

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
uCast, LLC (f/k/a Q Platform Americas
LLC), Q Media Services, LLC (f/k/a
Qello LLC), QMS Holdings, LLC (f/k/a
Qello Holdings, LLC),
Debtors.

Case No.: 23cv1258-LL-AHG

**ORDER DENYING MOTION TO
WITHDRAW THE REFERENCE
[ECF No. 1]**

GERALD H. DAVIS, Chapter 7 Trustee,
Plaintiff,
v.
GARY WINNICK,
Defendant.

Presently before the Court is Defendant Gary Winnick’s (“Defendant”) Motion to Withdraw the Reference (“Motion”). ECF No. 1. The Court hereby takes the matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having reviewed the Parties’ arguments and the law, the Court **DENIES** the Motion.

///

1 **I. BACKGROUND**

2 On September 2, 2020, uCast, LLC, Q Media Services, LLC, and QMS Holdings,
3 LLC (collectively “the Debtors”) filed their petitions for bankruptcy relief under Chapter
4 11 in the U.S. Bankruptcy Court for the Southern District of California (“Bankruptcy
5 Court”). *See* Doc. No. 1, No. 20-04501-MM7; Doc. No. 1, No. 20-04502-MM7; Doc. No.
6 1, No. 20-04503-MM7. On December 3, 2021, the Bankruptcy Court converted the
7 Bankruptcy cases from Chapter 11 to Chapter 7. *See* Doc. No. 113, No. 20-04501-MM7.

8 On September 2, 2022, Gerald H. Davis, the Chapter 7 Trustee (“Plaintiff” or the
9 “Trustee”) of the Debtors, filed a Complaint (hereinafter “Adversary Complaint”) in the
10 Bankruptcy Court initiating an adversary proceeding against Defendant. *See In re uCast,*
11 *LLC (f/k/a Q Platform Americas LLC), Q Media Services, LLC (f/k/a Qello LLC), QMS*
12 *Holdings, LLC (f/k/a Qello Holdings, LLC)*, No. 22-90049-MM (Bankr. S.D. Cal. 2020).
13 In the Adversary Complaint, the Trustee alleged claims of (1) breach of fiduciary duty, and
14 (2) corporate waste against Defendant Winnick. *Id.* at No. 1-1. On November 4, 2022,
15 Defendant filed a Motion to Dismiss the Adversary Complaint pursuant to Federal Rules
16 of Civil Procedure 12(b)(1) and 12(b)(6). Doc. No. 14, No. 22-90049-MM (Bankr. S.D.
17 Cal. 2020). On December 19, 2022, the Trustee filed an Opposition to the Motion to
18 Dismiss, and on January 20, 2023, the Defendant filed a Reply. Doc. Nos. 18, 20, No. 22-
19 90049-MM (Bankr. S.D. Cal. 2020). On March 6, 2023, the Bankruptcy Court issued a
20 ruling tentatively denying the Motion to Dismiss. Doc. No. 34, No. 22-90049-MM (Bankr.
21 S.D. Cal. 2020). On March 9, 2023, the Bankruptcy Court held a hearing on the Motion to
22 Dismiss and ordered supplemental briefing regarding Defendant’s objection to the
23 Bankruptcy Court adjudicating the Motion to Dismiss. Doc. No. 31, No. 22-90049-MM
24 (Bankr. S.D. Cal. 2020). On April 3, 2023, the Bankruptcy Court issued a seventeen-page
25 interlocutory order affirming its tentative ruling and denying Defendant’s Motion to
26 Dismiss. Doc. No. 34, No. 22-90049-MM (Bankr. S.D. Cal. 2020).

27 The Bankruptcy Court also set a pre-trial schedule for the case, including a discovery
28 deadline of August 1, 2023, and a pretrial hearing date of August 8, 2023. *Id.* at 17. On

1 April 21, 2023, the Defendant filed an Answer to the Complaint. Doc. No. 38, No. 22-
2 90049-MM (Bankr. S.D. Cal. 2020). On June 22, 2023, the Defendant filed a Motion to
3 Withdraw the Reference in the Bankruptcy Court. Doc. No. 47, No. 22-90049-MM (Bankr.
4 S.D. Cal. 2020). On June 26, 2023, the Trustee filed a Motion to Compel Discovery. No.
5 51, No. 22-90049-MM (Bankr. S.D. Cal. 2020). On June 27, 2023, the Defendant and the
6 Trustee jointly proposed extending certain pretrial deadlines, which the Bankruptcy Court
7 granted in an Order dated June 28, 2023. Doc. Nos. 55, 56, No. 22-90049-MM (Bankr.
8 S.D. Cal. 2020). The Bankruptcy Court extended the discovery deadline to October 2,
9 2023 for general discovery and October 30, 2023 for expert discovery, and reset the pretrial
10 conference date to November 9, 2023. Doc. No. 56, No. 22-90049-MM (Bankr. S.D. Cal.
11 2020).

12 In the instant Motion, Defendant seeks to withdraw the bankruptcy reference and
13 have the adversary proceeding heard in this Court. *See generally* Motion. Plaintiff filed an
14 Opposition to the Motion (“Oppo.”) and Defendant filed a Reply in support of the Motion
15 (“Reply”). ECF Nos. 1-3, 3.

16 II. LEGAL STANDARD

17 District courts have original jurisdiction over “all civil proceedings arising under
18 title 11,” which is the Bankruptcy Code, and over cases “arising in or related to cases under
19 title 11.” 28 U.S.C. § 1334(a)-(b). However, the district court’s jurisdiction is not exclusive,
20 and each district court may refer such proceedings to a bankruptcy judge. 28 U.S.C. §
21 157(a); *see also* S.D. Cal. B.L.R. 5011-1. Section 157 “classifies matters as either ‘core
22 proceedings,’ in which the bankruptcy court ‘may enter appropriate orders and judgments,’
23 or ‘non-core proceedings,’ which the bankruptcy court may hear but for which it may only
24 submit proposed findings of fact and conclusions of law to the district court for de novo
25 review.” *Sec. Farms v. Int’l Bhd of Teamsters, Chauffers, Warehousemen & Helpers*, 124
26 F.3d 999, 1008 (9th Cir. 1997) (quoting 28 U.S.C. § 157). “Actions that do not depend on
27 bankruptcy laws for their existence and that could proceed in another court are considered
28 ‘non-core.’” *Id.*

1 Pursuant to 28 U.S.C. § 157(d), a district court may withdraw reference to the
2 bankruptcy court. *See* 28 U.S.C. § 157(d). This provision provides for both permissible and
3 mandatory withdrawal. *Id.* “The district court may withdraw, in whole or in part, any case
4 or proceeding referred...on its own motion or on timely motion of any party, for cause
5 shown.” *Id.* The district court shall withdraw if “resolution of the proceeding requires
6 consideration of both title 11 and other laws of the United States regulating organizations
7 or activities affecting interstate commerce.” *Id.* The party seeking withdrawal carries the
8 “burden of persuasion.” *FTC v. First Alliance Mortg. Co.*, 282 B.R. 894, 902 (C.D. Cal.
9 April 30, 2001); *see also In re Heller Ehrman LLP*, 464 B.R. 348, 351-52 (N.D. Cal. Dec.
10 13, 2011).

11 “To determine whether cause for permissive withdrawal exists, a district court
12 ‘should first evaluate whether the claim is core or non-core, since it is upon this issue that
13 questions of efficiency and uniformity will turn.’” *One Longhorn Land 1, L.P. v. Presley*,
14 529 B.R. 755, 762 (C.D. Cal. April 13, 2015) (quoting *In re Orion Pictures Corp.*, 4 F.3d
15 1095, 1101 (2nd Cir. 1993)). Additionally, “[i]n determining whether cause exists, a district
16 court should consider the efficient use of judicial resources, delay and costs to the parties,
17 uniformity of bankruptcy administration, the prevention of forum shopping, and other
18 related factors.” *Sec. Farms*, 124 F.3d at 1008.

19 III. DISCUSSION

20 A. Summary of Parties’ Arguments

21 First, Defendant argues that “[t]he adversary proceeding cannot be adjudicated by
22 the bankruptcy court” because the two causes of action in the Complaint (for corporate
23 waste and breach of fiduciary duties) are “precisely the types of private right claims that
24 the Bankruptcy Court lacks constitutional authority to determine.” Motion at 13.
25 Specifically, Defendant argues that “the breach of duty and corporate waste claims raised
26 in the Complaint are private rights seeking to augment the bankruptcy estate, regardless of
27 whether the Defendant has filed a proof of claim (which he did not) – and cannot be
28 determined by the Bankruptcy Court under the public rights exception.” *Id.* Second,

1 Defendant argues that the Bankruptcy Court may not hold a jury trial without the consent
2 of all parties, and that Defendant does not consent to a jury trial before the Bankruptcy
3 Court. *Id.* at 13-14. Third, Defendant argues that the Court should exercise its discretion
4 to withdraw the reference because the claims at issue in the Complaint are “non-core”
5 matters. Finally, Defendant argues that the “adversary proceeding is only in the beginning
6 stages” and “there remains the gatekeeping issue as to whether the causes of action in this
7 lawsuit are timely under Bankruptcy Code § 108(a)(2), which issue must be decided on a
8 *de novo* basis by the District Court.” *Id.* at 14.

9 Plaintiff opposes Defendant’s Motion on the grounds that “mandatory withdrawal is
10 not implicated here because [] this proceeding does not require consideration of laws
11 ‘regulating organizations or activities affecting interstate commerce.’” *Oppo.* at 9. Second
12 Plaintiff argues that “Defendant’s request for permissive withdrawal is untimely and the
13 right to permissive withdrawal has been waived.” *Id.* at 10. In support thereof, Plaintiff
14 states that “courts routinely find that a motion to withdraw the reference is untimely when
15 filed a month or months after the basis for withdrawal became apparent.” *Id.* at 11 (internal
16 citations omitted). Third, Plaintiff argues that even if the instant Motion is considered by
17 the Court, the Defendant has failed to satisfy his burden to establish cause for permissive
18 withdrawal because of the following reasons: (1) “Uniformity in bankruptcy administration
19 is promoted by denial of the withdrawal motion;” (2) “Defendant is engaged in brazen
20 forum shopping;” (3) “Withdrawing reference will delay resolution of the chapter 7 cases;”
21 (4) “Withdrawing the reference is uneconomical;” (5) “The Defendant’s right to a jury trial
22 is speculative at best and even, assuming Defendant has a right to a jury trial, this would
23 not be a ripe basis for withdrawal of pre-trial matters.” *Id.* at 14-20.

24 **B. Analysis**

25 **1. Timeliness of Plaintiff’s Motion**

26 The threshold question in this case is whether under § 157(d) Defendant’s Motion
27 to Withdraw the Reference, filed almost ten months after Plaintiff’s Adversary Complaint
28 was filed, is timely. *Sec. Farms*, 124 F.3d at 1007-1008; *see also* 28 U.S.C. § 157(d). “A

1 motion to withdraw is timely if it was made as promptly as possible in light of the
2 developments in the bankruptcy proceeding.” *Sec. Farms*, 124 F.3d at 1007 n.3. If the
3 motion is not made in a timely manner, the parties’ rights under § 157(d) are deemed
4 waived. *Id.* A party must move for withdrawal “at the first reasonable opportunity” given
5 the “specific factual context [of the case].” *In re GTS 900 F, LLC*, 2010 WL 4878839, at
6 *2 (C.D. Cal. Nov. 23, 2010) (internal quotation and citation omitted).

7 Here, Plaintiff’s Adversary Complaint was filed on September 2, 2022, and
8 Defendant filed a Motion to Dismiss on November 4, 2022. Doc. No. 14, No. 22-90049-
9 MM (Bankr. S.D. Cal. 2020). Neither the Defendant’s Motion to Dismiss nor the Reply
10 indicated Defendant’s objection to the Bankruptcy Court’s adjudication of the Motion to
11 Dismiss. Doc. Nos. 14, 20, No. 22-90049-MM (Bankr. S.D. Cal. 2020). On March 6, 2023,
12 the Bankruptcy Court issued a tentative ruling denying Defendant’s Motion to Dismiss.
13 Doc. No. 30, No. 22-90049-MM (Bankr. S.D. Cal. 2020). At the initial motion hearing
14 scheduled for March 9, 2023, Defendant orally objected to the Bankruptcy Court
15 adjudicating the Motion to Dismiss and indicated that it had discovered additional authority
16 (not new authority) that mandated dismissal of the adversary proceeding. The Bankruptcy
17 Court ordered supplemental briefing on the additional authorities orally recited by the
18 Defendant, and the parties filed their respective supplemental briefs. Doc. Nos. 31-33, No.
19 22-90049-MM (Bankr. S.D. Cal. 2020).

20 On April 3, 2023, after the submission of the supplemental briefs, the Bankruptcy
21 Court issued an order denying the Defendant’s Motion to Dismiss, and also set a pretrial
22 schedule. Doc. No. 34, No. 22-90049-MM (Bankr. S.D. Cal. 2020). On April 21, 2023, the
23 Defendant filed his Answer to the Adversary Complaint. Doc. No. 38, No. 22-90049-MM
24 (Bankr. S.D. Cal. 2020). On June 22, 2023, almost ten months after Plaintiff’s Adversary
25 Complaint had been filed, Defendant filed the instant Motion to Withdraw the Reference.
26 ECF No. 1.

27 Defendant contends this matter should be withdrawn from the Bankruptcy Court
28 because of his constitutional right to a jury trial (*see, e.g.*, ECF No. 1-3 at 9), however, that

1 is not dispositive. As set forth in more detail below, “[a] valid right to a Seventh
2 Amendment jury trial in the district court does not mean the bankruptcy court must
3 instantly give up jurisdiction and that the action must be transferred to the district court.”
4 *In re Healthcentral.com*, 504 F.3d 775, 788 (9th Cir. 2007). Additionally, Defendant’s
5 moving papers do not offer sufficient justification for the near ten-month delay in seeking
6 withdrawal. The record in the Bankruptcy Court makes clear that Defendant first chose to
7 litigate this case in the Bankruptcy Court by filing a Motion to Dismiss, eventually an
8 Answer, and conducting initial discovery. Courts have found motions to withdraw
9 the reference untimely during similar periods of delay. *See Laine v. Gross*, 128 B.R. 588,
10 589 (D. Me. June 26, 1991) (finding a six month delay rendered the motion to withdraw
11 the reference untimely); *Connolly v. Bidermann Industries U.S.A., Inc.*, No. 05-1791, 1996
12 WL 325575, *3 (S.D.N.Y. June 13, 1996) (finding an eight month delay rendered
13 a motion to withdraw the reference untimely); *Stratton v. Vita Bella Group Homes,*
14 *Inc.*, No. 07-0584, 2007 WL 1531860, *3 (E.D. Cal. May 25, 2007) (finding that a one year
15 delay rendered a motion to withdraw untimely).

16 Defendant’s reliance on in *In re The VWE Group, Inc.*, 359 B.R. 441 (S.D.N.Y. Jan.
17 5, 2007), to justify the timeliness of the Motion is without merit. That case is
18 distinguishable on several grounds. The court in *In re The VWE Group, Inc.*, found the
19 movant to be timely when they moved for withdrawal four months after the complaint had
20 been filed. *Id.* at 445. In direct contrast to the instant case, when the movant in *In re The*
21 *VWE Group, Inc.* moved for withdrawal, no answer had been filed and the court had not
22 yet ruled on the motion to dismiss. *Id.* at 447. In *In re VWE Group, Inc.*, the Court found
23 that the movant was not engaged in delay or forum shopping because the motion to
24 withdraw the reference preceded the resolution of their motion to dismiss. *Id.* In making
25 this finding, the court distinguished the facts from those in *Laine v. Gross*, 128 B.R. at 589.
26 In *Laine*, the court denied the motion to withdraw the reference and found forum shopping
27 concerns because “[o]nly after the Bankruptcy Court denied their motion to dismiss,
28

1 having invested a significant amount of time and energy, did Defendants try another tack
2 and seek withdrawal of the reference.” *Id.*

3 In this case, the Court finds that Defendant did not file the Motion to Withdraw
4 Reference “as promptly as possible in light of the developments in the bankruptcy
5 proceeding.” *Sec. Farms*, 124 F.3d at 1007 n.3. Defendant filed a dispositive motion in the
6 Bankruptcy Court without raising any objection to the Bankruptcy Court’s adjudication of
7 the Motion. Only after the Bankruptcy Court issued a tentative ruling in Plaintiff’s favor
8 did Defendant claim the Bankruptcy Court lacked authority to adjudicate the motion. Now,
9 Defendant contends that “because this Court must handle the jury trial and must review on
10 a *de novo* basis any final rulings by the Bankruptcy Court, there is no forum shopping.”
11 Motion at 9. This argument is unsupported by controlling law.

12 Thus, the Court finds that Defendant's Motion is untimely. Even if Defendant’s
13 Motion had been timely filed, permissive withdrawal of the claims would be improper for
14 the reasons set forth below.

15 **2. Mandatory Versus Permissive Withdrawal**

16 In addition to the untimeliness of Defendant’s Motion, the Court finds that
17 withdrawing the reference in this case at this time is unwarranted. As an initial matter,
18 withdrawing the reference is not mandatory even if resolution of the claims at issue in the
19 Complaint eventually require a jury trial. Defendant is correct that the bankruptcy court
20 lacks authorization to conduct jury trials over non-core proceedings. *In re Cinematronics,*
21 *Inc.*, 916 F.2d 1444, 1450-51 (9th Cir. 1990). However, “[a] valid right to a Seventh
22 Amendment jury trial in the district court does not mean the bankruptcy court must
23 instantly give up jurisdiction and that the action must be transferred to the district court.”
24 *In re Healthcentral.com*, 504 F.3d at 788; *see also Hjelmset v. Cheng Hung*, 2018 WL
25 558917, at *5 (N.D. Cal. Jan. 25, 2018) (“[Movant] cites to no case indicating that the
26 district court must immediately assume jurisdiction whenever a party timely requests a jury
27 trial. Indeed, he could not, because in the Ninth Circuit, bankruptcy courts are not divested
28 of pre-trial jurisdiction over matters which they ultimately may be unable to decide.”).

1 Instead, bankruptcy courts retain jurisdiction to oversee matters requiring a jury up until
2 the date of trial. *In re Cedar Funding, Inc.*, 419 B.R. 807, 819 (B.A.P. 9th Cir. 2009). Thus,
3 withdrawal of reference is not required because the Bankruptcy Court is authorized to hear
4 dispositive motions, conduct discovery, and otherwise manage pre-trial proceedings
5 relating to the Complaint.

6 As to whether this Court should exercise its discretion to withdraw the reference
7 under a permissive withdrawal, Defendant has failed to establish that the balance of factors
8 weighs in favor of withdrawal. Plaintiff concedes that the Complaint’s fiduciary breach
9 and corporate waste claims are non-core. *Oppo*. at 14. However, “[t]he determination of
10 whether claims are core or non-core is not dispositive of a motion to withdraw a reference,”
11 and is instead merely “useful before considering the other factors.” *Hjelmeset*, 2018 WL
12 558917, at *3. “Even if [Plaintiff’s] claims are non-core, judicial efficiency may still be
13 served by denying withdrawal of the reference in light of the circumstances of th[e] case.”
14 *Id.* at *4.

15 Denial of withdrawal would promote judicial efficiency by permitting the court most
16 familiar with this matter to retain jurisdiction. The Bankruptcy Court has presided over the
17 underlying Bankruptcy Matter for three years and the Adversary Complaint for one year.
18 It is thus most familiar with the facts and events surrounding the Adversary Complaint. “It
19 is more efficient for the bankruptcy court – which is already familiar with the law and facts
20 – to continue adjudicating the case, rather than this Court essentially starting from scratch.”
21 *Weinstein v. Kuhl*, 2018 WL 4904901, at *4 (N.D. Cal. Oct. 9, 2018); *see also Hjelmeset*,
22 2018 WL 558917, at *4-5 (“[E]ven if [defendant] is ultimately correct that he has the right
23 to a jury trial and he does not consent to a final order by the bankruptcy court, it is still
24 proper for the proceeding to stay in the bankruptcy court for discovery, pre-trial litigation,
25 and pre-trial dispositive motions.”); *Bell v. Lehr*, 2014 WL 526406, at *4 (E.D. Cal. Feb.
26 7, 2014) (finding that “efficiency and judicial economy demand that the Bankruptcy Court
27 continue to handle all pretrial matters” where “the Bankruptcy Court has been handling the
28 underlying Bankruptcy case and related adversary proceedings” for multiple years and thus

1 is “intimately familiar” with the case). In *Bell v. Lehr*, the court found that withdrawing the
2 reference of an adversary proceeding prior to the conclusion of discovery, settlement
3 conferences, and motion practice “would waste judicial resources and increase delay and
4 costs to the parties, as well as jeopardize the uniformity of bankruptcy administration.” *Id.*

5 Thus, in addition to the untimeliness of the instant Motion, the Court finds that
6 withdrawal of the reference of the adversary proceeding is premature, at best. *In re*
7 *Healthcentral.com*, 504 F.3d at 788 (“Only by allowing the bankruptcy court to retain
8 jurisdiction over the action until *trial is actually ready* do we ensure that our bankruptcy
9 system is carried out.”) (emphasis in original).

10 **C. Conclusion**

11 For the reasons stated herein, the Court **DENIES** Defendant’s Motion to Withdraw
12 the Reference.

13 **IT IS SO ORDERED.**

14 Dated: September 19, 2023



15
16 Honorable Linda Lopez
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28