantly more progressed" than the ABE Lawsuit is unpersuasive as to consolidation. Notwithstanding that the DRS Lawsuit was pending for more than twenty months before removal to this Court, no decisions had been rendered by the Chancery Court, only written discovery had commenced but was not completed (presumably, in part because the state court had not ruled on discovery disputes[15]), and no depositions had been taken. [*See* Doc. 20 at 3.] Indeed, the primary procedural difference between the two is that answers and counterclaims had been filed in the DRS Lawsuit but not in the ABE Lawsuit. Although some discovery had occurred in the DRS Lawsuit, presumably that discovery is also relevant to the ABE Lawsuit given that 9600's defense in the DRS Lawsuit largely concerns the work of Debtor's concrete subcontractor, ABE. [*See* 3:24-ap-03026-SHB, ECF No. 1-2 at pp. 12-16.]

Second, the Court rejects 9600's arguments that the differences between the DRS Lawsuit and the ABE Lawsuit preclude consolidation. As previously stated, the questions of fact and law need not be identical. *See Ponder*, 2024 WL 3819848, at *2. In *Ponder*, the court found that consolidation was "the most efficient method of adjudicating these overlapping matters" and

[15] To be clear, the Court is not critical of the Chancery Court's administration of the DRS Lawsuit.

"given that all of the 'operative facts' underlying [the] claims have occurred and are identical[.]" *Id*. Here, there is no question that the underlying "operative facts" in both adversary proceedings are the same, even though the causes of action differ slightly. The Court also finds notable that the Chancery Court partially resolved ABE's motion to consolidate there by transferring the ABE Lawsuit to the chancellor to whom the DRS Lawsuit was assigned based on the perceived "likelihood that there will be substantial overlap in the factual and legal questions presented within the two lawsuits." [Doc. 1-3 at 4.]

For these reasons, the Court exercises its discretion to grant the Motion to Consolidate in the interests of judicial economy and efficiency of time and costs, as well as to avoid inconsistent adjudication of facts and law common to the two cases. *Cf. Cantrell*, 999 F.2d at 1011.

IV. ORDER

For the foregoing reasons, the Court directs the following:

1. The Motion for Abstention and/or Remand filed by 9600, LLC on January 3, 2025 [Doc. 14], is DENIED.

2. The Motion to Consolidate Adversary Proceedings filed by Plaintiff Al Blankenship Enterprises, LLC and F Scott Milligan, Chapter 7 Trustee, on December 27, 2024 [Doc. 10], is GRANTED.

3. Pursuant to Federal Rule of Civil Procedure 42, made applicable to adversary proceedings through Federal Rule of Bankruptcy Procedure 7042, this Adversary Proceeding No. 3:24-ap-03027-SHB is consolidated with Adversary Proceeding No. 3:24-ap-03026-SHB.

4. Adversary Proceeding No. 3:24-ap-03027-SHB shall be the lead case through which all filings are to be made.

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