

will avoid the possibility of any inconsistent disposition. In support of its request to withdraw the reference, MACC respectfully states as follows:

Background

1. On or about September 26, 2006, an involuntary petition for relief under chapter 11 of the Bankruptcy Code was filed against 1Point Solutions, LLC (“1Point”), along with an expedited motion for appointment of a chapter 11 trustee. An order granting the requested relief and directing the appointment of a chapter 11 trustee was entered on September 27, 2006. John C. McLemore was appointed as the chapter 11 trustee (the “Trustee”) on September 28, 2006. The Bankruptcy Court approved the Trustee’s appointment by order entered on September 29, 2006, and the Trustee continues in that capacity.

2. After his appointment in the 1Point case, the Trustee filed a complaint seeking substantive consolidation of 1Point and Barry R. Stokes (“Stokes”), the principal of 1Point. Upon agreement between the Trustee and Stokes, on October 13, 2006, the Bankruptcy Court entered an order for relief under chapter 11 of the Bankruptcy Code against Stokes individually. The Bankruptcy Court also consolidated the estates of 1Point and Stokes for purposes of administration and directed the appointment of a chapter 11 trustee in the Stokes case. Mr. McLemore was appointed as chapter 11 trustee in the Stokes case.

3. On August 16, 2007, a number of 401(k) savings plans brought suit against MACC in the District Court seeking to recover funds misappropriated by 1Point and Stokes. The Amended Complaint in that action brings claims alleging violations of ERISA, Tennessee common law and a claim under the Tennessee Securities Act (the “Plans’ Amended Complaint”) (copy attached hereto as Exhibit 1). That matter is pending as HERITAGE EQUITY GROUP 401(K)

SAVINGS PLAN ET. AL. VS. MID-ATLANTIC CAPITAL CORPORATION under Case Number 3:07-0841.

4. On or about August 20, 2007, the Trustee filed a complaint against Regions Bank (as successor in interest by merger to AmSouth Bank)(“Regions”) and MACC (the “Trustee’s Complaint”), also seeking to recover funds that were misappropriated by 1Point and Stokes. The Trustee’s Complaint seeks recovery not for the bankruptcy estate but for 401(k) savings plans, including the same 401(k) savings plans who are plaintiffs in the District Court action. Like the District Court action, the Trustee’s Complaint alleges various claims and theories under ERISA and under Tennessee common law. The Trustee’s claims are also predicated upon various federal regulatory statutes, which the Trustee purports apply to MACC’s actions as alleged in the Trustee’s Complaint. The Trustee’s Complaint admits that the proceeding is a non-core matter. *See* TRUSTEE’S COMPLAINT at ¶ 6.2 (copy attached hereto as Exhibit 2).

Withdrawal of the Reference is Appropriate

5. Section 157(d) of Title 28 compels a district court to withdraw a proceeding “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” 28 U.S.C. § 157(d). The Trustee’s Complaint is predicated upon ERISA and various statutes regulating financial institutions. Disposition of the Trustee’s claims necessarily requires consideration of these non-bankruptcy statutes. By the plain language of Section 157(d), withdrawal of the reference is mandatory.

6. Alternatively, permissive withdrawal is also warranted. Section 157(d) does not define "cause" for the district court to withdraw the reference of a proceeding to bankruptcy court. Several courts have held, however, that common or overlapping issues in a proceeding in

bankruptcy court with a case pending in district court constitute cause for withdrawal. *See e.g. Big Rivers Elec. Corp. v. Green River Coal Co., Inc.*, 182 B.R. 751, 755 (W.D. Ky. 1995). In this case, both actions involved the identical underlying factual scenario, make largely the same legal claims against MACC under ERISA and under state common law, and, remarkably, are even purportedly brought on behalf of many of the same parties.

7. Judicial efficiency and uniformity may also constitute cause where a non-core matter decided by the bankruptcy court would be subject to *de novo* review by the district court anyway. *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2nd Cir. 1993). Determination of the Trustee's claims is a non-core proceeding involving many factual and legal issues already before this Court in the Plans' Amended Complaint. If the reference is not withdrawn, MACC will incur the unnecessary cost of litigating essentially the same lawsuit in two different courts with potentially conflicting results. MACC may then, regardless of the outcome in the bankruptcy proceeding, incur the cost of a *de novo* review of the bankruptcy court's determination of the issues. Conceivably, these two intertwined cases could continue through the appeal process entirely separately at considerable expense to all parties and unnecessary use of judicial resources.

8. Withdrawal of the reference is also appropriate when the proceeding is the type of case regularly tried in the district courts, rather than one that is dependent on bankruptcy law and practice. *See In re NDEP Corp.*, 203 B.R. 905, 913 (D. Del. 1996)(reference withdrawn of an adversary proceeding brought by the bankruptcy debtor for an alleged breach of a supply contract in which the non-debtor defendant asserted a defense that the goods sold were defective and that the debtor had breached the contract in various other ways because suit was the type of

diversity case routinely tried in federal court and “somewhat removed from the bankruptcy court’s realm of expertise”).¹

For all of these reasons, MACC respectfully submits that withdrawal of the reference pursuant to 28 U.S.C. § 157(d) is not only appropriate, it is mandatory.

WHEREFORE, MACC respectfully requests the Court withdraw the reference of this adversary proceeding under 28 U.S.C. § 157(d) and grant such other relief as may be necessary and appropriate.

Respectfully submitted,

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¹ The courts and rule-drafters clearly intend that federal litigation proceed without waste of time or resources of the parties and the courts. *See* Fed. R. Civ. P. 42(a)(the court may consolidate actions or “make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay”). Withdrawal of the reference in this matter accomplishes that result.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on the 2nd day of January, 2008, on all parties receiving electronic notice through the Bankruptcy Court's CM/ECF system, including, specifically, counsel for the Plaintiff/Trustee and counsel for Defendant Regions Bank.

s/ Barbara D. Holmes
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