IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	**CASE NO. 05-35291 (Chapter 11)**
DOCTORS HOSPITAL 1997, L.P.,	§	
Debtor,	§	
	§	
CHARLES R. VELDEKENS, ASHRAF VELDEKENS, and TIDWELL PROPERTIES, INC.,	§	
Plaintiffs,	§	
v.	§	**ADVERSARY NO. 05-3772**
GE HFS HOLDINGS, INC., et al.,	§	
Defendants.	§	

REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT REGARDING MOTION OF CHARLES VELDEKENS, ASHRAF VELDEKENS, AND TIDWELL PROPERTIES, INC. FOR A RECOMMENDATION FOR THE WITHDRAWAL OF THE REFERRAL ORDER REFERRING THIS ADVERSARY PROCEEDING TO THIS BANKRUPTCY COURT

I. INTRODUCTION

On April 6, 2005, Doctors Hospital 1997, L.P. (**the Debtor**) filed for Chapter 11 in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. [Docket No. 1.][1] On August 19, 2005, Charles R. Veldekens, Ashraf Veldekens, and their privately-held

[1] Docket No. references are to the docket in Adversary Proceeding Number 05-3772, except that any references that begin with the phrase "Main Case" refer to docket entries in the Debtor's Chapter 11 case.

company, Tidwell Properties, Inc. (collectively hereinafter referred to as **the Veldekens**) filed suit against GE HFS Holdings, Inc. (**GE**) in the District Court of Harris County, Texas. [Docket No. 71, Attach. 4.] On September 30, 2005, GE removed this state court lawsuit to the United States District Court for the Southern District of Texas, Houston Division. [Civil Action No. 4:05-cv-03381, Docket No. 1.] Upon removal, this suit was assigned to the Honorable Vanessa D. Gilmore and given Civil Action No. 05-CV-03381. *Id.* On October 14, 2005, the Veldekens and GE filed an Agreed Motion for Referral to the U.S. Bankruptcy Court for the Southern District of Texas, Houston, Division. [Docket No. 104, Ex. A.] On October 18, 2005, the Honorable Vanessa D. Gilmore signed an Order granting the Agreed Motion for Referral to Bankruptcy Court. [Docket No. 1.] This Order referred the lawsuit to the undersigned bankruptcy judge (**the Referral Order**). This Order also stated that "pursuant to 28 U.S.C. § 157, and based on the consent of the parties, the Bankruptcy Court may hear and determine this action, and may enter appropriate final orders or judgment." *Id.*

Immediately after the Referral Order was docketed, the Clerk of Court assigned this suit Adversary Proceeding No. 05-03772 and noted on the docket that the Veldekens were seeking to recover money and property. [Docket No. 1.] Since District Judge Gilmore referred this lawsuit to this Court, there have been numerous motions and briefs filed on a multitude of issues, and as of the date of this Report and Recommendation, there are 134 entries on the docket. On November 4, 2005, the Veldekens filed their First Amended Complaint adding two defendants: Newbanks, Inc. (**Newbanks**) and Clifton D. Thomason (**Thomason**). [Docket No. 12.] On March 16, 2006, GE filed a Motion for Summary Judgment [Docket No. 66.]; on April 4, 2006, Newbanks filed its Motion for Summary Judgment [Docket No. 70.]; and on May 30, 2006, Thomason filed his own Motion for

Summary Judgment. [Docket No. 83.] On June 16, 2006, the Veldekens filed a Motion to Abstain and to Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this Case to the Bankruptcy Court by the United States District Court. [Docket No. 88.] Then, on June 23, 2006, the Veldekens filed their Amended Motion to Abstain and to Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this Case to the Bankruptcy Court by the United States District Court **(the Amended Motion)**. [Docket No. 99.] This Court has spent substantial time adjudicating various matters in this Adversary Proceeding, including a lengthy hearing on December 2, 2005 on the Veldekens' Application for a Preliminary Injunction against GE—which was denied—as well as two hearings on June 28, 2006 and August 10, 2006 on the Defendants' Motions for Summary Judgment.

This Court views the Amended Motion as a blatant attempt by the Veldekens to forum shop. Unhappy with this Court's denial of their Application for Preliminary Injunction, and worried that this Court will grant the Defendants' pending Motions for Summary Judgment, the Veldekens have decided to attempt to have some other court adjudicate the lawsuit. In the first instance, they want to return to the Harris County District Court; in the alternative, they want the suit to be returned to the United States District Court for the Southern District of Texas. This Court has already issued an order, together with a Memorandum Opinion, denying the Veldekens' request for this Court to abstain and remand the suit to Harris County District Court.[2] Having denied this relief, this Court now turns to the request by the Veldekens for a recommendation as to whether the Referral Order should be withdrawn so that the suit can be adjudicated in the United States District Court. This

[2] A copy of the Memorandum Opinion on the Amended Motion regarding the abstention and remand issues is attached to this Report and Recommendation.

Court interprets the relief requested by the Veldekens as the same relief a party would request if the suit had initially been filed in the bankruptcy court and a motion to withdraw the reference was thereafter filed. Accordingly, pursuant to Local Bankruptcy Rule 5011, this Court now makes its Report and Recommendation to the United States District Court as to whether the Referral Order should be withdrawn.

II. SUMMARY OF RECOMMENDATION

This Bankruptcy Court recommends that the District Court **not** withdraw the Referral Order.

III. RELEVANT PROCEDURAL BACKGROUND OF THIS BANKRUPTCY CASE AND THIS ADVERSARY PROCEEDING

1. Mr. Veldekens and Dr. Veldekens owned land located at 510 West Tidwell Road in Houston, Harris County, Texas and certain improvements on the land, including a hospital facility (all of which property and improvements are hereinafter collectively referred to as **the Tidwell Property**). [Docket No. 12, ¶ 13.]

2. On or about January 23, 1998, Mr. Veldekens and Dr. Veldekens entered into a Lease Agreement with the Debtor, whereby Mr. Veldekens and Dr. Veldekens leased the Tidwell Property to the Debtor. [Docket No. 63, p. 2:8-14, 18-19; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 1.] The Debtor is a Limited Partnership based in Houston, Texas, and was founded in January of 1998 for the purpose of leasing and operating the hospital facility located on the Tidwell Property in north Houston. [Docket No. 6, ¶ 6.]

3. On or about July 27, 1998, the Debtor borrowed $7 million from HCFP Funding II, Inc. (**the Loan**) pursuant to a Loan Agreement. [Dec. 2, 2005 Hrg. on Veldekens' Application for

Prelim. Inj., Joint Ex. 12.] Defendant GE was the most recent holder and owner of the Loan Agreement and all other instruments at issue in this Adversary Proceeding. [Docket No. 63, p. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

4. On or about July 27, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed the Assignment of Leases, Rents and Profits in favor of HCFP Funding II, Inc. [Docket No. 63, p. 3:3-6; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 3.]

5. On or about July 27, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed a Deed of Trust and Security Agreement for the benefit of HCFP Funding II, Inc. [Docket No. 63, p. 3:7-11; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 4.] GE was the most recent holder and owner of the Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

6. On or about July 27, 1998, Mr. Veldekens and Dr. Veldekens, as guarantors, also executed a Limited Guaranty Agreement with HCFP Funding II, Inc. [Docket No. 63, pp. 2:15-18, 3:24-25, 4:1-2; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 2.], which specifies the following:

> D. The proceeds from the Loan shall be used by [the Debtor] to construct new improvements on, and substantially renovate existing improvements on, the Facility and upon [the Tidwell Property], and therefore [Mr. Veldekens and Dr. Veldekens], as owner of the fee simple interest in the Property, will receive substantial benefits and increase in the value of its property from the making of the Loan to the [the Debtor].
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> E. In consideration of the benefits to be received by the [Mr. Veldekens and Dr. Veldekens] by the making of the Loan to the [the Debtor] and subject to the express limitation on personal liability set forth in Section 22, the [Mr. Veldekens and Dr. Veldekens have] agreed to execute and deliver to [HCFP Funding II, Inc.] this Guaranty.

[Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 2, Recitals D, E.]

GE was the most recent holder and owner of the Limited Guaranty Agreement. [Docket No. 63, pp. 2:21-24, 8:25, 9:1-6.]

7. On or about November 6, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed the First Amendment to Deed of Trust and Security Agreement for the benefit of HCFP Funding II, Inc. [Docket No. 63, p. 3:12-15; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 5.] GE was the most recent holder and owner of the First Amendment to Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

8. On or about December 22, 1999, Mr. Veldekens, Dr. Veldekens, and the Debtor executed the Second Amendment to Deed of Trust and Security Agreement for the benefit of Heller Healthcare Finance, Inc. [Docket No. 63, p. 3:16-19; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 6.] Heller Healthcare Finance, Inc. was the successor to HCFP Funding II, Inc. and became the holder of the instruments HCFP Funding II, Inc. originally held. [Docket No. 63, p. 3:19-23; *see* Docket 71, Ex. 2, ¶ 11.] GE was the most recent holder and owner of the Second Amendment to Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

9. Since purchasing the Tidwell Property in 1992 for $7.3 million, Mr. Veldekens and Dr. Veldekens received income therefrom in the form of lease payments from the Debtor and fees from sitting on the governing board, among other income. [Docket No. 63, p. 11:1-6.] The amount of income that Mr. Veldekens and Dr. Veldekens received totaled approximately $10.3 million. [Docket No. 63, p. 11:6-8.]

10. Mr. Veldekens and Dr. Veldekens transferred title to the Tidwell Property to Plaintiff

Tidwell Properties, Inc. by a warranty deed filed in Harris County, Texas on December 26, 2002. [Docket No. 12, ¶ 13.] Pursuant to Federal Rule of Evidence 201(a), (b), (c),[3] this Court takes judicial notice of the Texas Secretary of State Business Organization records, which indicate that **Charles Veldekens is the registered agent and sole officer and director of Tidwell Properties, Inc.**

11. On April 6, 2005, the Debtor filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. [Main Case No. 05-35291; Docket No. 1.]

12. On August 19, 2005, the Veldekens[4] filed suit against GE in the 334th Judicial District of Harris County, Texas (**the State Court Lawsuit**). [Docket No. 71, Exhibit 4.] The Original Petition in this State Court Lawsuit alleged that: (1) the Veldekens had leased the Tidwell Property to the Debtor; (2) the Debtor's lenders[5] had agreed to issue loans to the Debtor solely for the construction of improvements on the Tidwell Property; (3) GE is a Delaware corporation doing business in Texas and acquired the Debtor's lenders;[6] (4) the Veldekens had agreed to grant the Debtor's lenders a lien upon the Tidwell Property only to the extent

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[3]The Federal Rules of Evidence apply to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 9017 and Federal Rule of Evidence 1101(a), (b).

[4] It is worth reiterating that the phrase "the Veldekens" refers not only to Mr. Veldekens and Dr. Veldekens, but also Tidwell Properties, Inc.

[5]The Veldekens' suit alleged that the Debtor's lenders were Heller Healthcare Finance, Inc. and HCFP Funding, Inc., a/k/a HCFP Funding II, Inc. [Docket No. 71, Ex. 2, ¶ 11.] GE is the successor in interest to these entities.

[6]The Veldekens' Original Petition alleges that GE "is, based on knowledge and belief, a Delaware Corporation doing business in Texas." [Docket No. 6, Ex. 7, ¶ 6.] Pursuant to Federal Rule of Evidence 201(a), (b), (c), this Court takes judicial notice of the Texas Secretary of State Business Organization records, which indicate that GE is a Connecticut Corporation, with "Jurisdiction" in "DE/USA."

that the lenders extended loans to the Debtor for improvements on the Tidwell Property; and (5) the lenders made loans to the Debtor for purposes other than the construction of improvements on the Tidwell Property, thereby encumbering the Veldekens' fee simple interest in the property with liens related to loans "for purposes totally unrelated to improving the Tidwell Property, including purchasing a separate hospital facility on a different property not owned by the [Veldekens]." [*Id.* at ¶¶ 6, 9, 11, 13, 14.]

13. The State Court Lawsuit sought relief under the following causes of action: breach of contract, suit to remedy cloud/suit to quiet title, fraudulent inducement, fraud, and negligent misrepresentation. [*Id.* at ¶¶ 15-53.] The State Court Lawsuit also sought damages, exemplary damages, attorney's fees, and the following declaratory relief: (1) "to have the [Tidwell] Property immediately delivered back to [the Veldekens'] possession;" (2) "to have the cloud on [the Veldekens'] title created by the alleged liens on their interest in the [Tidwell] Property vacated and cancelled;" and (3) "If possession of the [Tidwell] Property is not immediately delivered back to [the Veldekens] and the cloud on [the Veldekens' title created by Heller/GE's alleged lien is not remedied, then [the Veldekens] seek to disgorge from Heller/GE's unjust enrichment, either through a return of the Loans that [the Debtor] unjustly received or a constructive trust placed upon any interest Heller/GE has in the [Tidwell] Property." [*Id.* at ¶¶ 54-58.]

14. On September 30, 2005, GE removed the State Court Lawsuit to the United States District Court for the Southern District of Texas, Houston Division (**the District Court**), where it was assigned Civil Action No. 4:05-cv-03381 and assigned to the Honorable Vanessa D. Gilmore, United States District Judge. [Civil Action No. 4:05-cv-03381, Docket No. 1.]

15. In a letter to Charles and Ashraf Veldekens dated October 7, 2005, GE demanded payment of $15,540,000.00 in indebtedness under the documents executed on July 27, 1998. [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 18; Docket No. 6, Ex. 11.] The letter also included a Notice of Substitute Trustee's Sale, which set forth that: (1) the Veldekens granted liens pursuant to the Deed of Trust to "secure a Limited Guaranty Agreement . . . dated as of July 27, 1998, executed jointly and severally by [the Veldekens] to secure indebtedness (the "Debt");" (2) GE was the current owner of the liens; and (3) "default has occurred in the payment of the Debt," which had matured, so that GE "authorized and directed the Substitute Trustee to file, post and mail this Notice of Substitute Trustee's Sale and to sell the Property and apply the proceeds against the Debt, as provided in the [Limited] Guaranty [Agreement]." The letter and the Notice of Substitute Trustee's Sale indicated that the sale would occur on November 1, 2005. *Id.*

16. On October 14, 2005, the Veldekens and GE jointly filed the following motion in the removed suit (bearing Civil Action No. 4:05-cv-03381) pending before District Judge Gilmore: Agreed Motion for Referral to the United States Bankruptcy Court for the Southern District of Texas, Houston Division (**the Agreed Motion for Referral**). [Docket No. 104, Ex. A.] This Agreed Motion for Referral made the following representations to District Judge Gilmore:

> Plaintiffs Charles R. Veldekens, Ashraf Veldekens, and Tidwell Properties, Inc. ("Plaintiffs") and defendant GE HFS Holdings, Inc. ("GE HFS"), formerly known as Heller Healthcare Finance, Inc. and, before that, HCFP Funding, Inc., and the successor in interest to HCFP Funding II, Inc., *jointly move the Court to refer this case to the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division.*
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> . . . .
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> *Both parties now move the Court to refer this case to the Bankruptcy Court,*

which is familiar with the dispute at issue.

2. Currently pending before the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division (Bohm, J.) (the "Bankruptcy Court") is a Chapter 11 bankruptcy, Cause No. 05-35291-H4-11, styles *In re Doctors Hospital 1997, L.P.* Doctors Hospital 1997, L.P. is the lessee of the real property which is the subject of this case. Further, already pending in Bankruptcy Court is Adversary Proceeding No. 05-3315, in which the Plaintiffs assert claims similar to the ones Plaintiffs brought in this matter. *The parties agree that the Bankruptcy Court is the appropriate forum to resolve the parties' dispute.*

3. *The parties agree that the Bankruptcy Court may hear and determine this case, and may enter appropriate final orders or judgment, pursuant to 28 U.S.C. § 157. To the extent necessary, the parties consent to the entry of final orders or judgment in this case by the Bankruptcy Court.*

Id. (emphasis added).

17. On October 18, 2005, District Judge Gilmore signed an agreed order referring the suit (Civil Action No. 4:05-cv-3381) to this Bankruptcy Court. [Docket No. 1.] This order was entered on the docket on October 19, 2005. *Id.*

18. Upon referral of this suit from the District Court to this Court, the Clerk of Court assigned this suit Adversary Proceeding No. 05-3772 (**the Adversary Proceeding**).

19. On October 31, 2005, the Veldekens filed their Verified Emergency Application for Temporary Restraining Order and Preliminary Injunction, requesting that this Bankruptcy Court enjoin the foreclosure sale of the Tidwell Property scheduled for November 1, 2005. [Docket No. 6, ¶ 39.]

20. On November 4, 2005, in the main case, the Debtor filed its Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code. [Main Case No. 05-35291; Docket No. 357.]

21. On November 4, 2005, the Veldekens filed their Verified First Amended Complaint Pursuant

to 11 U.S.C. §§ 362 and 105(a) and Application for Preliminary Injunction. [Docket No. 12.] The Veldekens added two defendants—Newbanks and Thomason—as parties to the Adversary Proceeding. [*Id.* at ¶¶ 10-11.] The Veldekens alleged that Newbanks is a foreign corporation with its place of business in Texas and that Thomason is an architect with his principal place of business in Texas. *Id.* The Veldekens' First Amended Complaint alleged that Thomason and Newbanks were acting as authorized agents of GE [*Id.* at ¶ 80.] when they failed to perform GE's contractual obligations [*Id.* at ¶ 39.] and made negligent misrepresentations. [*Id.* at ¶ 50.] The Veldekens also asserted causes of action under the Texas Deceptive Trade Practices Act [*Id.* at ¶ 65] and alleged a conspiracy among GE, Thomason, and Newbanks. [*Id.* at ¶ 77.]

22. On December 2, 2005, this Court held a full day hearing on the Veldekens' Application for Preliminary Injunction. [Docket No. 6.]

23. On December 5, 2005, this Court announced, from the bench, its oral Findings of Fact and Conclusions of Law and denied the Veldekens' Application for Preliminary Injunction. [Docket Nos. 60, 63.] With this Court's refusal to issue a preliminary injunction, GE soon thereafter foreclosed its lien on the Tidwell Property.

24. In denying the Veldekens' Application for Preliminary Injunction, the Court found that the Veldekens failed to satisfy all four prerequisites for obtaining a preliminary injunction, which the Fifth Circuit has set forth as the follows: "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will

not disserve the public interest." *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). [Docket No. 63, pp. 12:20-25, 13:1-10, 29:5-8.]

25. On December 15, 2005, Defendant Newbanks filed its Answer to the Veldekens' First Amended Complaint. [Docket No. 61.]

26. On January 24, 2006, the Debtor filed its First Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket Nos. 469, 473.][7]

27. On February 10, 2006, the Debtor filed its Second Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket No. 504.]

28. On March 3, 2006, the Debtor filed an additional Second Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket No. 530.][8]

29. On March 16, 2006, GE filed its Motion for Summary Judgment. [Docket No. 66.]

30. On March 31, 2006, the Veldekens filed their Motion for Withdrawal of Claim Pursuant to FED. R. BANKR. P. 3006, stating that the disputes related to the Lease Agreement were "properly within determination" of this Court in this Adversary Proceeding. [Main Case No. 05-35291; Docket No. 556, ¶ 4.]

31. On the same day, the Veldekens filed their Objection to Confirmation of the Debtor's Second Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code and Supporting Memorandum of Charles Veldekens, Ashraf Veldekens, and Tidwell Properties, Inc. [Main

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[7] The docket in the Main Case shows that on the same date, January 24, 2006, two documents titled "Debtor's First Amended Plan of Reorganization" were filed. There is a slight variation between the two documents and the second entry should have been correctly titled Second Amended Plan of Reorganization.

[8] Again, the Debtor filed two slightly varying documents with identical titles. In light of the two "first" Amended Plans that were filed, these documents should have been titled the third and fourth Amended Plans.

Case No. 05-35291; Docket No. 557.]

32. On April 4, 2006, Newbanks filed its Motion for Summary Judgment. [Docket No. 70.]

33. On April 5, 2006, the Debtor filed its Plan Supplement with respect to Debtor's Second Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code, relating to the Disclosure Statement and Second Amended Chapter 11 Plan filed at Docket Nos. 529 and 530 [Main Case No. 05-35291; Docket No. 577], submitting draft forms of certain documents necessary to implement the Plan. [*See* Main Case No. 05-35291; Docket No. 620, at ¶ 12.]

34. On May 8, 2006, the Debtor filed a modified Second Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket No. 619.][9]

35. On May 8, 2006, this Court entered its Order Confirming Debtor's Second Amended Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, as Modified relating to the Second Amended Plan at Docket No. 619 (**the Plan**). [Main Case No. 05-35291; Docket No. 621.] Counsel for the Veldekens appeared at this confirmation hearing to withdraw the Veldekens' prior objection to confirmation of the Plan. *Id.*

36. The Plan calls for Healthcare Financial Services Realty, LLC, an affiliate of GE, to transfer the Tidwell Property to the reorganized Debtor, or to Tidwell/Parkway Realco, a holding company of the reorganized Debtor. In exchange, the reorganized Debtor will have a new $2.5 million obligation to GE and GE will have senior liens and security interests in the Tidwell Property. [*Id.*, Ex. B, Art. 8.9.]

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[9] At least three versions of the Debtor's Second Amended Plan appear on the docket. This final version, which modifies the version filed on March 3, 2006, is the Second Amended Plan that was eventually confirmed. [*See* Finding of Fact No. 35]

37. On May 23, 2006, the Veldekens filed a Motion for a Rule 7016 Scheduling Conference and for Entry of Pretrial Scheduling Order. [Docket No. 80.]

38. On May 30, 2006, Thomason filed his Answer to the Veldekens' First Amended Complaint. [Docket No. 82.]

39. On May 30, 2006, Thomason filed his Motion for Summary Judgment. [Docket No. 83.]

40. On June 5, 2006, this Court signed an Order Authorizing and Approving Proposed Exit Financing and Related Loan Documentation in Connection with Debtor's Second Amended Plan of Reorganization under Chapter 11 of the United State Bankruptcy Code, as Modified. [Main Case No. 05-35291; Docket No. 646.] In the Order, this Court found that "the exit financing is a necessary and integral part of the Plan." [*Id.* at 2.]

41. On June 9, 2006, GE filed its Response to the Veldekens' Motion for Rule 7016 Scheduling Conference. [Docket No. 86.]

42. On June 15, 2006, the Veldekens filed their Response to Thomason's Motion for Summary Judgment. [Docket No. 87.]

43. On June 16, 2006, the Veldekens filed a Motion to Abstain and to Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this Case to the Bankruptcy Court by the United States District Court. [Docket No. 88.]

44. On June 20, 2006, Newbanks filed a Motion for More Definite Statement [Docket Nos. 90, 91.], Joinder in Defendant GE's Response to Motion for Rule 7016 Scheduling Conference [Docket No. 93.], and Reply in Support of Summary Judgment. [Docket No. 94.]

45. On June 23, 2006, the Veldekens filed the Amended Motion. [Docket No. 99.]

46. On June 27, 2006, GE, Newbanks, and Thomason (collectively, **the Defendants**) filed a

Joint Motion In Opposition to the Veldekens' Motion to Abstain and to Remand. [Docket No. 104.]

47. On the same day, the Defendants filed their First Amended Joint Opposition to Plaintiffs' Motion to Abstain and Remand. [Docket No. 109.]

48. On June 27, 2006, the Veldekens also filed their Supplemental Response to Defendants' Motions for Summary Judgment. [Docket No. 108.]

49. On June 28, 2006, the Veldekens filed their Reply in Support of Motion to Abstain and Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this Case to Bankruptcy Court by the United States District Court. [Docket No. 112.]

50. On June 28, 2006, the Court held a hearing lasting approximately two hours on the Amended Motion and the Defendants' Motions for Summary Judgment. [Docket Entry June 28, 2006.] Most of this hearing concerned arguments on the Amended Motion. At the close of the hearing, the Court asked both parties to file post-hearing briefs. The Court continued the hearing on the Motions for Summary Judgment and the Amended Motion until August 10, 2006. *Id.*

51. On June 30, 2006, the Plan became effective. [Main Case No. 05-35291; Docket No. 663.]

52. On July 14, 2006, the Defendants filed their Joint Hearing Brief Regarding Plaintiffs' Motion for Remand. [Docket No. 115.]

53. On August 4, 2006, the Veldekens filed their Post-Hearing Brief in Support of the Motion. [Docket No. 116.]

54. On August 9, 2006, GE filed its Response to Plaintiffs' Post-Hearing Brief in Support of

Motion to Remand. [Docket No. 121.]

55. On August 10, 2006, the Court reconvened the hearing on the Amended Motion and the Defendants' Motions for Summary Judgment. [Docket Entry Aug. 10, 2006.] This hearing lasted approximately four hours. The parties reviewed the affidavit evidence and made numerous legal arguments regarding the merits of the Motions for Summary Judgment. The Court orally announced that it had decided to deny the Amended Motion,[10] and would be issuing a written opinion to that effect. The Court also stated that it would be submitting a Report and Recommendation to the District Court recommending against withdrawal of the Referral Order. Finally, this Court determined that it was appropriate to delay ruling on the Motions for Summary Judgment until the District Court makes a decision on the Report and Recommendation. *Id.*

56. On August 25, 2006, Newbanks and Thomason filed their Separate Supplement to All Defendants' Supplemental Brief in Support of Motion for Summary Judgment and GE's Advisory to the Court Re: Motion to Strike. [Docket No. 124.]

57. On August 25, 2006, the Veldekens filed their Post-Hearing Brief in Opposition to Defendants' Motions for Summary Judgment [Docket No. 125] and Post-Hearing Brief in Opposition to Defendants' Motions for Summary Judgment. [Docket No. 126]

IV. DISCUSSION OF THE MERITS OF THE VELDEKENS' REQUEST THAT THE DISTRICT COURT WITHDRAW ITS REFERRAL ORDER OF OCTOBER 18, 2005

A. Procedural History of the Adversary Proceeding and Applicable Fifth Circuit Case Law for Determining Whether the Referral Order Should be Withdrawn

[10] This Court denied the Amended Motion only as to the abstention and remand issues.

General Order 2005-6 of the United States District Court for the Southern District of Texas provides that "Bankruptcy cases and proceedings arising under Title 11 or arising in or related to a case under Title 11 of the United states Code are automatically referred to the bankruptcy judges of this District . . . ." *See also* 28 U.S.C. § 157(a). When the Debtor filed its Chapter 11 petition in the District Court, the case was immediately referred to this Bankruptcy Court pursuant to the General Order.

The Veldekens owned the land on which one of the Debtor's two hospitals was operated. [Docket No. 12.] The dispute in this Adversary Proceeding arises out of a loan from GE's predecessor in interest to the Debtor that was guaranteed by the Veldekens. [Docket No. 63, p. 3:7-11; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 4.] The Veldekens originally filed suit in state court [Docket No. 71, Attach. 4.], and GE removed the case to the District Court based on either of two independent grounds: (1) diversity jurisdiction pursuant to 28 U.S.C. § 1332; and (2) arising under, or arising in, or related to a case under title 11 pursuant to 28 U.S.C. § 1334(b). [Civil Action No. 4:05-cv-03381, Docket No. 1.] The suit arrived in this Bankruptcy Court as a result of the parties' request to District Judge Gilmore that she refer the dispute to the undersigned bankruptcy judge. [Docket No. 104, Ex. A.] Since the referral of this suit, this Court has held numerous hearings, including the hearings on the Veldekens' Application for Preliminary Injunction (Dec. 2, 2005 and Dec. 5, 2005) and the Defendants' Motions for Summary Judgment (June 28, 2006 and Aug. 10, 2006).

As a party to the Adversary Proceeding, the Veldekens may move for withdrawal of the Referral Order, and the District Court may grant that motion for "cause shown." 28 U.S.C.

§157(d).[11] Bankruptcy Local Rule 5011 requires the Veldekens to present their request for withdrawal to this Court, which then makes a recommendation to the District Court as to whether to grant or deny the Motion.

In *Holland America*, the Fifth Circuit held that in determining whether a movant has shown cause under 28 U.S.C. § 157(d) to withdraw the reference, a district court should consider the following issues: (1) whether the underlying lawsuit is a core or non-core proceeding; (2) whether promotion of uniformity in bankruptcy administration will be achieved; (3) whether forum shopping and confusion will be reduced; (4) whether there will be economical use of debtors' and creditors' resources; (5) whether the withdrawal of reference will expedite the bankruptcy process; and (6) whether a party has demanded a jury trial. *Holland America Ins. Co. v. Roy*, 777 F.2d 992, 999 (5th Cir. 1985); *see also Mirant Corp. v. Southern Co.*, 337 B.R. 107, 115 (N.D. Tex. 2006) (considering *Holland America* factors in determination of motion to withdraw reference). This Court's review of these issues leads to the recommendation that the District Court *not* withdraw the Referral Order.

B. Application of the six *Holland America* factors to this Adversary Proceeding

1. *The Adversary Proceeding is a core proceeding.*

28 U.S.C. § 157 governs core proceedings. While this section does not specifically define core proceedings, subsection (b)(2) provides a comprehensive, yet non-exclusive, list of core proceedings. *In re Baudoin*, 981 F.2d 736, 740-41 (5th Cir. 1993); *Wood*, 825 F.2d at 95; *Mirant*, 337 B.R. at 116. This list includes very specific proceedings and very broad proceedings. Some

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[11] In pertinent part, 28 U.S.C. § 157(d) reads as follows:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.

examples of specific core proceedings include preference actions, 28 U.S.C. § 157(b)(2)(F), and fraudulent conveyance suits, 28 U.S.C. § 157(b)(2)(H). Broad categories of core proceedings include "all matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A), and "other proceedings affecting the liquidation of assets of the estate," 28 U.S.C. § 157(b)(2)(O). The Fifth Circuit warns against a broad interpretation of 28 U.S.C. § 157(b)(2)(O) and prefers to deem a proceeding as core under the more specific examples rather than fitting a particular proceeding into the catch-all language of subsections (b)(2)(A) and (b)(2)(O). *See Wood*, 825 F.2d at 95; *Mirant*, 337 B.R. at 116. Nevertheless, the Fifth Circuit has not limited the definition of core proceedings solely to the specific examples set forth in the laundry list of 28 U.S.C. § 157(b)(2). Rather, the Fifth Circuit has defined a core proceeding as one which "invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Wood*, 825 F.2d at 97. When determining whether a proceeding is core, a court must consider both the form as well as the substance of the proceeding. *Id.* (citing *In re World Fin. Servs. Ctr., Inc.*, 64 B.R. 980, 984-87 (Bankr. S.D. Cal. 1986)).

With respect to the Adversary Proceeding at bar, the category most likely to make this lawsuit a core proceeding is 28 U.S.C. § 157(b)(2)(K) because the Veldekens, in their First Amended Complaint, seek to invalidate GE's liens on the Tidwell Property. There is a split of authority on whether the liens referred to in 28 U.S.C. § 157(b)(2)(K) must relate only to property of the estate or can also relate to property of the debtor. One line of cases follows a more lenient rule that in order for 28 U.S.C. § 157(b)(2)(K) to apply, the lien may relate to either property of the estate *or* of the debtor. *Continental Nat'l Bank v. Sanchez (In re Toldeo)*, 170 F.3d 1340, 1347 (11th Cir. 1999); *Hasset v. BancOhio Nat'l Bank (In re CIS Corp.),* 172 B.R. 748 (S.D.N.Y. 1994); *In re Rarick*, 132

B.R. 47, 51 (D. Colo. 1991); *In re Grell*, 83 B.R. 652, 657 (Bankr. D. Minn. 1988).

The stricter line of cases holds that the lien may *only* relate to the property of the estate. *In re Huff*, 44 B.R. 129, 134 (Bankr. W.D. Ky. 1984); *In re Climate Control*, 51 B.R. 359, 361 (Bankr. M.D. Fla. 1985); *Citibank v. Park-KenilWorth Industries,* 109 B.R. 321, 325 (N.D. Ill. 1989); *In re Coan*, 95 B.R. 87, 89 (N.D. Ill. 1988); *In re Israel*, 112 B.R. 481, 483 (Bankr. D.Conn. 1990). The only court within the Fifth Circuit to address this issue followed this latter approach, limiting the scope of 28 U.S.C. § 157(b)(2)(K) to property of the estate, but not property of the debtor. *In re Jeter*, 48 B.R. 404, 406 n.1 (Bankr. N.D. Tex. 1985).

Other subsections of 28 U.S.C. § 157(b)(2) include explicit references to either "property of the estate" (28 U.S.C. § 157(b)(2)(E)) or "claims against the estate" (28 U.S.C. § 157(b)(2)(B) and (C)), but 28 U.S.C. § 157(b)(2)(K) is silent as to any limitation on either property of the estate or of the debtor. *See In re Blackmann*, 55 B.R. 437, 447 n.8 (Bankr. D.C. 1985). The need for limits on 28 U.S.C. § 157(b)(2)(K) arises from the fact that a plain reading without any limitations would allow bankruptcy courts to assert "a form of jurisdiction *ferae naturae,* capable of the rampant adjudication of property rights wherever found and by whomever owned." *In re Huff*, 44 B.R. at 134. However, this policy consideration is served equally by including liens on property of the debtor in addition to property of the estate. Therefore, this Court disagrees with *In re Jeter*, the only court within the Fifth Circuit addressing this point, and believes that the more persuasive approach includes liens on property of the debtor under 28 U.S.C. § 157(b)(2)(K).

The liens in the present suit present a new challenge because they do not relate to property of either the estate or the debtor; rather they are liens on property which belongs to the *reorganized* Debtor. The estate ceased to exist upon confirmation of the Plan; that event also transformed the

Debtor into the reorganized Debtor. As discussed above, *Wood* instructs a court to look beyond form to the substance of a proceeding in determining whether or not it is core. Here, the validity of the lien in question is vital to the success of the Plan. It is not only the validity of GE's current lien on the Tidwell Property that is necessary to the Plan; equally important is the validity of GE's original lien upon which it foreclosed. The Veldekens' First Amended Complaint asks this Court to invalidate that original lien and restore title in the Tidwell Property to the Veldekens. Such a result would undoubtedly alter the likelihood of success of the Plan.[12] Therefore, looking beyond mere form to the substance of the proceeding, this Court believes that 28 U.S.C. § 157(b)(2)(K) should include liens on property of the reorganized Debtor. Accordingly, this Adversary Proceeding is still a core proceeding under 28 U.S.C. § 157(b)(2)(K) despite the termination of the bankruptcy estate.[13]

In sum, the Adversary Proceeding is core because it involves the validity of a lien on property of the reorganized Debtor. Therefore, this factor weighs against withdrawing the Referral Order.

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[12] Part of the relief requested by the Veldekens is for this Court to declare that the liens claimed by GE on the Tidwell Property are invalid and that the Tidwell Property belongs to the Veldekens free and clear of these allegedly invalid liens. [Docket No. 6, Ex. 7. at ¶¶ 25, 54, 55] Invalidating GE's liens on the Tidwell Property and conveying title of the Tidwell Property to the Veldekens could negatively alter the Debtor's course of action because the Debtor would probably no longer have the option of obtaining financing from GE. GE has been extending financing to the Debtor, both prior to the bankruptcy filing and thereafter. GE provided such financing under the express understanding that its liens on the Tidwell Property are valid. A judgment from this Court invalidating these liens could conceivably jeopardize the Debtor's ability to obtain working capital financing to operate the hospital and pay ongoing bills. Such a scenario could easily lead to a shutdown of the hospital's operations, which would probably destroy any chance of claims being paid pursuant tao the confirmed Plan. Such a result could substantially impact the bankruptcy process.

[13] If liens on property of the reorganized Debtor are not included under § 157(b)(2)(K), then the only other provision that this Adversary Proceeding could classify as core under would be 28 U.S.C. § 157(b)(O), and, as already discussed, the Fifth Circuit's interpretation of this broad catch-all section is much narrower than its seemingly broad language. Despite the fact that the result of the suit could greatly affect the success of the Debtor's Plan, it would no longer be classified as a core proceeding under the *Wood* definition.

2. *Promotion of uniformity in bankruptcy administration*

If a bankruptcy court is already familiar with the facts of the underlying action, then allowing that court to adjudicate the proceeding will promote uniformity in the bankruptcy administration. *See Palmer & Palmer v. U.S. Trustee* (*In re Hargis*), 146 B.R. 173, 176 (N.D. Tex. 1992); *Kenai Corp. v. Nat'l Union Fire Ins. Co.*, 136 B.R. 59, 61 (S.D.N.Y. 1992) (finding that "[g]iven [the bankruptcy's judge's] familiarity with the bankruptcy case involving [the debtor], [the bankruptcy judge] is in the best position to monitor all the proceedings related to that bankruptcy, including this adversary proceeding."). In *Hargis*, the bankruptcy court ordered that the debtor's attorney disgorge fees received from the debtor over the course of the bankruptcy case. *Hargis,* 146 B.R. at 174. The attorney appealed, and the Fifth Circuit eventually remanded the matter to the bankruptcy court, requiring it to establish the reasonableness of the bankruptcy related fees. *Id.* The attorney filed a motion to withdraw reference and requested the district court to make such a determination. *Id.* at 175. In denying the attorney's motion to withdraw reference, the district court noted that the bankruptcy judge had "reviewed the entire record of this case and [wa]s intimately familiar with the underlying facts, the parties, and the remaining issue." *Id.* at 176.

In the proceeding at bar, the parties have extensively briefed and argued the issues. [*See* Docket Nos. 1, 3, 6, 8, 12-17, 19, 20, 22, 24, 29, 34, 38, 42, 47, 60, 61, 63-66, 70, 71, 72, 75, 80, 82, 83, 86-88, 90, 91, 93, 94, 99, 102-105, 108, 109, 112-116, 118, 119, 121, 123-128, 130.] [Docket Minute Entries Dec. 2, 2005, Dec. 5, 2005, June 28, 2006, Aug. 10, 2006.] This Court held a full-day hearing on December 2, 2005 on the Veldekens' Application for Preliminary Injunction. Additionally, this Court held a four-hour hearing on August 10, 2006 during which the parties made arguments on the Motions for Summary Judgment. [Docket No. 128, p. 56.] The underlying facts

and issues have not significantly changed since the December 2005 hearing on the Veldekens' Application for Preliminary Injunction. Between the parties' briefs and the hearings held on these matters, this Court has become "intimately familiar with the underlying facts, the parties, and the remaining issue[s]" in this Adversary Proceeding. If the District Court should decide not to withdraw the Referral Order, this Court is ready to rule on the merits of the Defendants' Motions for Summary Judgment. Due to the large amount of time and resources that this Court has already dedicated to this Adversary Proceeding, the promotion of uniformity in bankruptcy administration weighs heavily in favor of denying the withdrawal of the Referral Order and allowing this Court to adjudicate the suit.

3. *Reducing forum shopping and confusion*

The Veldekens' Amended Motion is a transparent attempt at forum shopping. After GE removed the suit to District Court, the Veldekens did not seek a remand to state court or request the District Court to adjudicate the suit. Instead, the Veldekens joined with GE in filing the Agreed Motion for Referral with the District Court and consenting to this Bankruptcy Court entering any appropriate final judgments and orders.[14] *See Katzev v. Dunavant*, No. Civ. A. 97-3941, 1997 WL 786461, at *5 (E.D. Pa. Nov. 20, 1997) ("In fact, this Court would promote forum shopping by withdrawing reference upon request of parties that had earlier consented to final judgment by the bankruptcy court, when the bankruptcy court may be authorized to decide the case."). The Veldekens only changed their mind and decided that they wanted to be back in District Court after

[14] The District Court presumably signed the Referral Order based upon the representations made in the Agreed Motion for Referral.

all the Defendants filed their Motions for Summary Judgment.[15] This Court has previously ruled against the Veldekens on their Application for Preliminary Injunction, which included a consideration of their likelihood of success on the merits. Fearing more adverse rulings on the pending Motions for Summary Judgment, the Veldekens now seek to return to the District Court in order to escape this Court adjudicating the merits of this suit.

They should not be allowed to do so. By affirmatively representing to District Judge Gilmore that they wanted her to refer this suit to the undersigned bankruptcy judge for final adjudication, the Veldekens have waived any right they may have had to prosecute their claims in any state court or the District Court. The Court arrives at this conclusion based upon holdings in two Fifth Circuit cases: *McFarlane v. Leyh* (*In re Texas General Petroleum Corp.*), 52 F.3d 1330 (5th Cir. 1995) and *M.A. Baheth Construction Co. v. Schott* (*In re M. A. Baheth Construction Co.*, 118 F.3d 1082 (5th Cir. 1997). In both of these cases, the party seeking to avoid a trial in bankruptcy court failed to object to the bankruptcy court entering a final judgment. *Id.* In each instance, the Fifth Circuit held that the failure to object allowed the bankruptcy court to hold trial and enter judgment. *Baheth,* 118 F.3d at 1084 ("Furthermore by failing to object to the bankruptcy court's assumption of core jurisdiction, [the Debtor] *impliedly consented to the court's entry of final judgment.* Thus, the bankruptcy court was statutorily authorized to enter judgment in this case, *even if the matter could be characterized as non-core.*" (emphasis added and citations omitted)); *Texas Gen. Petroleum*, 52 F.3d at 1337 ("By failing to object in the bankruptcy court, [the party] *consented impliedly to the court's assumption of core jurisdiction* . . . . We conclude that [the party's] failure to object to

[15] Indeed, the Veldekens prefer that the suit be remanded to the state court in Harris County, Texas. They only seek to have the suit adjudicated in the United States District Court as alternative relief if this Court refuses to abstain and remand to the Harris County District Court.

bankruptcy court jurisdiction allowed the court to enter judgment against him.")(emphasis added).

In the dispute at bar, *the consent of the Veldekens is not implied; it is express.* The Veldekens, through their counsel, signed the Agreed Motion for Referral and represented to District Judge Gilmore that they "agree that the Bankruptcy Court may hear and determine this case, and may enter appropriate final orders or judgment, pursuant to 28 U.S.C. § 157. To the extent necessary, the parties consent to the entry of final orders or judgment in this case by the Bankruptcy Court." [Docket No. 104, Ex. A, ¶ 3.] In order to escape from this Court, the Veldekens may not now recant what they represented to District Judge Gilmore. To permit this tactic would be to endorse blatant forum shopping and undermine judicial efficiency and economy. Such conduct should not be condoned, and this factor strongly disfavors a withdrawal of the Referral Order.

4. *Fostering an economical use of the debtors' and creditors' resources*

When dealing with a proceeding involving a bankruptcy estate and its creditors, a major goal is the efficient use of the debtor's and creditors' resources in efforts to administer the debtor's estate and to resolve any related litigation. *Plan Admin'r v. Lone Star RV Sales, Inc.* (*In re Conseco Fin. Corp.*), 324 B.R. 50, 55 (N.D. Ill. 2005) (citing *Holland Am.*, 777 F.2d at 999). When a bankruptcy court is intimately familiar with the underlying facts, parties, and issues, a withdrawal of reference would only "further delay final resolution of th[e] [suit]." *Hargis*, 146 B.R. at 176. As discussed above, this Court has already held multiple hearings on the substance of the underlying dispute in this Adversary Proceeding, and the parties have spent significant amounts of time and resources briefing this Court on the state law issues. If the District Court withdraws the Referral Order, it will have to spend substantial time to become familiar with the facts and parties in this case. These efforts will be duplicative of work that this Court has already done. This delay will result in

prejudice to the Defendants in the form of increased attorneys' fees associated with proceeding in District Court, as well as from the inevitable delay that will result while the District Court spends the necessary time to become acquainted with the suit. Because this Court is very familiar with the facts and issues in this proceeding, adjudication in this Court will not delay a resolution of this Adversary Proceeding, and will foster an economical use of the parties' resources. Thus, this factor favors the denial of the Motion to Withdraw the Referral Order.

5. *Expediting the bankruptcy process*

A district court should consider the importance of the proceeding to the bankruptcy case and refuse to withdraw the reference if the withdrawal would unduly delay the administration of the bankruptcy case. *In re Pruitt*, 910 F.2d 1160, 1168 (3rd Cir. 1990). Because this Court is familiar with the facts and issues in this proceeding, resolution of the issues in this Court will serve to expedite the bankruptcy process. Moreover, because the parties in this proceeding consented to this Court adjudicating the issues, this Court has the power to issue all necessary final orders and judgments. Because consent was given and this Court can enter final orders and judgments, the District Court need not review this Court's findings of fact and conclusions of law on a *de novo* basis. 28 U.S.C. § 157(c)(2); *see also In re Nell*, 71 B.R. 305, 312 (D. Utah 1987) ("Entry of consent would mean review would be by appeal."). Rather, this Court's findings in the Adversary Proceeding are only reviewed if an appeal is taken under 28 U.S.C. § 158. *Id.* Therefore, having this Court adjudicate this dispute will expedite the final resolution of the issues in this proceeding.

It also important to emphasize that a bankruptcy court which has conducted hearings in a case for an extensive period of time is in the best position to expedite the bankruptcy process. *See In re Larry's Apt., L.L.C.*, 210 B.R. 469, 474 (D. Ariz. 1997). The Debtor has been in bankruptcy for 18

months. Denying the withdrawal of the Referral Order is the quickest way to proceed to bring closure to this entire Chapter 11 case. In *Vista Metals Corp. v. Metal Brokers Int'l*, 161 B.R. 454, 458 (E.D. Wis. 1993), the pre-petition conduct of the debtor resulted in a litany of claims before the bankruptcy court. The bankruptcy court already had significant exposure to many of the factual and legal issues, as well as the parties, involved in the underlying dispute; therefore, by denying the request to withdraw the Referral Order, "the expeditiousness in the bankruptcy process is best served." *Id.*

In the suit at bar, the Plan has been confirmed and there is no longer a bankruptcy estate, but the "bankruptcy process" is not entirely complete. As discussed earlier, this Adversary Proceeding is still a core proceeding and could have a critical impact on the success of the Debtor's confirmed Plan.

As already previously noted, part of the relief requested by the Veldekens is for this Court to declare that the liens claimed by GE on the Tidwell Property are invalid and that the Tidwell Property belongs to the Veldekens free and clear of these allegedly invalid liens. [Docket No. 6, Ex. 7. at ¶¶ 25, 54, 55] Invalidating GE's liens on the Tidwell Property and conveying title of the Tidwell Property to the Veldekens could negatively alter the Debtor's course of action because the Debtor would probably no longer have the option of obtaining financing from GE. GE has been extending financing to the Debtor, both prior to the bankruptcy filing and thereafter. GE provided such financing under the express understanding that its liens on the Tidwell Property are valid.[16] A

[16] By way of example, set forth below are three instances where GE has provided financing to the Debtor under the express understanding that GE was, among other consideration, receiving a lien on the Tidwell Property or on any leasehold interest relating to the Tidwell Property:

(1) Lessor's Consent, Waiver, Estoppel Certificate and Agreement of July 2, 1998 ("For so long as

judgment from this Court invalidating these liens could conceivably jeopardize the Debtor's ability to obtain working capital financing to operate the hospital and pay ongoing bills.[17] Such a scenario could easily lead to a shutdown of the hospital's operations, which would probably destroy any chance of claims being paid pursuant to the confirmed Plan. Such a result could substantially impact the bankruptcy process.

Moreover, if the Veldekens are awarded title to the Tidwell Property, the Debtor would have to lease the Tidwell Property from the Veldekens. These circumstances negatively affect the Debtor's course of action for paying certain bills because if lease payments have to made to the Veldekens,

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the Borrower's obligations under the Loan Documents are outstanding but for the Assignment Period only as defined in the Assignment of Leases, Rents and Profits of even date herewith, *the Lessor subordinates to the Lender's lien and security interest under the Loan Documents* each and every right to payment of rent, security interest, landlord's lien, levy, or right of distraint other right which the Lessor now has or may hereafter have, under the laws of the State of Texas or any other State or by the terms of any real estate lease, sublease, security agreement, mortgage or deed of trust now in effect or hereafter executed by the Lessor or the Borrower or any other tenant of the Mortgaged Property, to execute upon, sell, levy or distrain upon for rent, in arrears, in advance or both, or to claim or assert title to, the Mortgaged Property.")(emphasis added) [Docket No. 05-3315, Ex. W, ¶ 14];

(2) Interim Order dated April 7, 2005 Authorizing Secured and Super Priority Post-Petition Financing Pursuant to 11 U.S.C. § 363, 364 and 507(B) ("GE HFS shall have and is hereby granted...valid and perfected security interests and liens in all present and after-acquired real property and personal property of the Debtor.") [Main Case No. 05-35291; Docket No. 24, p. 15.]; and

(3) Final Order dated June 1, 2005 Authorizing Secured and Super Priority Post-Petition Financing Pursuant to 11 U.S.C. § 363, 364 and 507(B)("Notwithstanding the foregoing, no Challenge (or any other action of any kind) by the Committee or by any other party shall affect in any way the validity, enforceability, or amount of the post-petition GE DIP Obligation owing under the GE DIP Loan Documents, or the validity, enforceability, perfection, or priority of the GE Liens granted to GE HFS under the GE DIP Loan Documents, the Interim Order, and this Order.") [Main Case No. 05-35291; Docket No. 141, Att. 1, p. 19.]

[17] By way of one example only, the Debtor-in-Possession Loan and Security Agreement dated April 6, 2005 provides that an event of default includes the following: "Borrower *or any Affiliate of Borrower*, shall challenge or contest, in any action, suit or proceeding, the validity or enforceability of this Agreement, or any of the other DIP Loan Documents, the legality or the enforceability of any of the obligations or the perfect or priority of any Lien granted to Lender." Upon event of default, one of the remedies available to GE is that the lender may "[t]erminate the DIP Loan, whereupon all outstanding Obligations shall be immediately due and payable.") [Docket No. 05-3315, Ex. B, Art. 8.1(p) and 8.3(a)(i).]

the Debtor will probably have less cash to pay other creditors. This result could also materially impact the bankruptcy process.

Therefore, while this Adversary Proceeding is still pending, the future success of the Plan remains in jeopardy. Because this Court is in a position to enter a final judgment faster than the District Court, the bankruptcy process will be more expeditiously handled if the District Court does not withdraw the Referral Order.

6. *Jury trial*

The Veldekens assert that they have a right to a jury trial. The First Amended Complaint states claims for breach of contract, suit to remove cloud on title, suit to quiet title, negligent misrepresentation, breach of fiduciary duty and numerous others. [Docket No. 12.] This Court recognizes that if the suit had remained in the District Court, the Veldekens would have had a right to a jury trial. *See Ross v. Bernhard*, 396 U.S. 531, 542 (1970); *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). However, even if the Veldekens had a right to jury trial in this suit, this Court believes that they have since waived such right. In the alternative, even if this Court is incorrect about the Veldekens waiving their right to a jury trial, this Court should be "specially designated" by the District Court, pursuant to 28 U.S.C. § 157(e), to conduct a jury trial if it becomes necessary in this Adversary Proceeding.

The Veldekens made a demand for a jury trial in the state court suit against GE. [Docket No. 71, Exhibit 4.] They repeated that demand to this Court in their First Amended Complaint, filed on November 4, 2005. [Docket No. 12.] Seven months passed before the Veldekens filed their initial Motion to Abstain and to Remand and, Alternatively, for a Recommendation for the Withdrawal of

the Referral Order.[18] [Docket No. 88.] This initial motion was the first time that the Veldekens took any action to assert their alleged right to a jury trial in the District Court. During the seven-month-period between the Veldekens first claiming the right to a jury trial and the time that they attempted to enforce that right by returning to the District Court, extensive resources were devoted to this Adversary Proceeding by the Defendants, the Veldekens, and this Bankruptcy Court: GE filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) [Docket No. 15.]; the Court conducted a full day hearing on the Veldekens' Application for Preliminary Injunction [Docket No. 6.]; all three of the Defendants filed Motions for Summary Judgment [Docket Nos. 66, 70, 83.]; and, particularly inconsistent with an intention to seek a jury trial, the Veldekens filed, on May 23, 2006, a Motion for Rule 7016 Scheduling Conference and for Entry of Pretrial Scheduling Order. [Docket No. 80.] The fact that the Veldekens filed a Rule 7016 Motion is evidence that they were contemplating and preparing for this Court to adjudicate this suit without a jury. The Veldekens' assertion that they have a right to a jury trial is another tactic in their attempt at forum shopping.

IG Services, Ltd. v. Deloitte & Touche, LLP (In re Blackwell), 279 B.R. 818 (Bankr. W.D. Tex. 2002) held that a party's right to demand a jury trial can be waived if it fails to seek a timely withdrawal of the reference. *Id.* at 819-820.

> "Both the statute and the rules contemplate the party who desires (and needs) withdrawal to affirmatively seek it by motion to the district court. [citations omitted]. If neither party timely takes this additional step (the essential last step to assure that one gets the jury trial they desire before the tribunal they prefer), then that failure can only be construed as a waiver of the party's right to a jury trial.
> ...
> A party's failure to follow through with the relatively simple procedural steps required to assure that party that they will have their day in court before a jury of their peers ought similarly to be treated as a waiver of that right. In this way, the party with the duty to act is

[18] The Veldekens then filed the Amended Motion a week later. [Docket 99.]

the party who suffers the adverse consequences for failing to act." *Id.*

In re Blackwell did not address how long of a delay in seeking a withdrawal of the reference would be considered so "untimely" as to justify waiver of the right to a jury trial, but courts outside the Fifth Circuit have found waiver in widely varying time frames. The movant in *In re Childs* waited nearly three years after first making a demand for a jury trial to file a motion to withdraw the reference. *Reding v. Gallagher (In re Childs)*, 342 B.R. 823, 825 (M.D. Ala. 2006). In addition to this obviously lengthy delay, the court also took note that the actions taken by the party asking for a withdrawal during this period were inconsistent with a demand for a jury trial:

> "In this case, [the party seeking a jury trial and withdrawal of the reference] has been a vigorous and seemingly willing participant in nearly three years of litigation in the bankruptcy court without mention of moving the proceedings to district court... [The movant] has waited until the eve of trial, and just after their motion for summary judgment was denied, to file this Motion for Withdrawal. [The movant] concedes that they never raised the issue of their jury demand during conferences held by the bankruptcy court, or otherwise brought it to anyone's attention, other than including the demand in answers, until the instant motion was filed." *Id.* at 828-829.

Other courts have found much shorter times to be sufficient to justify a finding of waiver of the right to a jury trial based on untimely filing a motion to withdrawal the reference. *J.P. Morgan Partners v. Kelley (In re HA-LO Indus.)*, 326 B.R. 116, 123 (N.D. Ill. 2005) (The movant delayed for 14 months. The court focused on the fact that the date for a bench trial had been set six months prior to the motion for withdrawal of the reference.); *see also Goodwyn v. V Restaurants (In re Goodwyn)*, 2006 Bankr. LEXIS 1464, at *8-9 (Bankr. M.D. Ala. June 19, 2006) (The delay here was only 10 months, but the court gave consideration to the fact that the motion for withdrawal of the reference came only two weeks before trial in the bankruptcy court was scheduled to begin.).

The theme appearing in each of the above cited cases is that the moving party was attempting to resurrect a dormant demand for a jury trial for the sole purpose of forum shopping. The Veldekens delayed seven months from initially making a jury demand in this Court to asking for a withdrawal of the Referral Order. During these intervening months, numerous pleadings and motions were filed, lengthy hearings were held, and orders were entered. The Veldekens' actions throughout each step of this Adversary Proceeding have been inconsistent with an intention to seek a jury trial, including the filing of their Rule 7016 Motion for a Scheduling Conference and for Entry of Pretrial Scheduling Order. If the Veldekens wanted to have a jury trial, they could have filed a motion to withdraw the Referral Order immediately upon the filing of their First Amended Complaint in November of 2005; their failure to do so can lead to no other conclusion than that they have waived their right to a jury trial.

If the District Court disagrees with this Court and finds that the Veldekens have not waived their right to a jury trial through an untimely motion for withdrawal of the Referral Order, then the Veldekens have also subjected themselves to the jurisdiction of this Bankruptcy Court by filing a proof of claim in the Debtor's Main Case. [Main Case No. 05-35291; Docket No. 556.] Once a claimant files or expresses an intent to file a proof of claim against the estate, the claimant is no longer entitled to a jury trial. *Langekamp v. Culp*, 498 U.S. 42, 44-45 (1990)(citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).[19]

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[19] However, the right to a jury trial is waived only when the cause of action will directly affect the liability or priority of the filed claim or relates to the process of the allowance or disallowance of claims. *Mirant v. Southern Co.*, 337 B.R. 107, 121 (N.D. Tex. 2006); *see In re Jensen*, 946 F.2d 369, 364 (5th Cir. 1991); *see also Germain v. Ct. Nat'l Bank*, 988 F.2d 1323 (2nd Cir. 1993). Here, at least some of the causes of action asserted by the Veldekens in their First Amended Complaint do directly affect the amount of the liability of the claim that they filed in the main case.

The Veldekens, in order to escape jurisdiction of this Court, attempted to withdraw their proof of claim in the Debtor's Main Case [Main Case No. 05-35291; Docket No. 556.][20] and also tried to orally amend their First Amended Complaint in the Adversary Proceeding to withdraw any claims relating to property of the estate and the reorganized Debtor.[21] They asked this Court to allow withdrawal of the claim for accrued lease payments because, as they noted in their Motion for Withdrawal of Proof of Claim, "such claims and disputes [are] properly within determination in Adversary Case Number 05-3772." *Id.* This admission by the Veldekens provides a sufficient nexus between the claim they filed in the Main Case[22] and the claims they assert in the Adversary

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[20] The Veldekens originally filed two claims on July 1, 2005, one in the name of Charles and Ashraf Veldekens [Main Case No. 05-35291; Claim No. 127.] and the other on behalf of Tidwell Properties. [Main Case No. 05-35291; Claim No. 129.] These claims were amended and consolidated into one claim on September 6, 2005. [Main Case No. 05-35291; Claim No. 186.] Therefore, on October 19,2005 (i.e. the date of referral), Claim No. 186 was the "live" pleading. Six months later, the Veldekens filed a withdrawal of claim relating only to Claim Nos. 127 and 129. [Main Case No. 05-35291; Docket No. 556] The Veldekens have never sought to withdraw Claim No. 186, and, as of the date of this Memorandum Opinion, Claim No. 186 is still a "live" pleading.

[21] At the June 28, 2006 hearing on the Motion and the Defendants' Motions for Summary Judgment, counsel for the Veldekens attempted to orally amend the pending First Amended Complaint by explaining that the Veldekens' Reply in Support of the Motion included a "withdrawal and waiver of the Veldekens' claims for any interest or title to the Tidwell Real Property, which is the subject of the Plan confirmed on May 8." Presumably, they did so in order to be able to argue that the result of the Adversary Proceeding would not affect the success of the Plan because the Tidwell Property would no longer be at risk; the Veldekens would only be seeking monetary damages from the Defendants. Veldekens' counsel further attempted to request leave under Bankruptcy Rule 7015 to amend the Veldekens' First Amended Complaint to drop such claims. This Court issued a bench ruling denying the oral motion to amend because the Court believes that this tactic was nothing more than a bare-faced attempt to escape this Court's jurisdiction and shop for another forum. This Court has discretion to deny such motions. Although courts shall freely give leave to amend "when justice so requires," courts "may consider such factors as ... bad faith or dilatory motive" when denying leave to amend. *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139-140 (5th Cir. 1993). The Veldekens' attempt to amend their First Amended Complaint in order to defeat jurisdiction, and thereby avoid summary judgment, constitutes bad faith and can be properly denied.

[22] The Veldekens' Amended Proof of Claim, filed on September 6, 2005, includes, aside from a claim for past due rent, "accruing monthly lease charges and attorneys' fees." [Claim No. 186] Therefore, the Proof of Claim relates to the outcome of the Adversary Proceeding because if the Veldekens lose the Adversary Proceeding, their claim in the Main Case will be reduced and any interest that they assert in the

Proceeding to warrant a finding that the Veldekens waived their right to a jury trial. This Adversary Proceeding arises out of the July 27, 1998 Loan Agreement and accompanying documents, which this Court has previously found to be one contract. [Docket No. 63, p. 14:1-4.] One of the documents executed on July 27, 1998 was an Assignment of Leases, Rents and Profits executed by the Veldekens in favor of GE's predecessor-in-interest. [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 3.] Therefore, the issues raised by the Veldekens in the Adversary Proceeding, and the potential result of a final adjudication, bear directly upon the claim filed in the Main Case for future rent: if the Veldekens do not own the Tidwell Property, they will have no claim for future rents. Thus, the filing of the Veldekens' proof of claim in the Main Case operates as a waiver of their right to a jury trial in the Adversary Proceeding.

In the alternative, if the District Court finds that the Veldekens still have a valid right to demand a jury trial, the District Court should "specially designate" this Court to conduct the jury trial because the parties have already given their consent. Bankruptcy courts can be authorized by the District Court to conduct a jury trial, with consent of both parties, under 28 U.S.C. § 157(e) ("If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.").

On October 14, 2005, the Veldekens and GE filed in the District Court the Agreed Motion for Referral of the suit to this Court. [Docket No. 104, Ex. A.] The Agreed Motion for Referral states that "[t]he parties agree that the Bankruptcy Court may hear and determine this case, and may enter appropriate final orders or judgment, pursuant to 28 U.S.C. § 157. To the extent necessary, the

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Tidwell Property will be extinguished.

parties consent to the entry of final orders or judgment in this case by the Bankruptcy Court." *Id.* The scope of consent in the Motion is broad enough to encompass the required consent to jury trial in 28 U.S.C. § 157 (e).

First, the Agreed Motion for Referral does not specify that the parties' consent is limited to any single subsection of 28 U.S.C. § 157. Second, the entry of a final order or judgment would not exclude this Bankruptcy Court from conducting a jury trial. Finally, the District Court should look at the Veldekens' actions and inaction since initially making a demand for a jury trial to this Court in their First Amended Complaint. The Veldekens did not immediately seek to have the Referral Order withdrawn so that they could receive a jury trial in the District Court. Instead, they delayed for seven months and allowed this Court and the Defendants to believe that this Adversary Proceeding would be adjudicated in this Court. Although 28 U.S.C. § 157(e) requires "express consent," the District Court should find that the Veldekens consented to this Court conducting a jury trial based on their representation of consent in the Agreed Motion for Referral and their inaction since making a demand for a jury trial to this Court. Thus, since the parties have consented to this Court conducting a jury trial, the District Court should "specially designate" this Court to do so because of this Court's level of familiarity with the facts and issues in this case.

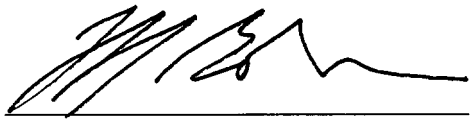
Under the circumstances discussed above, the sixth *Holland America* factor weighs against a withdrawal of the Referral Order.

V. CONCLUSION

All six of the *Holland America* factors weigh in favor of denying the withdrawal of the Referral Order. Even if the Adversary Proceeding is not classified as core because it involves liens on property of the reorganized Debtor, the considerable weight given to the other five factors would

still result in a recommendation in favor of denying withdrawal. Indeed, the single most important *Holland America* factor in this matter is the blatant forum shopping. Even if more than one of the other *Holland America* factors actually favored a withdrawal of the Referral Order, the eleventh-hour attempt to forum shop, and all the additional attorneys' fees and time that would be associated with another court adjudicating this suit, weigh heavily in favor of denying withdrawal of the Referral Order. For these reasons, this Court recommends that the District Court deny the Motion to Withdraw the Referral Order.

Signed this 5th day of October, 2006.



Jeff Bohm
U.S. Bankruptcy Judge

ADDENDUM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	**CASE NO. 05-35291 (Chapter 11)**
DOCTORS HOSPITAL 1997, L.P.,	§	
Debtor,	§	
	§	
CHARLES R. VELDEKENS, ASHRAF VELDEKENS, and TIDWELL PROPERTIES, INC.,	§	
Plaintiffs,	§	
v.	§	**ADVERSARY NO. 05-3772**
GE HFS HOLDINGS, INC., et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
ON CHARLES VELDEKENS, ASHRAF VELDEKENS, AND TIDWELL PROPERTIES, INC'S AMENDED MOTION TO ABSTAIN AND TO REMAND AND, ALTERNATIVELY, FOR A RECOMMENDATION FOR THE WITHDRAWAL OF THE REFERRAL ORDER REFERRING THIS CASE TO BANKRUPTCY COURT BY THE UNITED STATES DISTRICT COURT

I. INTRODUCTION

This adversary proceeding considers whether a bankruptcy court loses jurisdiction over a pending lawsuit, which was filed prior to the date of plan confirmation, upon confirmation of the plan. Stated differently: Is jurisdiction automatically extinguished upon confirmation of a plan? This Court believes the answer is in the negative. Assuming that this Court does have subject matter jurisdiction, the Plaintiffs nevertheless request this Court to abstain from adjudicating the dispute and to remand the suit to a Texas state court. The Court finds that it should not abstain and remand,

but rather keep the suit and adjudicate the disputes. The purpose of this Memorandum Opinion is to explain how this Court has arrived at these conclusions.

The Court makes the following Findings of Fact and Conclusions of Law under Federal Rule of Civil Procedure 52 as incorporated into Federal Rule of Bankruptcy Procedure 7052. To the extent that any finding of fact is construed to be a conclusion of law, it is adopted as such. To the extent that any conclusion of law is construed to be a finding of fact, it is adopted as such. The Court reserves the right to make any additional findings and conclusions as may be necessary or as requested by any party.

II. FINDINGS OF FACT

The facts, either as stipulated to or admitted by counsel of record, or as determined from the record, in chronological order, are as follows:

A. Factual background

1. Plaintiffs Charles Veldekens (**Mr. Veldekens**) and Dr. Ashraf Veldekens (**Dr. Veldekens**) owned land located at 510 West Tidwell Road in Houston, Harris County, Texas and certain improvements on the land, including a hospital facility (all of which property and improvements are hereinafter collectively referred to as **the Tidwell Property**). [Docket No. 12, ¶ 13.][1]

2. Mr. Veldekens and Dr. Veldekens purchased the Tidwell Property in 1992 for $7.3 million. [Docket No 63, p. 11:1-3.]

[1]Unless otherwise noted, Docket No. references are to the Docket in Adversary Proceeding Number 05-3772.

3. On or about January 23, 1998, Mr. Veldekens and Dr. Veldekens entered into a Lease Agreement with Doctors Hospital 1997, L.P. (**the Debtor**), whereby they leased the Tidwell Property to the Debtor. [Docket No. 63, p. 2:8-14, 18-19; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 1.] The Debtor is a Limited Partnership based in Houston, Texas that was founded in January of 1998 for the purpose of leasing and operating the hospital facility located on the Tidwell Property in north Houston. [Docket No. 6, ¶ 6.]

4. On or about May 18, 1998, the governing board of the Debtor held its monthly meeting, which was attended by Mr. Veldekens, among others. [Docket No. 63, p. 6:6-9; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44A, p. 1.] John Styles, Jr. (**Styles**), a member of the governing board, provided an update on the ongoing construction and renovations at the Tidwell Property. [Docket No. 63, p. 6:6-9; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44A, p. 1-2.] Additionally, Styles signed the Lease Agreement in his capacity as President of HealthPlus Corporation under the section in the Lease Agreement that states: "IN WITNESS WHEREOF, HealthPlus Corporation, a Delaware corporation, which owns all of the outstanding capital stock of North Houston HealthPlus, L.L.C., the general partner of [the Debtor], by its signature below joins herein for the purpose of agreeing to and acknowledging the representations and covenants applicable to it or made by it in this Lease." [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 1, p. 39.]

5. On or about June 10, 1998, Mr. Veldekens attended another monthly meeting of the Debtor's governing board. [Docket No. 63, p. 6:13-16; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44B, p. 1.] Styles provided an update of the ongoing construction

and renovations on the Tidwell Property and expressed concern about problems that the Debtor was experiencing with the Veldekens. [Docket No. 63, p. 6:21-24; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44B, p. 1, part III.] Specifically, the minutes of the June 10, 1998 meeting reflect that Styles reported that the Debtor was "[a]ttempting to put the Professional Office Building to bed," and that "[w]e are fully prepared to change plans and build on the land we own across the street if the issues of land for the proposed cannot be resolved with the Veldekens in the next few days." [Docket No. 63, pp. 6:24-25, 7:1-4; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44B, p. 1, part III(A)(8).]

6. On or about July 27, 1998, the Debtor borrowed $7 million from HCFP Funding II, Inc. (**the Loan**) pursuant to a Loan Agreement. [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 12.] Defendant, GE HFS Holdings, Inc. (**GE**) was the most recent holder and owner of the Loan Agreement and all other instruments at issue in this Adversary Proceeding. [Docket No. 63, p. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

7. On or about July 27, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed the Assignment of Leases, Rents and Profits in favor of HCFP Funding II, Inc. [Docket No. 63, p. 3:3-6; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 3.]

8. On or about July 27, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed a Deed of Trust and Security Agreement for the benefit of HCFP Funding II, Inc. [Docket No. 63, p. 3:7-11; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 4.] GE was the most recent holder and owner of the Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]