UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

AMERICAN TELECOMMUNICATIONS ENTERPRISES, INC.	CASE NO. 98-60700
Debtor	Chapter 11

APPEARANCES:

MARTIN, MARTIN & WOODARD, LLP Chapter 7 Trustee of First Express Financial Group, Inc. One Lincoln Center Syracuse, New York 13202	LEE E. WOODARD, ESQ. Of Counsel
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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court on the motion of Tidel Engineering, Inc. ("Tidel") joined by Lee E. Woodard, Esq., as Chapter 7 Trustee of First Express Financial Group, Inc. ("First Express"), which seeks relief from the automatic stay of § 362 of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), in order that it may proceed with an action in state court against the Chapter 11 Debtor, American Telecommunications Enterprises, Inc. ("American" or "Debtor"). The Court heard oral argument on Tidel's motion on December 15, 1998, after which the parties were permitted to file memoranda of law. This matter was submitted for decision on December 30, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(a)(1), (b)(1), and (b)(2)(G).

FACTUAL BACKGROUND

American, the debtor in this Chapter 11 case, is a Florida corporation engaged in the resale of long distance telecommunications services to hotels and pay telephones. First Express is a Delaware corporation formerly engaged in the development of electronic funds transfer systems, which has allegedly carried on no active business since late 1996. Both American and

First Express have as their sole stockholder Joseph C. Passalaqua ("Passalaqua"), who also serves as president of the Debtor.

In early 1996 Tidel delivered approximately 152 automatic teller machines to First Express, which intended to place them in and around the city of Atlanta, Georgia during the 1996 Summer Olympic Games. By all accounts, this venture was not a success, and First Express subsequently defaulted on its payment obligation to Tidel. First Express allegedly ceased all business operations shortly after the conclusion of the Atlanta Olympics, and on September 28, 1998, it filed a voluntary petition in this Court for relief under Chapter 7 of the Code.

In September 1996, Tidel brought an action against First Express in a Texas state court (the "Texas Action"), which is currently pending under the caption of *Tidel Engineering, Inc. v. First Express Financial Group et al.*, Case No. 96-09892, 191st Judicial District Court, Dallas County, Texas. In January 1997, Tidel amended its complaint to add American as a defendant, asserting a cause of action based on its alleged "failure to complete its Settlement Agreement," apparently in reference to American's role in abortive workout negotiations between Tidel and First Express. In a subsequent amendment of the pleadings, Tidel sought to hold American derivatively liable for its claim against First Express, asserting theories under the alter ego and single enterprise doctrines of state corporate law. Similar derivative claims have been asserted by Tidel against Passalaqua individually and against several other Passalaqua-controlled entities.

At a hearing on this motion on December 15, 1998, it was brought to the Court's attention that Tidel had voluntarily dropped American as a defendant from the Texas Action. No explanation was given as to why this was done, and in any case, Tidel now seeks a lifting of the automatic stay so that it can rejoin American as a defendant. Tidel's derivative claims against

the other Passalaqua entities apparently have not been dropped and remain pending before the Texas court.

The parties gave sharply different accounts of the status and progress of the Texas Action. Tidel asserted that its discovery was already substantially complete, and that it would be ready to proceed to trial in Texas almost immediately, notwithstanding its proposed re-addition of American as a defendant. American, by contrast, insisted that discovery had yet to be carried out on several key issues of Tidel's complaint, and further noted that many defendants intended to raise challenges to the jurisdiction of the Texas Court.[1]

Tidel has filed a proof of claim in the American bankruptcy for approximately $1,234,413.86, which is based on various contingent causes of action against American arising out of the First Express transaction. On September 30, 1998, American filed an objection to Tidel's claim, and on October 29, 1998, Tidel filed opposition to American's objection.

The motion presently under consideration marks the fourth time that Tidel has sought relief from the automatic stay in relation to its claims in the Texas Action. On April 21, 1998, the Court modified the automatic stay so as to permit Tidel to proceed with a pending motion for summary judgment against all defendants in the Texas Action. This summary judgment motion was subsequently denied by the Texas state court, which found a material issue of fact with regard to the underlying contract liability of First Express. No ruling was made as to the validity of Tidel's alter ego theory against the Debtor or any other defendant. On June 8, 1998, the Court issued an order authorizing Tidel to proceed against American's non-debtor co-defendants in the

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[1] Although the Debtor is not currently a party to the Texas Action, it appears that all Passalaqua entities, including the Debtor, are represented by the same Texas counsel.

Texas Action, and denied American's request for an injunction extending the automatic stay to Passalaqua in his individual capacity. On June 26, 1998, the Court denied without prejudice a motion brought by Tidel seeking a broader relief from the stay. In an oral ruling from the bench, the Court noted several factors that weighed in favor of continuing the stay, including the fact that the Debtor's bankruptcy was then still at a very early stage, as well as the general uncertainty regarding the progress of litigation in Texas.

There have been several significant developments in connection with the Debtor's reorganization since Tidel brought its June lift-stay motion. As noted, First Express filed a liquidating petition under Chapter 7 on September 28, 1998. At a hearing on various American-related matters on December 15, 1998, the First Express Trustee indicated that he intended to pursue his own alter ego cross claims against American in the Texas Action, and requested permission to join Tidel's motion for relief from the stay. This permission was orally granted by the Court. In addition, the First Express Trustee and Tidel have consented to a lifting of the stay which would permit the litigation between First Express and Tidel to proceed in the Texas Action.

On October 25, 1998, American filed a Chapter 11 Plan of Reorganization and Disclosure Statement ("Chapter 11 Plan"). Under the Chapter 11 Plan, American's reorganization was to be funded in principal part by Phoenix International Industries, Inc. ("Phoenix"), which had agreed to purchase all of American's common stock in return for approximately $ 6 million and 150,000 shares of its own stock. However, in November or December of 1998, Phoenix informed American that it was unable to obtain the financing contemplated by the stock purchase agreement. As a result, American withdrew its Chapter 11 Plan from further consideration on

December 7, 1998.

DISCUSSION

As a preliminary matter, American questions whether Tidel has standing to bring this motion. By the terms of Code § 362(d), motions to lift the automatic stay must be brought on request of "a party in interest," and although the term "party in interest" is not defined in the Code, the Second Circuit has constructed it to include, at a minimum, any creditor of the bankruptcy estate. *See Roslyn Savings Bank v. Comcoach Corp. (In re Comcoach Corp.)*, 698 F.2d 571, 573 (2d Cir. 1983).

American's standing argument is apparently based on the assertion that Tidel will not prevail against American on the merits of the Texas Action, and that Tidel is accordingly not a creditor of American for the purposes of the Code. Unfortunately for American, the statutory definition of "creditor" is not quite so narrow. Under Code § 101(10)(A), a creditor is any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." In turn, the word "claim" is defined by Code § 101(5)(A) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." The reach of Code § 101(5)(A) is expansive. By its plain language, it encompasses legal causes of action that have not yet been litigated, and it does not require a preliminary inquiry by the

Court as to the underlying merits of the litigation. Accordingly, Tidel's alter ego action is a claim for purposes of Code § 101(5)(A), and Tidel is a creditor for purposes of Code § 101(10)(A) with standing to bring this motion.

In turning to the substance of Tidel's lift-stay motion, the Court is guided by the factors catalogued in *Sonnax Industries, Inc. v. TRI Component Products Corp. (In re Sonnax Industries, Inc.)*, 907 F.2d 1280 (2d Cir. 1990). In *Sonnax*, the Second Circuit listed twelve factors relevant in deciding whether litigation against a debtor should be permitted to go forward in another forum, including: (1) whether relief would result in a partial or complete resolution of the issues; (2) whether the other action lacks any connection with or interferes with the bankruptcy case; (3) whether the other proceeding involves the debtor as fiduciary, (4) whether the other forum is a specialized tribunal with expertise relevant to the cause of action; (5) whether litigation costs would be borne by the debtor's insurer; (6) whether the action in the other forum primarily involves third parties; (7) whether litigation in the other forum would prejudice the interest of other creditors; (8) whether a judgment claim in the other action would be subject to equitable subordination; (9) whether the action in the other forum would result in a judicial lien avoidable by the debtor; (10) judicial economy; (11) whether the parties are ready for trial in the other proceeding; and (12) the balance of harms if the stay is lifted. *Sonnax*, 907 F.2d at 1286.

While *Sonnax* does not provide a mechanical test, the two weightiest factors are clearly those of (11) judicial economy and (12) the balance of harms, which encompass in general terms the substance of each of the other ten factors. In addition, several of the minor factors are also relevant to the present matter, including (2) connection with the bankruptcy case and (6) the role of third parties in the other action. For reasons explained below, the Court finds that at this stage

of American's reorganization, the *Sonnax* factors overwhelmingly support granting the relief from the stay sought by Tidel.

When the Court last visited Tidel's lift-stay motion, American's most compelling argument in opposition centered on the twelfth *Sonnax* factor, the balance of harms. The considerable potential harm to American, in turn, stemmed from the fact that its reorganization was then still fairly young, its petition having been filed on February 9, 1998. The policy of allowing newly-filed debtors a "breathing spell" from excessive harassment by lawsuit creditors is central to the purpose of the Bankruptcy Code, and courts have accordingly held that only the most extreme of circumstances will permit an unsecured creditor to go forward with litigation against the debtor in another forum during the first 120 days after the filing of a bankruptcy petition. *See In re Pioneer Commercial Funding Corp.*, 114 B.R. 45, 48 (Bankr. S.D.N.Y. 1990).

Since June, American has managed to prepare and file a reorganization plan (albeit one that has since been retracted), and the 120-day exclusivity period afforded by Code §1121(b) has expired. In short, American's need for a breathing spell is no longer as significant as it was in June, and American can not rely on the extraordinary immunity from litigation contemplated by *Pioneer Commercial Funding.*

The Court is not persuaded that any of the other circumstances cited by American amount to a measurable harm for purposes of *Sonnax*. While the Court appreciates American's observation that defending the Texas Action will drain the estate's resources and delay its efforts to reorganize, it appears that American would not be spared this hardship if Tidel's motion was denied. Instead, the alternative is for American to face exactly the same trial on the same issues in the form of a claims objection before this Court. The hardship to American, if any, would be

caused by the choice of the forum, not the litigation itself. In fact, given that American is apparently represented in Texas by the same counsel as its non-bankrupt co-defendants, there is some indication that the burden on American would actually be lessened if the stay were to be lifted, since it presumably might be able to pool its Texas litigation costs with the other defendants, and would be spared having to litigate the same issues at entirely its own expense before this Court.

Although the facts presented to this Court about the litigation in Texas are at best scanty, it is clear even on this limited record that judicial economy will be better served if the Tidel-American and American-First Express lawsuits are litigated as part of the Texas Action. In addition to the two defendants that are also debtors in this Court, Tidel has filed suit on essentially the same facts and on the same theories against several non-debtor defendants over whom this Court does not and cannot exercise jurisdiction. At best, allowing parallel litigation of these claims in this Court and in Texas will waste considerable judicial resources; at worst, it may leave the litigants faced with inconsistent results.

As a general matter, courts look with disfavor upon the piecemeal litigation of factually-interlocking causes of action in separate fora. *See Comeau v. Rupp*, 810 F.Supp. 1127, 1156 (D. Kan.1992); *Rodriguez v. Chandler*, 641 F.Supp. 1292, 1302 (S.D.N.Y. 1986). In the present case, the Court finds that litigation of all First Express-related causes of action in a single forum will conserve judicial resources, avoid confusion, and minimize the possibility of inconsistent judgments. As noted above, this Court will not be able to assert jurisdiction over any of the Passalaqua defendants that are not presently debtors; and while it is not clear that the Texas court will be able to obtain personal jurisdiction over all the non-debtor defendants, it appears that

Texas nevertheless offers the best hope of bringing as many interested parties as possible together for a single trial. Accordingly, the Court finds that interests of judicial economy are best served by granting Tidel relief from the stay.

While the Texas Action is undoubtedly connected to the American bankruptcy, in the sense that it may act to fix the claim of one creditor against the estate, no special circumstances exist that would give this factor decisive weight. By contrast, in *Sonnax*, the state court action involved a restraining order that would have affected the very manner in which the reorganized debtor could do business, and accordingly was held to potentially interfere with the debtor's reorganization. *Sonnax*, 907 F.2d at 1287.

Finally, as noted above, regardless of the Court's decision today, the Texas Action will presumably proceed against several defendants over whom this Court has no jurisdiction. The participation of these third parties in the Texas Action is another factor that favors a lifting of the stay.

Based on the foregoing, it is hereby

ORDERED that the automatic stay is modified to permit Tidel and the First Express Trustee to add American as a defendant and to assert alter ego, single business enterprise, and veil-piercing causes of action in the Texas state court action now pending as *Tidel Engineering, Inc. v. First Express Financial Group, Inc. et al.*, No. 96-09892; provided, however, that such modification of the stay extends only to a determination and liquidation of American's liability, and does not extend to the execution of any judgment thereby obtained.

Dated at Utica, New York

this 20th day of January 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge