Trujillo v. Apple Computer, Inc. et al Doc. 638

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL M. PRUSKY, individually PAUL M. PRUSKY IRAS& STEVEN PRUSKY, individually Plaintiffs, v. ALLSTATE LIFE INSURANCE COMPANY f/n/a NORTHBROOK LIFE INSURANCE COMPANY, Defendant.	)))))))))))))	Case No: 05 C 6361 Judge Blanche M. Manning Magistrate Judge Sidney I. Schenkier

DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO ABSTAIN

If ever there was a case where the Colorado River doctrine was meant to apply, it would be this one. Plaintiffs have all but conceded that their decision to file this action nearly three years after they filed a similar action in Pennsylvania state court was the product of gamesmanship and forum-shopping, including their desire to avoid further unfavorable discovery rulings by the Pennsylvania court and to get a quick summary judgment ruling here before the Pennsylvania court can enter judgment on their claims. In short, Plaintiffs are hoping that they will be able "to accelerate or stall proceedings in one of the forums in order to ensure that the court most likely to rule in their favor will decide a particular issue first," LaDuke v. Burlington N. Railroad Co., 879 F.2d 1556, 1560 (7th Cir. 1989), a result the Colorado River doctrine was specifically designed to prevent.

For the reasons explained below, this Court should abstain from hearing this action.

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ARGUMENT

I. The State Court and Federal Court Proceedings Are Parallel.

As Allstate explained in its opening brief, the Pennsylvania State Action and the present case are "parallel" within the meaning of the Colorado River doctrine because "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." Clark v. Lacy, 376 F.3d 682, 686 (7th Cir. 2004) (citations omitted). Plaintiffs do not dispute that this is the applicable test. Nor do they dispute that the issues in the two cases arose "out of the same basic facts." (Pl. Resp. at p. 5, citations omitted.) Instead, they claim the cases are not parallel because the parties in both actions are not identical, and because they have included a claim for breach of fiduciary duty in the present case that does not appear in the Pennsylvania State Action. Both arguments are without merit.

A. The Parties in Both Actions Are "Substantially Similar."

Despite Plaintiffs' claim to the contrary, the Seventh Circuit has repeatedly stated that parties need not be identical for purposes of Colorado River, and that "[t]he addition of a party or parties to a proceeding, by itself, does not destroy the parallel nature of state and federal proceedings." Id. at 686. Thus, despite Plaintiffs' argument to the contrary, the mere fact that Steven Prusky has been added as a plaintiff to the federal action is insufficient to destroy the parallel nature of the cases "because a plaintiff cannot control the parallel nature of concurrent proceedings simply by naming different parties in the federal case." The Proctor & Gamble Co. v. Alberto Culver Co., No. 99 C 1158, 1999 WL 319224, at *3 (N.D. Ill. Apr. 28, 1999), attached hereto as Exhibit A.

Instead, the applicable test is whether the parties are "substantially the same -- not completely identical." Clark, 362 F.3d at 686. "Parties with 'nearly identical' interests are

considered 'substantially the same' for Colorado River purposes." Id. However, Plaintiffs contend that the parties are not substantially similar in both cases because Paul Prusky did not file the Pennsylvania State Action in his individual capacity, but rather in his capacity as the trustee for an educational fund and a 401(k) profit sharing trust that he controls. (Pl. Resp. at p. 2.) This is beside the point. The Pruskys' interests are indistinguishable from the entities on whose behalf Paul Prusky has filed suit in the Pennsylvania State Action. The Pruskys are the sole officers of the profit sharing trust. (Steven Prusky Dep. Tr. at pp. 52-53, attached hereto as Exhibit B.) And, even though the profit sharing trust has other participants, "the vast bulk of the plan" -- approximately 95% or more -- is owned and controlled by Paul Prusky (Paul Prusky Dep. Tr. at pp. 146-151, attached hereto as Exhibit C). Thus, Paul Prusky's individual interests are perfectly aligned with and indistinguishable from that of the trust. Similarly, the Pruskys are the only members of the Board of Directors for the educational fund and Paul Prusky is the sole contributor to that fund. (Paul Prusky Dep. Tr. at pp. 18-19.) Accordingly, there is no meaningful difference between the parties in both actions. They are not only parallel for Colorado River purposes, they are, for all practical purposes, the same.[1]

B. The Claims in Both Actions Are "Substantially Similar."

Plaintiffs' argument that the actions are not parallel because they have added a breach of fiduciary duty claim to the federal action is similarly unpersuasive. The fact that the actual causes of action in both cases are not identical does not destroy the parallel nature of the lawsuits

[1] The decision in Williams v. Security Nat'l Bank, 314 F. Supp. 2d 886 (N.D. Iowa), which is cited to and referred to by Plaintiffs as "Franklin," does not suggest a different result. In that case -- decided under the Eighth Circuit's standards governing the application of Colorado River, which are different than the standards that are applied by the Seventh Circuit -- the district court found it relevant that the defendant trustee bank in the federal case "would not be afforded relief or required to pay any judgment" in the state court action. Id. at 900. In short, though the bank was a party to both suits, when appearing in its capacity as a trustee, the bank -- as an institution -- had no financial interest in the outcome of the litigation. In contrast, while Paul Prusky filed the Pennsylvania State Action in his capacity as trustee for the 401(k) and educational fund he controls, he is a personal investor in both of those entities. See supra I(B). Thus, Paul Prusky has a direct financial interest in the claims he has asserted on behalf of his 401(k) and educational fund prevail in the Pennsylvania State Action.

where, as here, all of the claims are premised on the same conduct. Clark, 376 F.3d at 686. Plaintiffs cannot avoid abstention here by "repackaging the same issue under different causes of action." Id. at 686-687. Rather, the proper inquiry is whether "the claims all arise from the same operative event." Proctor & Gamble Co., 1999 WL 319224, at *5. Here, there is no dispute that the claims in both actions all arise out of the same event; namely, Allstate's imposition of the Transfer Restrictions.

Plaintiffs' contention that the contracts at issue in this litigation are not the same as the contracts at issue in the other litigation is similarly unavailing. As support for this assertion, Plaintiffs rely on inapplicable Sixth Circuit case law that stands for the proposition that the issue of whether cases are parallel is to be based on the cases as they "currently exist" not as they "could be modified to mirror each other." (Pl. Resp. at p. 5.) The Seventh Circuit, however, has not adopted this interpretation of the parallel requirement, and has instead held that "later proceedings" may be considered in determining the propriety of a stay under the Colorado River doctrine. Day v. Union Mines, Inc., 862 F.2d 652, 657 (7th Cir. 1988) ("we find that the Colorado River doctrine's goal of conserving judicial resources is best served by taking notice of UMI's second amended complaint, which makes the issues in state court mirror those raised in federal court").[2] This is significant, as Plaintiffs have not claimed that they cannot amend their pleadings in the Pennsylvania State Court Action to add these seven contracts.

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[2] Plaintiffs' reliance on Williams, 314 F. Supp. 2d 886 (N.D. Iowa 2004), to support their claim that the case is not parallel is misplaced for this same reason. In that case, the court relied on this same interpretation of the "parallel" requirement, which has not been adopted by the Seventh Circuit. In addition, the facts of Williams are inapposite. In that case, the state court litigation involved a probate action that a trustee had filed for disgorgement of improper distributions to the income beneficiaries of a trust, while the federal action involved a breach of fiduciary duty claim by the remainder beneficiaries of that trust against the trustee for breach of fiduciary duty. As a result, the court determined that the "central issues in the two case differ[ed] dramatically." Id. at 900. In contrast, there is no dispute that the central issues in these cases -- whether Allstate's imposition of the Transfer Restrictions breached the annuity contracts -- are identical.

More importantly, there is no dispute that Plaintiffs could have added these contracts to the Pennsylvania State Action when they filed that action nearly three years ago. This is important because "the presence of new issues in a federal action which ***could*** have been properly raised in a prior state court action does not insulate the federal action from attack under Colorado River." Proctor & Gamble Co., 1999 WL 319224, at *5 (emphasis added).

In short, where, as here, the claims in both cases all arise from the same "operative event," involve the interpretation of identical contracts and ***could*** have been raised in one action, they are parallel for purposes of the Colorado River doctrine.

II. The Ten Colorado River Factors Weigh Heavily in Favor of Abstention.

Although Plaintiffs acknowledge that this Court is to consider the ten factors set forth in Allstate's opening brief in determining whether abstention is appropriate, they surprisingly claim that none of these factors support abstention. Plaintiffs' arguments as to each of these factors are strained to say the least. They ignore both the factual record and applicable case law.

A. Abstention is Appropriate Because This Is Not an *In Rem* Action.

Plaintiffs contend that application of the first factor, whether the state has assumed jurisdiction over property, weighs against abstention because this is not an "*in rem*" action. (Resp. at p. 8.) In so doing, they ignore the decision of this Court, which was cited in Allstate's opening brief and clearly stands for the proposition that this factor is ***inapplicable*** in such a situation. See Proctor & Gamble Co., 1999 WL 319244, at *6.

B. Abstention is Appropriate Because Each Forum Is Equally Convenient.

Plaintiffs contend that factor two, the relative convenience of the federal forum, weighs in favor of abstention. In support of this claim, Plaintiffs argue that since they filed suit here, "they would obviously prefer this action to proceed here." (Pl. Resp. at p. 8.) Plaintiffs' preference, however, has no bearing on the relative convenience of the fora, and lends nothing to

the Colorado River analysis. At any rate, Plaintiffs chose to file their first lawsuit in Pennsylvania -- where they live and where they filed all of their other market timing lawsuits -- so they "obviously prefer[red]" to proceed there at that time. Why should their current preference be given more weight than their earlier preference?

The simple fact is that Plaintiffs "elected to file suit in both [Pennsylvania] and Illinois so [they] cannot claim that Illinois is more convenient than [Pennsylvania]." Proctor & Gamble, 1999 WL 319224, at *6. Thus, if anything, this factor weighs in favor of abstention.

C. Abstention Is Necessary to Avoid Piecemeal Litigation and Inconsistent Judgments.

As Allstate explained in its opening brief, factor three weighs heavily in favor of a stay because a stay would help to avoid piecemeal litigation and eliminate the risk of inconsistent judgments. (Def. Mem. at p. 7.) In apparent recognition of the fact that the risk of inconsistent judgments is "very present here since both state and federal cases depend on interpretation of the same contract," Day, 862 F.2d at 659, Plaintiffs do not even address this issue. However, they do offer a series of unpersuasive reasons as to why they do not believe that a stay of this case would avoid piecemeal litigation.

First, Plaintiffs mysteriously contend that a stay would not avoid piecemeal litigation because "a decision on the merits and in favor of the plaintiffs in the Pennsylvania Action would not provide a shortcut or other obvious benefit to the instant Plaintiff." (Pl. Resp. at p. 8.) This is clearly irrelevant, as it goes without saying that the purpose of Colorado River abstention is not to provide an "obvious benefit" to the Plaintiffs, but, rather, to promote wise judicial administration.

Plaintiffs also make the puzzling claim that a stay will not prevent piecemeal litigation because if this matter were stayed, they would file a **new** action in Pennsylvania and would "most likely obtain[] a different judge and hav[e] to start the litigation process anew." (Pl. Resp.

at p. 9.) Even assuming that Plaintiffs would not be able to amend their pleadings to include their remaining contracts in the Pennsylvania State Action or otherwise consolidate their claims under these contracts with the Pennsylvania State Action,[3] this argument merely serves to highlight the fact that Plaintiffs' gamesmanship has created a situation where, absent a stay of the claims they have asserted here, piecemeal is likely to result. Day, 862 F.2d at 659.

Finally, Plaintiffs' argument that a stay at this point will not produce less "overall litigation" is not only irrelevant, it is wrong. It is irrelevant because the total volume of litigation has absolutely nothing to do with whether the litigation is piecemeal. It is wrong because if the claims in this action are stayed, then the Pennsylvania state court will interpret the annuity contracts and determine whether Allstate's conduct breached those contracts. The Pennsylvania court's decision in this regard could have a preclusive effect on the claims in this case, which would obviously create less "overall litigation" than if the claims in both cases were to proceed simultaneously. Although Plaintiffs would no doubt regard such a result as unfair, they have admitted in deposition testimony that they made a knowing and calculated decision not to file suit under all of their contracts when they initiated the Pennsylvania State Action. If they somehow find that they are unable to do so now, they have "only [themselves] to blame." Lumen Constr., Inc. v. Brant Constr. Co., Inc., 780 F.2d 691, 696 (7th Cir. 1986).

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[3] Plaintiffs have conveniently avoided mention of the possibility that a new action in Pennsylvania could be consolidated with the Pennsylvania State Action pursuant to Pennsylvania Rule of Civil Procedure 213, which provides that "[i]n actions pending in a county which involve a common question of law or fact or which arise from the same transaction or occurrence, the court on its own motion or on the motion of any party may order a joint hearing or trial of any matter in issue in the actions, may order the actions consolidated, and may make orders that avoid unnecessary cost or delay." Thus, even, if Plaintiffs were to file a new action, it is far from clear that this would create piecemeal litigation.

D. This Court Should Abstain Because the Pennsylvania State Court Action Has Been Pending for Nearly Three Years and There Has Been Significant Progress in that Case.

As Allstate previously explained in its discussion of the fourth and seventh factors, the Pennsylvania state court obtained jurisdiction over this case ***almost three years*** before the present federal lawsuit was filed. In contrast to the present case in which nothing has happened aside from the filing of the complaint and the present motion, there has been significant progress in the Pennsylvania State Action. The parties have exchanged several rounds of written discovery, the Pruskys and their broker have been deposed and Paul Prusky has filed a motion for partial summary judgment that is currently pending before the Pennsylvania court. In addition, after significant briefing and oral argument and over Plaintiffs' vigorous objections, the Pennsylvania court recently granted Allstate's motion to compel Plaintiffs to produce telephone recordings relating to, *inter alia*, their negotiation and purchase of the contracts at issue in this case after determining that such recordings were relevant to Plaintiffs' pending summary judgment motion. (See Nov. 29, 2005 Order, attached hereto as Exhibit D.) In their response, however, Plaintiffs ignore the progress that has been made in the Pennsylvania State Court Action and disingenuously assert that "the parties are still engaged in preliminary discovery." (Pl. Resp. at p. 10.)

Perhaps more disturbing than Plaintiffs' mischaracterization of the status of the Pennsylvania State Action are their admissions that the present suit is the product of gamesmanship and forum shopping. Specifically, Plaintiffs claim that they decided to file this action here because this forum "has demonstrated very quick adjudication of motions for summary judgment on the very issues present in this case," and has "prevented abuses of discovery when a party seeks early determination of a matter on summary judgment." (Pl. Resp. at p. 11.) This latter comment is no doubt a reference to Plaintiffs' dissatisfaction with the

Pennsylvania state court's recent ruling that ordered them to produce the telephone recordings after determining that these recordings were relevant to their pending summary judgment motion.

Plaintiffs go on to assert that, given this Court's track record, it "may likely fully adjudicate this case before that matter is concluded." (Id.) This is astonishing. Plaintiffs are admitting that their real goal in filing this lawsuit here is to try to get a quick summary judgment ruling from this Court before the Pennsylvania court can enter judgment because they believe this forum will be more favorable to them.[4] This is exactly what Colorado River was designed to prevent.

E. Abstention Is Proper Because Plaintiffs' Claims Are Governed by State Law.

Although Plaintiffs admit that the bulk of their claims are governed by state law, they claim that abstention is inappropriate because their breach of fiduciary duty claim is "predicated upon the existence of a fiduciary duty under federal securities statutes." (Pl. Resp. at p. 10.) This claim fails for several reasons.

First, the mere fact that the bulk of Plaintiffs' claims are governed by state law is itself sufficient to end the inquiry because the United States Supreme Court has made it clear that Colorado River abstention is appropriate where "the bulk of the litigation necessarily revolve[s] around state law." Lumen Constr., 780 F.2d 691, 696, n.3 quoting Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 n. 29 (1983).

Second, Plaintiffs' claim that their breach of fiduciary duty claim arises under federal law is flatly contradicted by the allegations in their own Complaint. The Complaint identifies diversity jurisdiction as the ***sole*** basis for this Court's jurisdiction over the matter (Compl. at ¶

[4] Although the order requiring Plaintiff to produce the recordings was not entered by the Court until November 29, 2005, the discovery master that heard argument on Allstate's motion to compel indicated that he would recommend that the Court enter such an order at a hearing on September 30, 2005. Thus, Plaintiffs knew this ruling was going to be handed down more than a month before they filed this lawsuit.

2), and it is devoid of any allegations that Allstate owes Plaintiffs any fiduciary duties arising under federal law. Instead, the only reference to any federal law that appears in the Complaint is a passing reference to the fact that Plaintiffs' Annuity Contracts are registered unit investment trusts under the Investment Company Act of 1940. (Id. at ¶ 36.)

Third, there is no legal support for Plaintiffs' claim that their breach of fiduciary duty claim somehow arises under federal law. To the contrary, three other judges in this district have rejected the very same claim in similar litigation against Allstate that was also filed by Plaintiffs' counsel. See McDonnell v. Allstate Life Ins. Co., No. 04 C 3076, 2004 WL 2392169, at *2, n.1 (N.D. Ill. Oct. 25, 2004) (St. Eve, J.) (rejecting plaintiff's claim that Allstate's imposition of transfer restrictions on plaintiff's variable annuity contracts stated a claim for breach of fiduciary duty under the Investment Company Act); Prescott v. Allstate Life Ins. Co., No. 04 C 2442, 341 F. Supp. 2d 1023, 1029-30 (N.D. Ill. 2004) (Castillo, J.) (same); (Brady v. Allstate Life Ins. Co., Case No. 04 C 2518, 2004 WL 2218372, at *3 (N.D. Ill. Oct. 1, 2004) (Zagel, J.) (same), attached hereto as Exhibits E through G. Not surprisingly, Plaintiffs fail to bring these decisions to this Court's attention.

Finally, even assuming *arguendo* that Plaintiffs' breach of fiduciary duty claim somehow raised an issue of federal law, even Plaintiffs are not bold enough to suggest that it is exclusively an issue of federal law that cannot be handled by a state court. Absent such a situation, abstention is still appropriate because "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." Lumen, 780 F.2d at 697, quoting Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (affirming district court's decision to abstain under Colorado River despite plaintiff's contention that its federal claims would not be fairly adjudicated in state court).

F. The Pennsylvania Court Can Provide All of the Relief Plaintiffs Seek Through This Action.

As Allstate has explained, factor six also weighs in favor of a stay because there is no question that the Pennsylvania court has the power to provide all of the relief the Plaintiffs seek in the federal court action. (Def. Mem. at p. 8.) Plaintiffs nevertheless disagree with this conclusion, arguing that the Pennsylvania court will not address their breach of fiduciary duty claim. This argument misses the point because factor six relates solely to the ***relief*** sought in the federal action, not the actual labels Plaintiffs have attached to the various causes of action they have asserted. Plaintiffs do not dispute that the Pennsylvania court has the power to award all of the ***relief*** they seek in the federal action -- namely, compensatory and punitive damages for injuries Plaintiffs' allegedly sustained when Allstate imposed the Transfer Restrictions -- and, as a result, they have conceded that this factor weighs in favor of abstention.

G. Abstention Is Proper Because the Courts Have Concurrent Jurisdiction.

Allstate has explained that factor eight weighs in favor of a stay because both the state and federal court have jurisdiction over all of Plaintiffs' claims. (Id.) Plaintiffs do not dispute this in their response. Accordingly, there does not appear to be any dispute that this factor weighs in favor of abstention.

H. Abstention Is Appropriate Because the Time for Removal Has Passed.

Factor nine, which deals with the possibility of removal, also weighs in favor of abstention because the time for removal of the Pennsylvania State Action has long since passed. Clark, 376 F.3d at 688 ("not only does the availability of concurrent jurisdiction weigh in favor of a stay, so does the inability to remove the [state court] action to federal court").

In their response, Plaintiffs simply state, without citation to any authority, that this factor should not weigh in favor of abstention because it was Allstate's decision not to remove the case. (Pl. Resp. at p. 12.) This response misses the point. The issue is not whether the case could have

been removed, but whether it can still be removed because there is a "policy against hearing a federal claim which is related to ongoing non-removable state proceedings." Day, 862 F.2d at 659-60. Because the case is no longer removable, this factor weights in favor of abstention.

I. The Vexatious and Contrived Nature of this Litigation Weighs Heavily in Favor of Abstention.

Finally, the tenth factor weighs heavily in favor of a stay because of "the vexatious or contrived nature of the federal claim[s]" that Plaintiffs have asserted in this action. Plaintiffs deliberately chose not to initially file suit under all of their annuity contracts. (Paul Prusky Dep. Tr. at pp. 163-64, attached as Exhibit B to Def. Mem.) Instead, they intentionally split their claims by filing suit under just half of their contracts -- the half that Paul Prusky held as trustee for entities that he owns and controls -- so that these corporations could litigate the issue and incur the attorneys' fees because Plaintiffs were under the impression that they could sit back and reap the benefit of any favorable precedent in subsequent litigation. (Id.)[5]

The only reasonable explanation for Plaintiffs' apparent change of heart in deciding to file suit before any precedent had been established in the Pennsylvania State Action is their desire to run away from unfavorable discovery rulings in that case, as well as recent, unfavorable decisions against them by other Pennsylvania courts. Indeed, the Pruskys' desire to avoid Pennsylvania law is rivaled only by their desire to reap the benefit of what they perceive to be more favorable law in this district. In fact, Plaintiffs not only fail to deny Allstate's claim that

[5] Plaintiffs do not dispute this in their response. Instead, they try to neutralize this testimony by arguing that "it may be often better to allow other cases pending in a system [sic] proceed ahead if they could possibly provide a potential litigation roadmap, create helpful precedents, reduce exposure to counter-suits and/or otherwise reduce expenses of litigation." (Pl. Resp. at p. 11.) Yet, the mere filing of this lawsuit now shows that Plaintiffs' conduct in filing suit here is the product of forum shopping. If Plaintiffs truly believed it would be better to allow a case to move forward so that they could reap the "intangible benefits" of "legal precedent," then they would have waited for a decision on their claim in the Pennsylvania State Action before they filed this suit. Instead, the fact that they originally intended to sit back and wait for a decision in the Pennsylvania State Action, but subsequently decided to file suit here without waiting for any decision, is further evidence that their decision to file this suit was the product of forum-shopping.

they were motivated to file suit in this district by Judge Grady's decision in Allmerica, they actually cite that case in their response brief as support for their claim that this forum has "demonstrated very quick adjudication of motions for summary judgment on the very issues present in this case." (Pl. Mem. at p. 11.)

Perhaps most telling is the significance that Plaintiffs have attached to the possibility that this Court will "fully adjudicate this case" before the Pennsylvania State Action has concluded. (Pl. Resp. at p. 11.) It is clear that Plaintiffs' original strategy has now changed, and instead of sitting back and waiting for the Pennsylvania State Action to generate favorable precedent that they can then apply to the other half of their annuity contracts, they now hope to bypass the Pennsylvania court altogether and get a quick summary judgment decision from this Court because they no longer believe the Pennsylvania forum will be favorable to them. Such blatant forum shopping and gamesmanship should be rejected because, as the Seventh Circuit has noted, "[t]he legitimacy of the court system in the eyes of the public and fairness to the individual litigants are also endangered by duplicative suits that are the product of gamesmanship . . ." Lumen, 879 F.2d 1556.

CONCLUSION

For the foregoing reasons, the Court should abstain from hearing this matter pursuant to the Colorado River doctrine.

Dated: December 20, 2005

ALLSTATE LIFE INSURANCE COMPANY

By: /s/David C. Jacobson
One of Its Attorneys

David C. Jacobson, ARDC No. 1315676
Nicole S. Pakkala, ARDC No. 6271682
SONNENSCHEIN NATH & ROSENTHAL LLP
7800 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000

<u>CERTIFICATE OF SERVICE</u>

I, Nicole S. Pakkala, an attorney, hereby certify that I have caused a copy of the foregoing **DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO ABSTAIN** to be served upon:

Jon D. Cohen
Stahl Cowen Crowley, LLC
55 W. Monroe
Suite 500
Chicago, IL 60603

by causing a copy via CM/ECF filing to be delivered this 20th day of December, 2005.

/s/Nicole S. Pakkala
Nicole S. Pakkala