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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACERS, INC.,

Debtor.

MIDWAY VENTURE, LLC.,

Plaintiff,

v.

LESLIE T. GLADSTONE, Trustee,

Defendant.

Civil No. 11-cv-1401-L(BGS)

Bankruptcy Case No. 09-12738-LA-11

Adversary Action No. 10-90527-LA

**ORDER GRANTING MOTION TO
WITHDRAW THE REFERENCE
[DOC. 9]**

Plaintiff Midway Venture, LLC. moves to withdraw the reference of the adversary action that it commenced in the bankruptcy court. Plaintiff asserts two causes of action in the operative second amended complaint (“SAC”) in the adversary proceeding for (1) misrepresentation, and (2) implied equitable indemnity. Defendant Leslie T. Gladstone, Chapter 11 Trustee, opposes.

The Court found this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). (Doc. 13.) For the following reasons, the Court **GRANTS** Plaintiff’s motion to withdraw the reference.

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1 **I. BACKGROUND**

2 On August 27, 2009, Pacers, Inc. filed its Chapter 11 bankruptcy petition. On March 19,
3 2010, the bankruptcy court appointed Defendant as the Chapter 11 Trustee. At the time of
4 Defendant’s appointment, the bankruptcy estate’s assets included the transferable assets of an
5 adult entertainment business then doing business as “Larry Flynt’s Hustler Club.” On April 29,
6 2010, Defendant moved to sell the assets of debtor’s estate to Peter Z. Balov, Steven R. Bitter,
7 and Plaintiff. On June 8, 2010, the bankruptcy court entered an order granting Defendant’s
8 motion.

9 On November 1, 2010, Plaintiff commenced an adversary proceeding in the bankruptcy
10 court against defendants LFP IP, LLC, LFP Publishing Group, LLC, Larry C. Flynt, Keith
11 Campbell, and Defendant Leslie T. Gladstone. In that complaint, Plaintiff asserted causes of
12 action for (1) declaratory relief, (2) misrepresentation, (3) breach of implied covenant of good
13 faith and fair dealing, and (4) implied equitable indemnity. All the defendants have since been
14 dismissed except for Gladstone. On March 8, 2011, Plaintiff filed a first amended complaint
15 (“FAC”) against the Defendant asserting causes of action for misrepresentation and implied
16 equitable indemnity. On March 16, 2011, Plaintiff filed a SAC—which is the subject of this
17 motion—alleging the same causes of action.

18 On April 18, 2011, Plaintiff filed a motion in the bankruptcy court to withdraw the
19 reference of the adversary action and to remove the action to the district court. Plaintiff
20 contends that the Bankruptcy Court Clerk failed to forward the motion to the district court.
21 (Pl.’s Mot. 11:26–28.) The bankruptcy court subsequently denied Plaintiff’s motion.

22 On August 11, 2011, Plaintiff filed this motion in this Court to withdraw the reference.
23 The parties have fully briefed the motion.

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1 **II. ANALYSIS¹**

2 **A. The Adversary Action Is a Non-Core Proceeding.**

3 District courts have discretion to refer “any or all cases under title 11 and any or all
4 proceedings arising under title 11 or arising in or related to a case under title 11” to the
5 bankruptcy judges for that district. 28 U.S.C. § 157(a). “[B]ankruptcy courts may hear and enter
6 final judgments in ‘core proceedings’ in a bankruptcy case.” *Stern v. Marshall*, — U.S. —, 131
7 S. Ct. 2594, 2601–02 (2011). In non-core proceedings—proceedings that are not core but are
8 “otherwise related to a case under title 11,” 28 U.S.C. § 157(c)(1)—“the bankruptcy courts
9 instead submit proposed findings of fact and conclusions of law to the district court, for that
10 court’s review and issuance of final judgment.” *Stern*, 131 S. Ct. at 2601–02.

11 The District Court “may withdraw in whole or in part, any case proceeding referred, on its
12 own motion or on timely motion of any party, for cause shown.” 28 U.S.C. § 157(d). “Core
13 proceedings are actions by or against the debtor that arise under the Bankruptcy Code in the
14 strong sense that the Code itself is the source of the claimant’s right or remedy, rather than just
15 the procedural vehicle for the assertion of a right covered by some other body of law, normally
16 state law.” *Matter of U.S. Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997). The party seeking
17 withdrawal of the reference bears the burden of showing that the reference should be withdrawn.
18 *In re Larry’s Apartment, LLC*, 210 B.R. 469, 472 (Bankr. D. Ariz. 1997).

19 In this case, Plaintiff moves to withdraw the reference of the adversary complaint based
20 on the contention that the claims that it asserts are not core bankruptcy matters, but instead are
21 based on alleged violations of state law. Plaintiff argues that its causes of action for
22 misrepresentation and implied equitable indemnity do not invoke a substantive right created by
23 federal bankruptcy law and therefore, are non-core proceedings that should be heard in this

24
25 ¹ As a preliminary matter, Defendant contends that Plaintiff “has failed to make a timely
26 motion under 28 U.S.C. § 157(b)(3).” (Def.’s Opp’n 7:11–20.) “A motion to withdraw is timely
27 if it was made as promptly as possible in light of developments in the bankruptcy proceeding.”
28 *Sec. Farms v. Int’l Bros. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999,
1007 n.3 (9th Cir. 1997) (internal quotation marks omitted). Defendant fails to address whether
Plaintiff’s motion was filed as promptly as possible. Accordingly, the Court rejects and finds no
basis to her contention that Plaintiff’s motion is untimely. *See id.*

1 Court. (Pl.’s Mot. 4:4–6.) In other words, like the *Stern* case, the state law claims at issue in this
2 action are “in no way derived from or dependent upon bankruptcy law.” *See Stern*, 131 S. Ct. at
3 2618. In response, Defendant contends that Plaintiff’s adversary action is a core proceeding
4 because Plaintiff conceded that it was a core proceeding in its initial complaint for damages and
5 again in its FAC. (Def.’s Opp’n 2:6–7.) The Court disagrees with Defendant.

6 Plaintiff’s prior concessions have no bearing on this Court’s determination. Plaintiff’s
7 causes of action relate to a sales transaction that merely involved bankruptcy proceedings, and
8 thus “is not a core proceeding but . . . is otherwise related to a case under title 11.” *See* 28
9 U.S.C. § 157(c)(1). In addition, Plaintiff’s alleged misrepresentation is an action at “common
10 law[,] . . . the very type of claim that . . . must be decided by an Article III court.” *Stern*, 131 S.
11 Ct. at 2616. Therefore, the Court concludes that Plaintiff’s adversary proceeding is a non-core
12 proceeding.

13 14 **B. Plaintiff Is Entitled to a Jury Trial in the District Court.**

15 According to the Bankruptcy Code, “[i]f the right to a jury trial applies in a proceeding
16 that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct
17 the jury trial if specifically designated to exercise such jurisdiction and with the express consent
18 of all the parties.” 28 U.S.C. § 157(e). The Seventh Amendment guarantees the right to a jury
19 trial for the determination of legal, as opposed to equitable, rights and remedies. *Feltner v.*
20 *Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–48 (1998). The right to a jury trial is a
21 fundamental constitutional right and, accordingly, should carry a presumption against waiver.
22 *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 394 (1937); *see also Beacon Theatres, Inc. v.*
23 *Westover*, 359 U.S. 500, 510 (1959) (wherever possible, the constitutional right to a jury trial
24 must be preserved).

25 Plaintiff argues that withdrawal to this Court is appropriate because of its right to a jury
26 trial and because withdrawing the reference now would promote judicial efficiency. (Pl.’s Mot.
27 12:19–13:2, 13:14–21.) It emphasizes that it did not consent to having the bankruptcy court
28 conduct a jury trial and enter a final judgment in the operative complaint before the Court. (*Id.*

1 at 9:14–19.) Furthermore, Plaintiff explains that withdrawing the reference now instead of
2 waiting until the bankruptcy court has made pretrial rulings would be more efficient because “it
3 is likely that the Bankruptcy Court’s interlocutory rulings will ultimately end before this Court
4 and the jury trial will eventually be conducted by this Court.” (*Id.* at 13:18–21.)

5 Citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), Defendant responds that
6 Plaintiff has no right to a jury trial because “once a party invokes the core jurisdiction of the
7 USBC by filing a proof of claim, that party has no Seventh Amendment right to a jury trial.”
8 (Def.’s Opp’n at 8:20–21.) She suggests that by filing a proof of claim, Plaintiff, the creditor,
9 has forsaken its right to adjudicate before a jury on issues that bear directly on the allowance of
10 that claim. (*Id.* at 8:23–9:2.) Defendant also emphasizes that Plaintiff “has voluntarily and
11 repeatedly submitted itself to the jurisdiction” of the bankruptcy court. (*Id.* at 9:2–6.)

12 In *Granfinanciera*, the Supreme Court set forth a three-part test for determining whether a
13 party asserting a statutory cause of action is entitled to a jury trial under the Seventh Amendment
14 in the context of bankruptcy litigation. 492 U.S. at 42–43. First, a court must “compare the
15 statutory action to 18th-century actions brought in the courts of England prior to the merger of
16 the courts of law and equity.” *Id.* at 42. Second, it must “examine the remedy sought and
17 determine whether it is legal or equitable in nature.” *Id.* “If, on balance, these two factors
18 indicate that a party is entitled to a jury trial under the Seventh Amendment,” the third step is to
19 “determine whether Congress may assign and has assigned resolution of the relevant claim to a
20 non-Article III adjudicative body that does not use a jury as factfinder.” *Id.* Elaborating on this
21 last step, the court explained that Congress may assign resolution of a claim to a non-Article III
22 body that does not use a jury as a factfinder only if the claim is based on a public, rather than
23 private, right. *Id.* at 51. That said, not every claim that arises from a bankruptcy proceeding
24 necessarily implicates a public right. *See id.* at 55–58. A claim is a matter of public right only
25 when it arises part of the process of allowance and disallowance of claims. *Id.* at 58.

26 It is not likely that Plaintiff’s claims fall within the purview of *Granfinanciera*. First,
27 unlike the creditor in *Granfinanciera*, Plaintiff’s claims of misrepresentation and implied
28 equitable indemnity are common law claims, not statutory claims. Second, Plaintiff’s claims do

1 not arise from the bankruptcy proceeding itself; they simply relate to the bankruptcy proceeding.

2 Even assuming that *Granfinanciera* applies, the outcome of its application favors a jury
3 trial. The remedy sought by Plaintiff is legal in nature. Further, under *Stern*, the adversary
4 proceeding is a non-core proceeding—it does not arise out of bankruptcy law—and therefore has
5 not been assigned by Congress to be adjudicated by the Bankruptcy Court. Moreover, even
6 where the “resolution of a party’s legal claims aris[e] from a bankruptcy proceeding,” but will
7 have only “a negligible impact on the claims-allowance process, the right to a jury trial is
8 preserved.” *In re Crown Vantage, Inc.*, No. C 02-03836, 2002 WL 32872440, at *3 (N.D. Cal.
9 Dec. 16, 2002). Because Plaintiff did not waive its jury-trial right or otherwise consent to a jury
10 trial in the bankruptcy court, and because Plaintiff’s common-law claims do not arise out of
11 bankruptcy law, the Court finds that Plaintiff is entitled to a jury trial in the district court.

12
13 **C. The Factors Favor Withdrawal of the Reference.**

14 Finally, the Court must still determine whether withdrawal of the reference is required,
15 and, if not, whether it should exercise its discretion to do so at this moment. “A valid right to a
16 Seventh Amendment jury trial in the district court does not mean the bankruptcy court must
17 instantly give up jurisdiction and that the action must be transferred to the district court.” *In re*
18 *Healthcentral.com*, 504 F.3d 775, 788 (9th Cir. 2007). “Instead . . . the bankruptcy court may
19 retain jurisdiction over the action for pretrial matters.” *Id.* Even where the presence of non-core
20 claims and a jury demand dictate that the reference to the bankruptcy court ultimately may have
21 to be withdrawn, a district court may exercise its discretion not to withdraw the reference
22 immediately where, for example, the bankruptcy court already is familiar with the relevant facts
23 and issues, and the issues triable by a jury are not yet ripe for trial. *See, e.g., Barlow & Peek*,
24 163 B.R. at 179; *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101–02 (2d Cir. 1993).

25 The Bankruptcy Code specifically provides that a bankruptcy court may hear and “submit
26 proposed findings of fact and conclusions of law to the district court,” subject to *de novo* review,
27 in a proceeding “that is not a core proceeding.” 28 U.S.C. § 157(c)(1). Thus, the Court may
28 decline to withdraw the reference and require the bankruptcy court to provide proposed findings

1 of fact and conclusions of law. In the Ninth Circuit, the court must consider five factors to
2 determine whether it should exercise its discretion and withdraw the reference: (1) efficient use
3 of judicial resources; (2) delay and costs to the parties; (3) uniformity of bankruptcy
4 administration; (4) the prevention of forum shopping; and (5) other related factors. *Sec. Farms*,
5 124 F.3d at 1008.

6 Here, the most efficient use of judicial resources supports withdrawal of the reference.
7 The Court is able to consider the factual and legal basis for the adversary action, which is based
8 on determinations of state-law causes of action, without unreasonable delay or costs. Because
9 this type of action has been considered frequently in the district court, the results of the
10 adversary litigation would likely be consistent with similar cases. This is not a case where there
11 are complex issues of law that require consideration of the interplay between bankruptcy and
12 state-law issues. Furthermore, because Plaintiff's causes of action are non-core, the bankruptcy
13 court may not enter a final judgment. As a result, given the circumstances of this case, this
14 action would inevitably return to this Court.


15 In sum, the factors favor withdrawal of the reference. *See Sec. Farms*, 124 F.3d at 1008.
16 Thus, the Court exercises its discretions to withdraw the reference.

17
18 **III. CONCLUSION & ORDERS**

19 In light of the foregoing, the Court **GRANTS** Plaintiff's motion to withdraw the
20 reference. Defendant shall answer or otherwise respond to Plaintiff's SAC by **April 9, 2012**.

21 **IT IS SO ORDERED.**

22 DATED: March 20, 2012

23 
24 M. James Lorenz
United States District Court Judge

25 COPY TO:

26 HON. BERNARD G. SKOMAL
27 UNITED STATES MAGISTRATE JUDGE

28 ALL PARTIES/COUNSEL