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U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Dunes Hotel Associates, a South Carolina general partnership, Debtor.	C/A No. 94-75715-W Adv. Pro. No. 95-8223-W
Dunes Hotel Associates, a South Carolina general partnership, Objector, Counterclaim Plaintiff, v. Hyatt Corporation, a Delaware corporation and S.C. Hyatt Corporation, a South Carolina corporation, Claimant, Counterclaim Defendants.	**JUDGMENT** Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court shall abstain from determining Dunes' First and Second Counterclaims. Dunes' Objection to Hyatt's claim and Third Counterclaim are dismissed without prejudice.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 11, 1996.

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FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Dunes Hotel Associates, a South Carolina general partnership, Debtor.	C/A No. 94-75715-W Adv. Pro. No. 95-8223-W
Dunes Hotel Associates, a South Carolina general partnership, Objector, Counterclaim Plaintiff, v. Hyatt Corporation, a Delaware corporation and S.C. Hyatt Corporation, a South Carolina corporation, Claimant, Counterclaim Defendants.	**ORDER** Chapter 11

THIS MATTER comes before the Court pursuant to the Complaint of Dunes Hotel Associates ("Dunes" or the "Debtor"), the debtor in possession, titled (I) First Amended Objection To Proof Of Claim Filed By S.C. Hyatt Corporation; and (II) Counterclaims Against S.C. Hyatt Corporation And Hyatt Corporation (the "Objection" and "Counterclaims" on August 28, 1995. On October 6, 1995, a motion to dismiss Dune's Objection and Counterclaims was filed by Hyatt Corporation and S.C. Hyatt Corporation (collectively referred to as "Hyatt"). At the hearing held upon this motion on February 14, 1996, the Court, *sua sponte*, raised the issue of whether it should abstain from hearing the First and Second Counterclaims pursuant to 28 U.S.C. § 1334. Based upon the submissions of Hyatt on the motion to dismiss, the response thereto by

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Dunes filed November 28, 1995 and the reply of Hyatt filed February 9, 1996 and the submissions of both Hyatt and Dunes on the Court's motion to abstain, the record of the hearing before this Court on February 14, 1996, and the record of the Chapter 11 case, this Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[1]

FINDINGS OF FACT

1. On November 18, 1994 (the "Petition Date"), Dunes Hotel Associates commenced the above-captioned case under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"[2]), and has remained a debtor in possession pursuant to §§ 1107 and 1108.

2. Dunes is a South Carolina general partnership formed in 1972 and has its principal place of business in Stamford, Connecticut.

3. The general partners of Dunes are Andrick Hotel Corporation and Meyers Enterprises, Inc., wholly owned subsidiaries of Pension Holding Corporation, which itself is a wholly owned affiliate of the General Electric Pension Trust ("GEPT"). GEPT is a New York common law trust with an asset portfolio of approximately $30 billion dollars and is one of the largest pension trusts in the United States.

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[1] The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

[2] All further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq,* shall be by section number only.

4. Dunes' primary asset is the real property, improvements and personal property which comprise the 505-room resort/convention hotel commonly known as the Hyatt Regency Hilton Head (the "Hotel"), located on Hilton Head Island, Beaufort County, South Carolina. (Such real property, improvements and personal property, including, without limitation, the Hotel, are collectively referred to as the "Hotel Property".)

5. S.C. Hyatt, a South Carolina corporation and a wholly-owned subsidiary of the Hyatt Corp., a Delaware corporation, occupies and operates the Hotel Property pursuant to an Agreement and Lease dated November 2, 1973, as subsequently amended (the "Agreement and Lease"), between Dunes and Hyatt Corp. Hyatt Corp. assigned its rights under the Agreement and Lease to S.C. Hyatt with the Debtor's written agreement.

6. Since the Petition Date, S.C. Hyatt has continued to occupy and operate the Hotel Property and to remit Hotel Payments to Dunes.

7. Pursuant to the Agreement and Lease, a furniture, fixtures and equipment ("FF&E") replacement account, a capital improvements account, is held by S.C. Hyatt in trust for Dunes and used to reimburse S.C. Hyatt for such capital improvements in the normal course of business.

8. On March 16, 1995, S.C. Hyatt filed a proof of claim for an unsecured claim in the amount of $31,438.56 for unreimbursed capital improvement expenses as of the Petition Date.

9. At the hearing on February 14, 1996, counsel for Dunes stated that "[t]here are interrelated allegations, of course, between the objection to claim and the counterclaim, but the Hyatt claim itself, the Hyatt and S.C. Hyatt claim itself that was asserted pre-

petition has been paid." Transcript of February 14, 1996, page 26 at ll. 19-22.

10. In 1986, Dunes executed a promissory note (the "Note") and other loan documents with Aetna in order to evidence and secure a loan. The original principal amount of the Note was $50,000,000.

11. In February 1995, Aetna and S.C. Hyatt separately filed motions to dismiss the Debtor's reorganization case (collectively, the "Case Dismissal Motions"). The primary basis for dismissal alleged in each motion was the asserted futility of reorganization given the Debtor's lack of creditors other than Aetna and S.C. Hyatt. In addition, Aetna and S.C. Hyatt asserted that the petition was filed in order to increase, rather than preserve, the equity of the Debtor's owners in the Hotel Property at these creditors' expense, which they characterized as subjective bad faith. Both Aetna and S.C. Hyatt asserted that they would not vote for any plan of reorganization which sought to limit or modify their rights for the benefit of GEPT, the Debtor's ultimate equity holder, and that in the absence of any consenting creditors, the Debtor's reorganization was futile because it could not satisfy § 1129(a)(10).

12. Subsequent to the filing of the Case Dismissal Motions, on April 5, 1995, Dunes filed its amended Chapter 11 Statements and Schedules (the "Amended Statements and Schedules") which, *inter alia*, retracted the Debtor's contention that any tax or vendor claims were assertable only against S.C. Hyatt, and, for the first time, listed the Trade Claims as well as various tax claims (the "Tax Claims") as claims against the Debtor.

13. With the exception of the Wolf Block claim, the Trade Claims and Tax Claims listed on the Amended Statements and Schedules were paid by S.C. Hyatt.

14. Subsequent to the filing of the Case Dismissal Motions, on February 27, 1995, Dunes filed a complaint commencing an adversary proceeding (the "First Adversary Proceeding") against S.C. Hyatt and Hyatt Corp. In its "First Claim for Relief", Dunes asked the Court to avoid Hyatt's claim of an unrecorded leasehold interest in the Hotel Property under the Agreement and Lease pursuant to § 544. In its alternative "Second Claim for Relief", Dunes asked for (a) a declaratory judgment that the Agreement and Lease is an executory management contract that Dunes could reject under § 365, and (b) a judgment that S.C. Hyatt had materially breached the Agreement and Lease. In its "Third Claim for Relief", the Debtor sought, pursuant to § 542, a turnover of the Hotel Property if the Court granted it relief under the First or Second Claims for Relief.

15. On August 25, 1995, the Court entered the Order and Judgment of August 25, 1995 (the "First Adversary Proceeding Order") dismissing the First Adversary Proceeding and referring certain claims by Dunes against Hyatt for breach of contract contained in the "Second Claim for Relief" of Dunes' complaint to arbitration in accordance with section 14 of the Agreement and Lease. Relying in part on Wellman v. Wellman, 933 F.2d 215 (4th Cir.), cert. denied, 502 U.S. 925 (1991), the Court held that Dunes had no standing to pursue avoidance or rejection of the Agreement and Lease because avoidance and rejection powers are granted to a debtor in possession under the Bankruptcy Code in order to benefit the estate and creditors and not for the sole benefit of the debtor.

16. On August 28, 1995, the Debtor timely filed the Objection and Counterclaims to Hyatt's claim and alleges that: (a) Hyatt and Aetna conspired to eliminate Dunes' creditors, and (b) Hyatt both breached its duty of good faith and fair dealing under the

Agreement and Lease, and intentionally interfered with Dunes' prospective contractual relations with Aetna regarding refinancing, by allegedly imparting information to Aetna regarding Dunes' negotiations with Hyatt. Dunes alleges that the transmission of such information prevented further negotiations between Dunes and Aetna and lead to Aetna's attempt to foreclose on the Hotel Property and the Debtor's eventual voluntary Chapter 11 petition.

CONCLUSIONS OF LAW

I. ABSTENTION

As explained further below, abstention is appropriately utilized only for state law causes of action. The presence of matters that are not state law related does not, however, forestall this Court's abstention from the state law counterclaims. In re Republic Reader's Serv., Inc., 81 B.R. 422, 427 (Bkrtcy. S.D. Tex. 1987) ("partial abstention [is] appropriate to divisible state law claims").

Abstention allows a federal court, as a matter of discretion, to relinquish jurisdiction over a matter to permit that matter to be addressed by a more appropriate tribunal. Abstention exists to promote the strong policy of federalism, enabling a federal court to remove itself from conflict with state courts over matters of state law and state policy. See, e.g., Burford v. Sun Oil Co., 319 U.S. 315, reh'g denied, 320 U.S. 214 (1943); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

Abstention in bankruptcy is broader than in other situations before federal courts because of the unique nature of the grant of jurisdiction over bankruptcy and bankruptcy related matters to the federal courts. In re Republic Reader's Serv., Inc., 81 B.R. at 424-25. Federal courts have

exclusive and original jurisdiction over cases arising under the Bankruptcy Code. 28 U.S.C. § 1334(a). Federal courts also have original, but not exclusive, jurisdiction over civil proceedings arising under the Code or in cases under the Code ("core matters"), and civil proceedings that are merely related to cases under the Code or proceedings arising therein ("non-core matters"). 28 U.S.C. § 1334(b). To counterbalance the grant in 28 U.S.C. § 1334(b) to the federal courts of the power to exercise jurisdiction over matters having only a tangential relationship to a case in bankruptcy, Congress enacted 28 U.S.C. § 1334(c) to provide for permissive and mandatory abstention by the federal courts over matters that are "best left for resolution to a state or other non-bankruptcy forum." In re Republic Reader's Serv., 81 B.R. at 425. The breadth of abstention in bankruptcy is further supported by the revision in the Bankruptcy Reform Act of 1994, Pub. L. No. 108-394, Title I, § 104(b), 108 Stat. 4109 (codified at 28 U.S.C. § 1334(d)) which provides that the only section 1334(c) decision that is appealable is one not to abstain. "The appellate courts have no jurisdiction over any other bankruptcy abstention decision." Balcor/Morristown Ltd. v. Vector Whippany Assocs., 181 B.R. 781, 793 (D.N.J. 1995).

A. MANDATORY ABSTENTION

Mandatory abstention is governed by 28 U.S.C. § 1334(c)(2) which provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2) (emphasis added). This statute reflects the "intent of Congress ... that abstention must play a far more significant role in limiting those matters, which although

properly brought within the jurisdiction under Title 11, are nonetheless best left for resolution to a state or other nonbankruptcy forum." In re Republic Reader's Serv., 81 B.R. at 425.

There are six requirements for mandatory abstention: (1) a timely motion, (2) a state law claim in dispute, (3) the proceeding must be related to a case under title 11, (4) but not arising under that title, (5) the action could not have been commenced in a federal court, (6) an action must have been commenced in a state forum with jurisdiction to hear the matter.

As to the first requirement that a timely motion must have been filed, this requirement has been met by this Court's own motion. Abstention may be raised by the Court sua sponte pursuant to its broad equitable powers under Section 105. In re Clayter, 174 B.R. 134, 142 (Bkrtcy. D. Kan. 1994); see also In re Republic Reader's Serv., 81 B.R. at 423.

A review of the Debtor's First and Second Counterclaims clearly establishes that they are state law causes of action arising out of the Agreement and Lease (albeit with factual relations to the bankruptcy case itself), and therefore the second requirement also has been met. The First Counterclaim is for an alleged breach of the implied duty of good faith and fair dealing. The Second Counterclaim is for intentional interference with a prospective contractual relation. Both parties acknowledge that the First and Second Counterclaims are governed exclusively by South Carolina state law. "[R]espect for state law favors state courts interpreting the laws of the state court forum." In re Clayter, 174 B.R. at 143.

The third and fourth requirements are related and likewise have been met here. A matter which is a core proceeding is not subject to mandatory abstention. 28 U.S.C. § 1334(c)(2). Clearly, the First and Second Counterclaims are "related to" a title 11 case but are not ones "arising under" title 11 or "arising in" a case under title 11. A proceeding "arises under" title 11

if the cause of action is created or determined by a statutory provision of title 11. In re Eastport Assocs., 935 F.2d 1071, 1076 (9th Cir. 1991). As neither the First or Second Counterclaims is created or determined by title 11, those Counterclaims do not "arise under" title 11.

"'Arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of bankruptcy." Id. (quoting In re Wood, 825 F.2d 90, 96-97 (5th Cir. 1987)). If this chapter 11 case did not exist, the Debtor could still pursue its causes of action in state court or through arbitration. Therefore, the Adversary Proceeding is not a proceeding "arising in" title 11 and thus, is not a core proceeding.

As to the fifth mandatory abstention requirement, here no federal diversity subject matter jurisdiction could exist over the counterclaims. The plaintiff and one of the defendants are a South Carolina partnership and South Carolina corporation, respectively. In the absence of complete diversity, diversity jurisdiction does not exist. Casas Office Machs., Inc. v. Mita Copystar Amer., Inc., 42 F.3d 668, 673 (1st Cir. 1994); Schlumberger Indus., Inc. v. National Surety Corp., 36 F.3d 1274, 1284 (4th Cir. 1994). Dunes' claims also do not present a federal question or controversy except through their connection to Dunes' bankruptcy, and Dunes has asserted no other basis of jurisdiction apart from title 11. To the extent that these claims are premised exclusively upon South Carolina law, the federal courts obviously would lack a federal question upon which jurisdiction could be based. Thus, the fifth requirement for mandatory abstention has been met.

However, the Court has concerns of whether the sixth requirement of a pending state action regarding the same matters has also been met. The parties have taken the position that the arbitration ordered by this Court in the August 25, 1995 Order regarding the contract breach

disputes between the Debtor and Hyatt does not satisfy the requirement that the proceeding be heard in a "State forum of appropriate jurisdiction." In support of this argument, the parties have cited the In re Springer-Penguin, Inc., 74 B.R. 879, 882 (S.D.N.Y. 1987) opinion for the proposition that arbitration is not a state proceeding and does not satisfy the principle of comity due to state courts. The In re Springer-Penguin, Inc. opinion is clearly distinguishable as it involved a foreign arbitration proceeding. As that court stated: "[t]here is no state court involved in this case and the Constitutional concept of full faith and credit that must be accorded state court judgments is not implicated when dealing with an arbitration proceeding to be held in Yugoslavia". In re Springer-Penguin, Inc., 74 B.R. at 882. In this case, the arbitration that was ordered pursuant to the August 25, 1995 Order provides for arbitration proceedings pursuant to the Federal Arbitration Act codified at 9 U.S.C. § 1, *et seq*, and was based upon Section 14 of the Agreement and Lease between Dunes and S.C. Hyatt which specifically states that "[t]he decision and award of a majority of the arbitrators or of such sole arbitrator, shall be binding upon both Owner [Dunes] and Hyatt and shall be enforceable in any court of competent jurisdiction".

> The Full Faith and Credit statute, 28 U.S.C. § 1738, provides that: "[State] judicial proceedings ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738 (1994). A state court's confirmation of an arbitration award is a final judgment with the preclusive effect accorded it by state law. Jalil v. Avdel Corp., 873 F.2d 701, 704 (3d Cir.1989), cert. denied, 493 U.S. 1023, 110 S.Ct. 725, 107 L.Ed.2d 745 (1990). A court reviewing the confirmation of an arbitration award must "apply section 1738 and follow its directive of assessing the preclusive effect the state court's decision would be given by another court in the state." Id.

In re Marks, 192 B.R. 379, 383 (E.D.Penn. 1996). Additionally, 28 U.S.C. § 1334(c)(2) does not specifically require a pending lawsuit filed in the state court, it simply provides for an action commenced in a "State forum of appropriate jurisdiction." For these reasons, it would appear to this Court that a contracted-for arbitration proceeding in conformity with the Federal Arbitration Act or a state-court arbitration statute, and one which is enforceable and reviewable in the state court, would meet the requirements of "State forum of appropriate jurisdiction" pursuant to 28 U.S.C. § 1334(c)(2). However, even though the Court believes that all of the requirements for mandatory abstention may be met in this case, since the Court abstains on other grounds, the Court will not recognize mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2) in this case at this time.

B. DISCRETIONARY ABSTENTION

Pursuant to 28 U.S.C. § 1334(c)(1), discretionary abstention is permitted (1) where abstention is in the interests of justice, (2) where abstention is in the interest of comity with state courts, or (3) out of respect for concurrent state law. The three bases are disjunctive and the court need only consider one of three as the basis of its conclusion. In re Bellucci, 119 B.R. 763, 772 (Bkrtcy. E.D. Cal. 1990); In re Kolinsky, 100 B.R. 695, 705 (Bkrtcy. S.D.N.Y. 1989). In addition, "[w]here mandatory abstention is not applicable, the disposition of each of its six factors will inform the decision to exercise permissive abstention or to equitably remand." Balcor/Morristown Ltd. v. Vector Whippany Assocs., 181 B.R. at 788. See also In re Seven Springs, Inc., 148 B.R. 815 (Bkrtcy. E.D. Va. 1992) (finding mandatory abstention required, but also finding on the same analysis that discretionary abstention would be appropriate, as well).

In addition to the tests for abstention listed in the statute, courts have developed further

criteria to aid in the determination of whether one or more of the statutory grounds is satisfied. A representative list of factors to consider regarding whether to recommend abstention which has been approved by courts within this district was propounded by the court in In re Republic Reader's Serv., 81 B.R. at 429:

1. the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,

2. the extent to which state law issues predominate over bankruptcy issues,

3. the difficulty or unsettled nature of the applicable state law,

4. the presence of a related proceeding commenced in state court or other nonbankruptcy court,

5. the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

6. the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,

7. the substance rather than form of an asserted "core" proceeding,

8. the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,

9. the burden of [the bankruptcy court's] docket,

10. the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,

11. the existence of a right to a jury trial, and

12. the presence in the proceeding of nondebtor parties.

See also In re Eastport Assocs., 935 F.2d at 1075-76; In re Landmark Land Co., Case No. 91-5817, Adv. No. 2:91-5290-1 (D.S.C. 1994) (specifically approving the Republic Reader's analysis for discretionary abstention).

The outcome of the first two Counterclaims likely will have no effect on the administration of the bankruptcy case. The remedy for Dunes' allegations, if proven, are damages which would accrue to the benefit of an already solvent Debtor, and not to any creditor. Both of the causes of action are based solely on state law. While the state law issues may not be unsettled or complicated, this Court is of the view that:

> Where a cause of action for monetary damages based primarily on state law can be litigated in state court without substantial delay and disruption to the orderly administration of the estate, the best forum for resolution of that action is state court, irrespective of whether the legal issues present unsettled questions of state law.

In re Republic Reader's Serv., 81 B.R. at 426. This Court believes adjudication of the claims alleged in the First and Second Counterclaims is best accomplished in a nonbankruptcy forum. See also In re Steingold Cos., 960 F.2d 147 (Table), 1992 WL 81677 at *1 (4th Cir. 1992) (unpubl.) (by 28 U.S.C. § 1334(c) "Congress has indicated a strong preference for allowing state law claimants to litigate their disputes in state courts rather than the bankruptcy courts").[3]

Additionally, the Second Counterclaim seeks damages for intentional interference with prospective contractual relations, a tort with a relatively brief history in South Carolina, having only been recognized by the Supreme Court of South Carolina in the 1990 case of Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (S.C. 1990).

> Abstention is especially advised where there are unsettled questions of state law. Thompson v. Magnolia Petroleum Co., 309

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[3] Although unpublished Fourth Circuit opinions are not binding precedent (I.O.P 36.5 and 36.6), they may supply "helpful guidance". In re Serra Builders, Inc., 970 F. 2d 1309, 1311 (4th Cir. 1992).

> U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940); Harley Hotels, supra; Matter of Krupke, 57 B.R. 523 (Bkrtcy.W.D.Wis.1986); In re Kimrey, 10 B.R. 466 (Bkrtcy.M.D.N.C.1981). As stated by the court in Krupke, supra, at 528, ...Permissive abstention based on the alleged novelty of the state law issues may, however, be appropriate, if the resolution of those issues involves matters of substantial public import, and if there exists no state precedent that will enable the bankruptcy court to predict with reasonable certainty the result that the state courts would reach were the issue before them.

In re A&D Care, Inc., 90 B.R. 138, 141 (Bkrtcy.W.D.Penn. 1988).

In addition, as discussed previously, there is no basis other than Dunes' bankruptcy for these Counterclaims to be adjudicated in this court. This is not a core proceeding, as Dunes avers.[4] "Often a proceeding, cast in the language of a core proceeding, merely shrouds state law actions under the guise of a bankruptcy issue." In re Republic Reader's Serv., 81 B.R. at 427 (citing as an example the use of § 542 to induce a bankruptcy court to exercise jurisdiction).

In these actions, the Debtor continues to seek to tie its contract disputes with Hyatt to a legitimate bankruptcy process in order to avail itself of the bankruptcy codes extraordinary avoiding power statutes as a weapon against Hyatt.

This is an anomalous case in which there are no true creditors remaining (even Hyatt has been paid its prepetition claim). The Debtor's only other creditor, Aetna, was paid out by Dunes' beneficial owner, GEPT. This Court finds little reason to further burden its docket to maintain jurisdiction over causes of action that can produce no benefit for any non-insider creditors in the

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[4] Indeed, Dunes has misinterpreted the prior holding of this Court in referring Dunes' contract claims to arbitration by asserting that the Court had found those claims to be "core" matters. What this Court held was that it was dismissing the core matters and referring the other, non-core contract claims to arbitration.

bankruptcy case. See In re Starnes, 159 B.R. 748, 751 (Bkrtcy. W.D.N.C. 1993) (court abstained where "determination [of tax liability pursuant to § 505] would have no effect on any creditor and would benefit only the debtor.") This Court is not inclined to allow the Debtor to disguise state law contract causes of actions merely to perpetuate its goal of avoiding the Lease and Agreement, a result previously denied by this Court. Such actions, if valid, may be appropriately addressed in the arbitration proceeding which is pending between these parties.

The Court notes that where a proceeding is not core, the jurisdiction of the bankruptcy court depends upon it being at least "related to" a title 11 case. Whether a proceeding is related to a bankruptcy case depends on whether the outcome of the proceeding will have an effect on the administration of the bankruptcy case. In re Clayter, 174 B.R. at 140 (citing Pacor v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (test for whether a civil proceeding is related to a bankruptcy proceeding is "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."). The Debtor has argued that the outcome of this action, if the Debtor is successful, will allow it to offset damages which Hyatt may allege if the District Court reverses this Court's Adversary Proceeding Order.

This Court is not persuaded to look beyond the facts as they currently exist. These facts are that: (1) the Debtor has no non-insider creditors other than Hyatt (whose entire prepetition claim has been paid); (2) this Court has ruled that the Debtor may not avoid or reject the Agreement and Lease; and (3) this Court has denied confirmation of the Debtor's Amended Plan and there is no other plan of reorganization pending. These facts indicate that the outcome of these causes of action or Counterclaims can have no presently important impact on the administration of the bankruptcy case in its present posture. Any judgment would only benefit

the solvent Debtor or its equity holder GEPT. The Debtor may seek this benefit in other non-bankruptcy forums including the pending arbitration proceeding and the result may be incorporated in any legitimate reorganization process (a process which due to the expected continuing appeals by one or both parties may possibly take many years). As such, the First and Second Counterclaims are more appropriately resolved in an appropriate non-bankruptcy forum and the Court will exercise discretionary abstention pursuant to 28 U.S.C. § 1334(c)(1).

II. THE OBJECTION AND DUNES' THIRD COUNTERCLAIM

Dunes objected to S.C. Hyatt's claim on three grounds: 1) S.C. Hyatt has not provided adequate proof of the validity or amounts in the claim, 2) the S.C. Hyatt claim will be disallowed pursuant to the First Adversary Proceeding for avoidance or rejection, and 3) Hyatt has not turned over the Hotel Property to Dunes pursuant to § 542 based upon the allegations contained in the First Adversary Proceeding.

As to Dunes' first ground for the objection to S.C. Hyatt's filed claim and its Third Counterclaim seeking a designation of S.C. Hyatt's claim for voting purposes, the Court must dismiss these allegations as moot. The pre-petition claim of S.C. Hyatt has voluntarily been paid. As to the second and third grounds for objection, this Court has previously dismissed the First Adversary Proceeding, including the claim for turnover pursuant to § 542, and therefore under the present law of this case, these objections must also be dismissed.

Additionally, the Court has denied confirmation of the Initial Plan of Reorganization Proposed by Dunes Hotel Associates by Order and Judgment dated September 20, 1995 (the "Initial Plan Order"). On March 18, 1996, the United States District Court for the District of South Carolina dismissed the appeal of that Order as interlocutory. Further, Dunes' Amended

and Restated Plan of Reorganization Presented for Confirmation September 27, 1995 was similarly denied by Order and Judgment dated January 26, 1996 (the "Amended Plan Order")[5].

Since there is no pending plan of reorganization and as it does not appear that Dunes intends to submit a new plan of reorganization until this Court's previous Orders in the First Adversary Proceeding have been either reversed or remanded on appeal, it would appear that any concern for a designation of Hyatt's vote on such plan would be premature or moot. In the event that Dunes does in fact file a new plan of reorganization, at that point, if the objections have not otherwise been waived, Dunes will be able to resuscitate their objections to Hyatt's claims or request a determination of Hyatt's ability to vote. The Court is mindful that Dunes was required to file its objections to claims by a certain deadline based upon this Court's previous scheduling orders, but to the extent this Order conflicts with the previous scheduling orders, this Order shall prevail.

CONCLUSION

Dunes' First and Second Counterclaims seek recovery in damages on allegation based solely on state law which could not have been brought in this Court absent Dunes' filing for bankruptcy under Chapter 11, and that such issues are more appropriately determined in a non-bankruptcy forum. Accordingly, this Court finds and holds that pursuant to 28 U.S.C. § 1334(c)(1), abstention is appropriate.

As to Dunes' Objection to S.C. Hyatt's filed claim and Dunes' Third Counterclaim, this adversary proceeding will be dismissed without prejudice pending resolution of the appeals of

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[5]This Order is currently pending appeal.

this Court's prior orders.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 11, 1996.

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