

**U.S. BANKRUPTCY COURT  
District of South Carolina**

Case Number: 09-03768B

ADV. PROCEEDING NO: 09-80118-hb

**ORDER GRANTING BANK MERIDIAN, N.A.'S MOTION FOR REMAND**

The relief set forth on the following pages, for a total of 14 pages including this page, is hereby **ORDERED**.

**FILED BY THE COURT  
10/29/2009**



Entered: 10/30/2009

US Bankruptcy Court Judge  
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	Case No. 09-03768B
Earth Structures, Inc.,	)	
	)	Chapter 11
Debtor.	)	
_____	)	
	)	
Bank Meridian, N.A.,	)	<b>Adversary No. 09-80118-hb</b>
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Ultra Holdings, LLC, Earth Structures,	)	
Inc., Steven R. Wicker, Timothy Bailey,	)	
First Citizens Bank and Trust Co., Inc.,	)	
and the United States of America by and	)	
through its Agency the Department of the	)	
Treasury, Internal Revenue Service,	)	
	)	
Defendants.	)	
_____	)	

**ORDER GRANTING BANK MERIDIAN, N.A.’S MOTION FOR REMAND**

This matter comes before the Court on the Notice of Motion and Bank Meridian N.A.’s Motion for Remand or in the Alternative for Abstention filed on September 1, 2009 and on Notice of Motion for Remand or in the Alternative for Abstention and Statement Pursuant to Rule 9027(e)(3) of the Federal Rules of Bankruptcy Procedure by the Defendants Timothy Bailey and Ultra Holdings, LLC filed on September 11, 2009. On October 10, 2009, Defendants Earth Structures, Inc. and Steven R. Wicker, by and through their attorneys of record, filed Defendant’s Earth Structures, Inc., and Steven R. Wicker’s Objection to Plaintiff Bank Meridian N.A.’s Notice of Motion and Motion for Abstention and Remand. A hearing was held before this Court on October 16, 2009,

attended by Kristin Burnett Barber and Shane W. Rogers, attorneys for Bank Meridian, N.A.; Elinor V. Lister, attorney for Ultra Holdings, LLC and Timothy Bailey; and Jane H. Downey and William H. Edwards, attorneys for Earth Structures, Inc. and Steven R. Wicker. From the evidence, testimony and arguments of counsel, I find as follows:

### FACTS

The civil action listed above was filed on February 9, 2009 in the Spartanburg County Court of Common Pleas in the State of South Carolina, in Civil Action Number 2009-CP-42-0793 (the "Litigation"). By Order of Reference filed on February 10, 2009, in the Office of the Clerk of Court for Spartanburg County, South Carolina, the Litigation was referred to the Honorable Gordon G. Cooper, Spartanburg County Master-in-Equity ("Judge Cooper").

The Debtor, Earth Structures, Inc., filed its Chapter 11 bankruptcy petition on May 19, 2009 in the United States Bankruptcy Court for the District of South Carolina in Bankruptcy Case Number 09-03768-hb. After receiving notice of the Debtor's bankruptcy filing, Judge Cooper signed an Order, which was filed in the Litigation on May 20, 2009, which stated that "the Defendant filed Bankruptcy; therefore, the above-named case is hereby Stricken from the Active Roster with leave to restore when the stay is lifted with the same docket number and no additional filing fee."

On or about May 29, 2009, Bank Meridian, N.A. (the "Bank") filed a Motion to Alter or Amend Judgment. In its motion, the Bank asked Judge Cooper to alter or amend his May 20, 2009 Order on the grounds that there were multiple defendants in the Litigation and the Debtor was the only party to the Litigation who had filed bankruptcy.

Additionally, the Plaintiff argued that a number of the causes of action contained in the Complaint were not subject to the automatic stay triggered by the Debtor's bankruptcy.

By Order dated and filed on June 24, 2009, Judge Cooper granted the Bank's Motion to Alter or Amend Judgment. In doing so, Judge Cooper determined that it was appropriate to allow the Bank to proceed with the following causes of action which he determined were not subject to the automatic stay triggered by the Debtor's bankruptcy:

- a. First Cause of Action (Breach of Note 1);
- b. Fourth Cause of Action (Breach of Note 3);
- c. Fifth Cause of Action (Foreclosure of Mortgage 2, Encumbering Real Property);
- d. Sixth Cause of Action (Breach of Guaranty 1);
- e. Seventh Cause of Action (Breach of Guaranty 2);
- f. Eighth Cause of Action (Breach of Guaranty 3);
- g. Ninth Cause of Action (Breach of Guaranty 4);
- h. Fourteenth Cause of Action (Breach of Guaranty 5) and
- i. Fifteenth Cause of Action (Breach of Guaranty 6).

(the "Restored Causes of Action"). The Order dated June 24, 2009 is attached hereto as **Exhibit "A"** and incorporated herein by reference.

The Court then restored the causes of action listed above to the Active Roster pursuant to an Order to Restore dated July 9, 2009 and filed on July 9, 2009 in the Litigation. A copy of said Order to Restore is attached hereto as **Exhibit "B"** and incorporated herein by reference.

#### CONCLUSIONS OF LAW

The Bank, Ultra Holdings, LLC and Timothy Bailey have argued, among other things, that the Restored Causes of Action should be remanded to the State Court, based on the following: that the Restored Causes of Action are against Defendants who have not filed for Bankruptcy; that the collateral which is the subject of the Fifth Cause of action is not owned by the Debtor, but owned by Ultra Holdings, LLC; and that the Restored Causes of Action do not effect the administration of the Debtor's estate.

The Debtor has argued, among other things, that the entire action should remain in this Court based on the following: that the civil action is critical to the administration; that the counterclaims filed by the Debtor against the Bank would be best adjudicated by the Bankruptcy Court, as they are claims of the bankruptcy estate; and that the Bank's interests as a secured creditor have a direct relationship with the Debtor's estate.

28 U.S.C. § 1452(b) provides that a court to which a claim or cause of action is removed to may remand such claim or cause of action on any ground. Additionally, 28 U.S.C. § 1334(c)(1) provides that a district court is not prevented, in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

The Restored Causes of Action are against parties who have not filed for bankruptcy, being Ultra Holdings, LLC, Steven R. Wicker and Timothy Bailey. Said causes of action do not seek judgment against the Debtor, nor do the same seek to enforce security interests against any collateral or assets of the Debtor or its bankruptcy estate.

Further, Judge Cooper carefully considered and made a determination that the restored causes of action listed above should be heard by the State Court and that the

remaining causes of action that are related specifically to the Debtor should be stayed pending the Bankruptcy Court's determination on the Debtor's bankruptcy proceeding.

Based on the foregoing, and pursuant to 28 U.S.C. § 1334(c)(1) and 28 U.S.C. § 1552(b), this Court is hereby abstaining from hearing the Restored Causes of Action and orders that the same be remanded to Judge Cooper for final determination on the merits of the same.

Furthermore, this Court hereby retains jurisdiction over the remaining causes of action which have been stayed by Judge Cooper's Order dated May 20, 2009 and are subject to the automatic stay, being the following causes of action:

- a. Second Cause of Action (Breach of Note 2);
- b. Third Cause of Action (Foreclosure of Mortgage 1 Encumbering Real Property);
- c. Tenth Cause of Action (Breach of Note 4);
- d. Eleventh Cause of Action (Breach of Security Agreement 1 and Security Agreement 2 and Collection of Accounts);
- e. Twelfth Cause of Action (Foreclosure of Mortgage 3 Encumbering Real Property);
- f. Thirteenth Cause of Action (Foreclosure of Mortgage 4 Encumbering Real Property);
- g. Sixteenth Cause of Action (Collection of Rents);
- h. Seventeenth Cause of Action (Injunction-Accounts Receivables);
- i. Eighteenth Cause of Action (Injunction - Rents) and
- j. Nineteenth Cause of Action (Accounting).

## ORDER

IT IS HEREBY ORDERED:

1. That this Court, through its power of discretionary abstention and remand, hereby abstains from hearing and hereby remands the following causes of action to Judge Cooper for a final determination: First Cause of Action (Breach of Note 1); Fourth Cause of Action (Breach of Note 3); Fifth Cause of Action (Foreclosure of Mortgage 2 Encumbering Real Property); Sixth Cause of Action (Breach of Guaranty 1); Seventh Cause of Action (Breach of Guaranty 2); Eighth Cause of Action (Breach of Guaranty 3); Ninth Cause of Action (Breach of Guaranty 4); Fourteenth Cause of Action (Breach of Guaranty 5) and Fifteenth Cause of Action (Breach of Guaranty 6); and

2. That this Court retains jurisdiction over the following causes of action which are subject to the automatic stay: Second Cause of Action (Breach of Note 2); Third Cause of Action (Foreclosure of Mortgage 1 Encumbering Real Property); Tenth Cause of Action (Breach of Note 4); Eleventh Cause of Action (Breach of Security Agreement 1 and Security Agreement 2 and Collection of Accounts); Twelfth Cause of Action (Foreclosure of Mortgage 3 Encumbering Real Property); Thirteenth Cause of Action (Foreclosure of Mortgage 4 Encumbering Real Property); Sixteenth Cause of Action (Collection of Rents); Seventeenth Cause of Action (Injunction-Accounts Receivables); Eighteenth Cause of Action (Injunction - Rents) and Nineteenth Cause of Action (Accounting).

IT IS SO ORDERED.

**EXHIBIT "A"**  
(Copy of Order dated June 24, 2009)

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Bank Meridian, N.A., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Ultra Holdings, LLC; Earth Structures, Inc.; )  
 Steven R. Wicker; Timothy H. Bailey; and )  
 First Citizens Bank and Trust Company, )  
 Inc.; United States of America-by and )  
 through its agency Department of the )  
 Treasury-Internal Revenue Service, )  
 )  
 Defendants. )  
 )

IN THE COURT OF COMMON PLEAS

C.A. No.: 2009-CP-42-0793

**ORDER**

FILED  
 2009 JUN 24 PM 1:54  
 MARC MITCHELLS

This matter is before the Court pursuant to the above-named Plaintiff's Motion to Alter or Amend Judgment filed on May 29, 2009 ("Motion"). In the Motion, the Plaintiff, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, requested that the Court reconsider, alter or amend its Order of May 20, 2009 ("Order"). The Order indicates that "the Defendant filed bankruptcy; therefore, the above-named case is hereby Stricken from the Active Roster with leave to restore when the stay is lifted with the same docket number and no additional filing fee." By way of its Motion, the Plaintiff asserted that a number of the causes of action contained in the Complaint were not subject to the automatic stay triggered by Earth Structures, Inc.'s bankruptcy and that the Plaintiff should be allowed to proceed with said causes of action.

Pursuant to Rule 59(f), SCRCP, the Court has decided this matter on the pleadings filed herein without oral arguments.

After having considered the Plaintiff's Motion and the other pleadings filed herein, the

Court finds that the Order of May 20, 2009 should be altered, modified and/or amended to reflect that only the following causes of action are stricken from the active roster with leave to restore when the stay is lifted with the same docket number and no additional filing fee:

- a. Second Cause of Action (Breach of Note 2);
- b. Third Cause of Action (Foreclosure of Mortgage 1 Encumbering Real Property);
- c. Tenth Cause of Action (Breach of Note 4);
- d. Eleventh Cause of Action (Breach of Security Agreement 1 and Security Agreement 2 and Collection of Accounts);
- e. Twelfth Cause of Action (Foreclosure of Mortgage 3 Encumbering Real Property);
- f. Thirteenth Cause of Action (Foreclosure of Mortgage 4 Encumbering Real Property);
- g. Sixteenth Cause of Action (Collection of Rents);
- h. Seventeenth Cause of Action (Injunction-Accounts Receivables);
- i. Eighteenth Cause of Action (Injunction - Rents) and
- j. Nineteenth Cause of Action (Accounting).

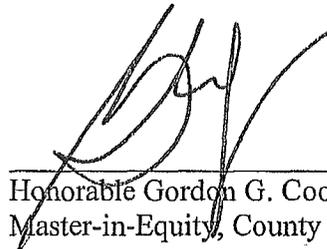
The Court further finds that Order of May 20, 2009 should be altered, modified and/or amended to allow the Plaintiff to proceed with the following causes of action which are not subject to the automatic stay triggered by Earth Structures, Inc.'s bankruptcy:

- a. First Cause of Action (Breach of Note 1);
- b. Fourth Cause of Action (Breach of Note 3);

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- c. Fifth Cause of Action (Foreclosure of Mortgage 2 Encumbering Real Property);
- d. Sixth Cause of Action (Breach of Guaranty 1);
- e. Seventh Cause of Action (Breach of Guaranty 2);
- f. Eighth Cause of Action (Breach of Guaranty 3);
- g. Ninth Cause of Action (Breach of Guaranty 4);
- h. Fourteenth Cause of Action (Breach of Guaranty 5) and
- i. Fifteenth Cause of Action (Breach of Guaranty 6).

IT IS SO ORDERED.

  
\_\_\_\_\_  
Honorable Gordon G. Cooper  
Master-in-Equity, County of Spartanburg

Spartanburg, South Carolina

June 24, 2009

FILED  
CLERK OF COURT  
2009 JUN 24 PM 1:54  
MARC KITCHENS

**EXHIBIT "B"**  
(Copy of Order to Restore)

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Bank Meridian, N.A., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Ultra Holdings, LLC; Earth )  
 Structures, Inc.; Steven R. Wicker; )  
 Timothy H. Bailey; and First Citizens )  
 Bank and Trust Company, Inc.; )  
 United States of America-by and )  
 through its agency Department of the )  
 Treasury-Internal Revenue Service, )  
 )  
 Defendants. )  
 )

IN THE COURT OF COMMON PLEAS

C.A. No.: 2009-CP-42-0793

**ORDER TO RESTORE**

FILED  
 2009 JUL -9 PM 2:35  
 HARRISBURG

This case was stricken from the Active Roster pursuant to a Form 4 Order Filed on May 20, 2009 striking the above-captioned action due to the filing of Chapter 11 Bankruptcy by the Defendant Earth Structures, Inc., with leave to restore when the stay is lifted with the same docket number and no additional filing fee.

On May 29, 2009, Bank Meridian, N.A., filed Plaintiff's Motion to Alter or Amend Judgment filed on May 29, 2009 (the "Motion") for the reasons stated therein. On June 24, 2009, this Court issued an Order which provides, in part, that the Order of May 20, 2009 is altered, modified and or amended to allow the Plaintiff to proceed with the following causes of action which are not subject to the automatic stay triggered by Earth Structures, Inc.'s Bankruptcy:

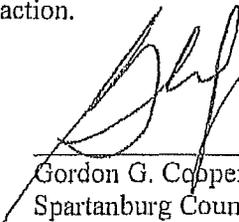
- a. First Cause of Action (Breach of Note 1);
- b. Fourth Cause of Action (Breach of Note 3);
- c. Fifth Cause of Action (Foreclosure of Mortgage 2 Encumbering Real

Property);

- d. Sixth Cause of Action (Breach of Guaranty 1);
- e. Seventh Cause of Action (Breach of Guaranty 2);
- f. Eighth Cause of Action (Breach of Guaranty 3);
- g. Ninth Cause of Action (Breach of Guaranty 4);
- h. Fourteenth Cause of Action (Breach of Guaranty 5) and
- i. Fifteenth Cause of Action (Breach of Guaranty 6).

Upon payment of a filing fee, the above-captioned action shall be restored to the active docket, with regard to the above-stated causes of action.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Gordon G. Cooper, Master-in-Equity for  
Spartanburg County, South Carolina

July 9, 2009

Spartanburg, South Carolina

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