UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARINA DEVELOPMENT, INC.	CASE NO. 01-67451
FRANKLIN INDUSTRIAL COMPLEX, INC.	01-67459
CHRISTINE FALLS OF NEW YORK, INC.	01-67458
TRAFALGAR POWER, INC.	01-67457
PINE RUN OF VIRGINIA, INC.	01-67456
Debtors	Chapter 11
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MARINA DEVELOPMENT, INC.
TRAFALGAR POWER, INC.
CHRISTINE FALLS OF NEW YORK, INC.
FRANKLIN INDUSTRIAL COMPLEX, INC.
PINE RUN OF VIRGINIA, INC.

Plaintiffs

vs. ADV. PRO. NO. 02-80005

ALGONQUIN POWER CORPORATION, INC.
ALGONQUIN POWER SYSTEMS, INC.
ALGONQUIN POWER FUND (CANADA), INC.
ALGONQUIN POWER INCOME FUND
ALGONQUIN POWER SYSTEMS NEW HAMPSHIRE, INC.
ALGONQUIN POWER (U.S.) HOLDINGS, INC.
AETNA LIFE INSURANCE COMPANY
CIT CREDIT GROUP, INC., f/k/a NEWCOURT CREDIT GROUP, INC.
CANADIAN INCOME PARTNERS I LIMITED PARTNERSHIP

Defendants

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

Under consideration by the Court is a motion filed on behalf of Algonquin Power Corporation, Inc. ("APC"), Algonquin Power Systems, Inc., Algonquin Power Fund (Canada), Inc., Algonquin Power Income Fund ("Fund"), Algonquin Power Systems New Hampshire, Inc. and Algonquin Power (U.S.) Holdings, Inc. (collectively "Algonquin" or "Algonquin Defendants") on November 15, 2002, seeking partial summary judgment in the above-referenced adversary proceeding with respect to the seventh through the thirteenth causes of action set out in the complaint ("Complaint") filed on August 29, 2001. On January 3, 2003, a similar motion was filed on behalf of Aetna Life Insurance Co. ("Aetna"), also a defendant in the adversary

proceeding. Additionally, before the Court is a cross-motion filed on behalf of Marina Development, Inc. ("MDI"), Trafalgar Power, Inc. ("TPI"), Christine Falls of New York, Inc. ("CFC"), Franklin Industrial Complex, Inc. ("Franklin") and Pine Run of Virginia, Inc. ("Pine Run") (collectively "Plaintiffs" or "Debtors")[1] on January 13, 2003, opposing both Algonquin's and Aetna's motions and requesting summary judgment (collectively, the "Motions").

The Court heard oral argument on the Motions on February 4, 2003, at its regular motion term in Syracuse, New York. The Court reserved its decision on the Motions and asked that the parties first address the issue of the Court's jurisdiction with respect to the adversary proceeding. The matter of the Court's jurisdiction was submitted for decision on March 4, 2003.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(3) and 157(c)(1).

FACTUAL BACKGROUND

The Debtors filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of North Carolina, on August 27, 2001. The cases were transferred to this Court on or about December 26, 2001, as was this adversary

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[1] It is alleged that MDI owns 100% of the outstanding shares of TPI, Franklin and Pine Run. *See* Memorandum of Law of Debtors, filed on March 4, 2003 at 1. CFC is a subsidiary of TPI. *See id.* n. 2.

proceeding commenced by the Debtors on August 29, 2001, against the various defendants. Plaintiffs acknowledge in their Complaint that at the time they filed their petitions in August 2001, the "[m]atters detailed in this adversary proceeding are the subject of pending actions among the parties . . . " in both the United States District Court for the Northern District of New York ("District Court") and the Merrimack County (New Hampshire) Superior Court ("State Court"), which had been commenced sometime in 1999.[2] *See id.* at ¶ 7.

The Court will assume familiarity with the facts set forth in a prior Memorandum-Decision and Order of the District Court, *see Trafalgar Power, Inc. v. Aetna Life Insurance Co.*, 131 F.Supp. 2d 341 (N.D.N.Y. Jan. 16, 2001) (McCurn Sr. U.S.D.J.), and for purposes of this decision the Court will also rely on the summary provided by Judge McCurn in a subsequent decision of the District Court. *See Trafalgar Power, Inc. v. Aetna Life Insurance Co.*, 2001 WL 640908 (N.D.N.Y. May 23, 2001):

> Between 1986 and 1988 TPI and CFC acquired and developed at least seven hydroelectric power projects in Upstate New York. In 1989, defendant Aetna Life Insurance Company loaned TPI and CFC approximately $22.5 million in connection with the power projects. In January 1996, that loan was restructured and pursuant to a Revised Loan Agreement, the original amount of the projects' debt was broken into "A" Notes and "B" Notes. Aetna also provided TPI and CFC with an unsecured line of credit in the amount of $1.3 million.
>
> As a condition precedent to entering into the Revised Loan Agreement, TPI and CFC agreed to secure a professional hydroelectric plant operator to manage the power plants on a day-to-day basis. To that end, TPI and CFC entered into a Management Agreement with Algonquin whereby Algonquin agreed to provide various operations, maintenance and management services for the power facilities. Additionally, Algonquin agreed to loan TPI and CFC funds in the form of

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[2] According to the docket of the civil action pending in the Northern District of New York, the matter is scheduled for a pretrial on June 23, 2003. According to the Clerk's Office in Merrimack County, New Hampshire, the matter pending in Superior Court is scheduled for trial on September 15, 2003. In both actions a jury demand has been made by the plaintiffs/petitioners, the debtors in the adversary proceeding pending in this Court.

> working capital through the aforementioned $1.3 million unsecured line of credit provided by Aetna. Thereafter, Aetna allegedly sold Algonquin the "B" Notes and, later the "A" Notes, in violation of TPI's and CFC's right of first refusal as contained in the Revised Loan Agreement.

Id. at *1.

On or about July 20, 1999, the Algonquin Defendants allegedly sent TPI/CFC a Notice of Default as a result of their alleged failure to pay certain franchise taxes. *See* Complaint at ¶ 62. According to the Plaintiffs, the Algonquin Defendants were contractually obligated to cause the Security Trustee[3] to pay said taxes. *Id.*

Plaintiffs further allege that in June 1991 Franklin and Confederation Leasing Limited entered into a loan and financing agreement with respect to a $6.2 million loan to Franklin in connection with the operation of two hydroelectric facilities in New Hampshire. *See* Complaint at ¶ 74. It is further alleged that Confederation became insolvent and CIT Credit Group, Inc., f/k/a Newcourt Credit Group, Inc. ("Newcourt") and Canadian Income Partners I Limited Partnership ("CIP") obtained rights as assignees of the loan. Sometime in 1994 Franklin defaulted on its payments. As part of a workout arrangement, in approximately June of 1995 Franklin entered into an agreement with APC for management services in connection with the operation of Franklin's New Hampshire power projects. *Id.* at 76. Plaintiffs allege that after APC became the manager in June 1995, it intentionally suppressed the power output at the New Hampshire Projects and/or failed to repair the facilities, resulting in a decrease in anticipated revenues. *See id.* at ¶ 79-80. It is further alleged that at some point APC purchased the Franklin

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[3] Plaintiffs allege that as a condition to the original loan with Aetna, "Aetna required that State Street Bank and Trust Company of Connecticut, N.A. ('State Street' or the 'Security Trustee') be designated as Aetna's collateral agent pursuant to a Collateral Trust Indenture ('Indenture') to hold, manage and administer the mortgage and collateral document encumbering the New York Projects . . . ." *See* Complaint at ¶ 26.

loan from Newcourt and CIP for $3.8 million and then assigned it to the Fund for $5 million. *Id.* at 92. According to the Plaintiffs, the Fund then sought full payment of approximately $5.7 million under the Franklin loan. *Id.* at 95.

According to the Complaint, the Plaintiffs allege that the Algonquin Defendants, in concert with Aetna, Newcourt and CIP (collectively the "Lenders"),

a. failed to competently, prudently and faithfully manage and operate the Debtors' various Power Projects[4];

b. failed to properly and fully account for and pay over revenues due to Debtors for and on account of electric power generated at and sold from the Power Projects;

c. failed to properly and timely pay expenses incurred in the operation of the Power Projects;

d. failed to properly and timely provide tax information relevant to the operation of the Power Projects and necessary to file required tax returns;

e. converted the Power Projects to their own use and control;

f. wrongfully held themselves out to be the owners of the Power Projects;

g. wrongfully interfered with the contractual rights and relationships of the Plaintiffs; and

h. converted corporate opportunities of the Debtors to their own purpose, design and benefit while holding positions as agents and fiduciaries of the Debtors.

See ¶ 5 of the Complaint.

Plaintiffs indicate that the adversary proceeding in this Court seeks to:

a. recover from the Defendants and/or require the Defendants to turn

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[4] The "Power Projects" refer to the seven hydroelectric facilities in New York and the two in New Hampshire.

> over all property of the Debtors or their estates which property was wrongfully acquired by the Defendants, including each of the Power Projects and all revenues and other assets related thereto.
>
> b. determine the validity, enforceability, priority and extent of any lien, claim or interest of any of the Defendants in the Power Projects, in any other assets of the Debtors, or otherwise against the Debtors' respective estates.
>
> c. subordinate any allowed or allowable claim or interest of any of the Defendants to the fullest extent allowed by law and equity.
>
> d. obtain an accounting and audit from the Algonquin Defendants relative to their operation, management and control of the Power Projects; and
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> e. recover actual damages, including lost profits from and impose punitive damages upon the Defendants for their wrongful actions.

See id. at ¶ 6.

In this regard, the Complaint identifies nineteen causes of action including (1) avoidance of alleged fraudulent transfers made by the Algonquin Defendants in paying themselves or their affiliates fees and expenses utilizing Debtors' funds in connection with the management of the Power Projects pursuant to § 548 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"); (2) avoidance of alleged preferential transfers made by the Algonquin Defendants in paying themselves or their affiliates fees and expenses utilizing Debtors' funds in connection with the management of the Power Projects within the year prepetition pursuant to Code § 547; (3) turnover by the Algonquin Defendants of certain power projects located in both New York and New Hampshire alleged to be property of the estate, as well as an accounting and turnover of records and documents; (4) equitable subordination of the claims of the Algonquin Defendants as a result of acts while in control of Plaintiffs assets and acting in a position of trust; (5) imposition of a constructive trust with respect to the B Note based on allegations of breach of

fiduciary duties and usurping of opportunities belonging to the Plaintiffs; (6) avoidance of alleged fraudulent transfers pursuant to Code § 544; (7) breach of contract (Aetna); (8) breach of duty of good faith and fair dealings in refusing to transfer the B Note (Aetna); (9) breach of fiduciary duty and conspiracy (Aetna); (10) conversion (Aetna); (11) specific performance by Algonquin and Aetna with respect to a revised loan agreement and right of first refusal; (12) conversion (Algonquin); (13) tortious interference with the contract between Plaintiffs and Aetna by Algonquin; (14) breach of fiduciary duty by Algonquin based on their alleged failure to act in good faith, to exercise loyalty and due care and their alleged self-dealing; (15) negligence as to the management of the operation and finances of certain power projects (Algonquin); (16) breach of fiduciary duty and conspiracy (Newcourt and CIP); (17) breach of good faith and fair dealing (Newcourt and CIP); (18) conversion (Newcourt and CIP), and (19) unjust enrichment with respect to all defendants.

In the Complaint, the Debtors seek to avoid certain transactions and to subordinate certain claims of the Algonquin Defendants. In addition to seeking the recovery of the transfers subject to avoidance, the Debtors seek an award of compensatory damages in excess of $20 million; an order directing Aetna, the Algonquin Defendants, Newcourt and/or CIP to transfer to the Debtors the "A Note" and the "B Note" and the Franklin Loan; an order declaring that Franklin is the owner of the New Hampshire Projects; an order declaring that Trafalgar and Christine Falls are the owners of the New York Projects; and an order awarding punitive damages.

The action in the District Court (99-CV-1238) was commenced by TPI and CFC on August 6, 1999.[5] The original complaint identified ten causes of action against Aetna and APC.

[5] It also appears that there is an action pending in the District Court (00-CV-1246) which was commenced by APC and the Fund against TPI, CFC, Pine Run and American Casualty

On or about January 11, 2000, TPI and CFC filed an Amended Complaint identifying the Fund, as well as Algonquin Power Fund (Canada), Inc. as additional defendants. The Amended Complaint identifies only seven causes of action and seeks a judgment in an amount exceeding $20 million and the delivery of the "A" and "B" Notes to the plaintiffs, as well as an award of punitive damages.

A comparison of the Amended Complaint in the District Court action and the Complaint presently under consideration by this Court reveals the following:

U.S. Bankruptcy Court N.D.N.Y. Adv. Pro. 02-80005		U.S. District Court N.D.N.Y. 99-CV-1238
Seventh Cause of Action	=	First Cause of Action
Eighth Cause of Action	=	Second Cause of Action
Ninth Cause of Action	=	Fourth Cause of Action
Tenth Cause of Action	=	Sixth Cause of Action
Eleventh Cause of Action	=	Third Cause of Action
Twelfth Cause of Action	=	Seventh Cause of Action
Thirteenth Cause of Action	=	Fifth Cause of Action

These seven causes of action are based on the transactions involving the transfer of the A and B Notes as described below. It is those particular causes of action for which summary judgment is sought in this Court.

An Amended Petition for Declaratory Judgment and for Other Relief Including Damages, dated February 17, 2000, was allegedly filed in State Court by Franklin, MDI and Arthur H. Steckler, owner of MDI (jointly referred to as "Petitioners") against Algonquin, Newcourt and

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Company of Reading, Pennsylvania, on or about December 11, 2000, which arguably was stayed upon the Debtors' filing of their petitions on August 27, 2001.

CIP.[6] In the Amended Petition, Petitioners identify sixteen counts, including unfair competition under New Hampshire state law, assertions of respondent superior liability and commercial unreasonableness. The Petitioners seek, *inter alia*, a declaration that a foreclosure sale of their assets by Algonquin cannot be commercially reasonable and would constitute a breach of the defendants' duties of good faith and due diligence. Petitioners also seek a declaration that Franklin is the owner of the New Hampshire facilities. Certain counts in the New Hampshire litigation present allegations which appear comparable to those asserted in the adversary proceeding pending in this Court:

U.S. Bankruptcy Court N.D.N.Y. Adv. Pro. 02-80005		New Hampshire Superior Court. 99-E-0383
Fourteenth Cause of Action	=	First Count
Fifteenth Cause of Action	=	Eighth Count
Sixteenth Cause of Action	=	Second Count
Seventeenth Cause of Action	=	Fifth Count
Eighteenth Cause of Action	=	Fourteenth Count
Nineteenth Cause of Action	=	Sixth Count

A review of the proofs of claim filed in the Debtors' cases reveals that Algonquin Power Fund (Canada), Inc. filed proofs of claim against Marina, as well as Franklin, for $7,915,330 based on contingent liability related to a guaranty of obligations owed by Franklin. *See* Proofs of Claim #2 and 9. There is also a claim by APC, as well as by the Fund, against Pine Run in the amount of $11,000,000, described as a contingent unliquidated claim relating to fraudulent

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[6] Although not originally provided, the Court requested that Plaintiffs' counsel furnish it with a copy of the Amended Petition in order for it to review the matters pending in State Court. The Court was also provided with a copy of a Petition for Declaratory Judgment and Other Relief, dated October 26, 1999, identifying Algonquin Power Fund (Canada) Inc. as the "petitioner" and Franklin, MDI and Steckler as respondents. There is no reference to a docket number identifying the action, however, and the Court has no information on whether judgment was obtained prior to the bankruptcy filings. Arguably, that matter was stayed, insofar as it seeks relief against Franklin and MDI, upon the filing of the Debtors' petitions on August 27, 2001.

transfer of assets. *See* Proofs of Claim #3 and 4. The Fund has also filed proofs of claim against TPI, as well as CFC in the amount of $18,821,496 for money loaned and secured by a lien on essentially all of their assets. *See* Proofs of Claim #5 and 7. APC filed proofs of claim against TPI, as well as CFC, in the amount of $253,176, described as "Other" - secured by the right of recoupment. *See* Proofs of Claim #6 and 8. Finally, APC filed a claim against Franklin in the amount of $50,905 for goods sold, services performed, secured by the right of recoupment. *See* Proof of Claim #10.

On May 9, 2002, Algonquin filed a motion seeking withdrawal of the reference of this adversary proceeding and the appropriate documents were forwarded to the District Court, on May 22, 2002. On October 10, 2002, the Hon. David N. Hurd, U.S. District Judge, Northern District of New York, issued a Memorandum-Decision and Order in response to the motion by Algonquin to withdraw the reference of the adversary proceeding herein. Judge Hurd concluded that "'before a withdrawal of reference motion is made to the District Court, the bankruptcy court must make the determination of whether proceedings are core or non-core.'" *See Marina Development, Inc. v. Algonquin Power Corp., Inc. (In re Marina Development, Inc. et al.)*, 6:02-MC-031-035, slip. op. at 3 (N.D.N.Y. 1995), quoting *In re C-TC 9th Ave. Partnership*, 177 B.R. 760, 766, *reconsideration denied*, 182 B.R. 1 (N.D.N.Y. 1995); *see also In re 610 W. Owners Corp.*, 1997 WL 317019 at *3-4 (S.D.N.Y. 1997) (concluding that the bankruptcy court should make the determination as to whether claims are core or non-core after it had reviewed cases in the Second Circuit and found that either the bankruptcy court or the district court may make the determination "depending upon the situation.").

DISCUSSION

The Court's subject matter jurisdiction is defined in 28 U.S.C. §§ 157 and 1334. *See Plaza at Latham Associates v. Citicorp North America, Inc.*, 150 B.R. 507, 510 (N.D.N.Y. 1993). This Court has subject matter jurisdiction with respect to (1) cases "under title 11,' (2) civil proceedings "arising under title 11," (3) civil proceedings "arising in" a case under title 11 and (4) civil proceedings "related to" a case under title 11. *See* 28 U.S.C. § 157(a). "Bankruptcy judges *may hear and determine* all cases under title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments. . . ." 28 U.S.C. § 157(b)(1) (emphasis added).

> A bankruptcy judge may also *hear* non-core proceedings that are otherwise related to a title 11 case. In such a proceeding, however, the bankruptcy judge may not *determine* the issue, but may only submit proposed findings of fact and conclusions of law to the district court.

In re Best Products Co., Inc., 68 F.3d 26, 30 (2d Cir. 1995), citing 28 U.S.C. § 157(c)(1).

Section 157(b)(3) authorizes the bankruptcy judge to make a determination whether a proceeding is a "core" proceeding or otherwise "related to" the bankruptcy case. In this regard, a review of the legislative history of 28 U.S.C. § 157 supports the conclusion that Congress intended "a broad interpretation of the parameters of a core proceeding." *See id.* at 31, citing *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir.), *vacated sub nom. Insurance Co. Of State of Pennsylvania v. Ben Cooper, Inc.*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 408 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991). The fact that the resolution of the matter may be impacted by state law does not prevent the bankruptcy court from finding that it is a core matter. *See* 28 U.S.C. § 157(b)(3). Indeed, the Second Circuit has made it clear that "bankruptcy courts are not precluded from adjudicating state law claims when such claims are at the heart of the

administration of the bankruptcy estate." *Ben Cooper*, 896 F.2d at 1399.

Whether or not a proceeding is a "core" proceeding depends on the nature of the proceeding if it is not one of those specifically listed in 28 U.S.C. 157(b)(2). *See In re Kings Falls Power Corp.*, 185 B.R. 431, 438 (Bankr. N.D.N.Y. 1995), citing *In re S.G.Phillips Constructors, Inc.*, 45 F.3d 702, 707 (2d Cir. 1995). The Debtors contend that the entire adversary proceeding is a core proceeding. According to the Debtors, causes of action 1, 2, 3, 4, 6 10, 12 and 18 are "clearly core proceedings." It is the Debtors' position that the other causes of action are also core as they involve "the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship . . . ." 28 U.S.C. § 157(b)(2)(0)). Furthermore, Debtors contend that the fact that certain causes of action are based on state law, rather than the Code, does not mean that they are not core because, according to the Debtors, they are "integral to estate administration" and impact on the claim allowance process.

The Court's main focus of inquiry must be on whether the essence of the proceeding is "'at the core of the federal bankruptcy power.'" *S.G. Phillips Constructors*, quoting *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). In making a determination of whether to classify a proceeding as core, courts have examined several factors, including

> whether the action was commenced after the filing of the petition, *see, e.g., In re Ben Cooper*, 896 F.2d at 1400; what impact the outcome of the proceeding will have on the administration of the bankruptcy case, *see, e.g., In re Prudential Lines, Inc.*, 170 B.R. 222, 229 (S.D.N.Y. 1994); and whether the party essentially believed it was dealing with the debtor as 'an officer of the court,' *see, e.g., Ben Cooper* at 1399. One additional articulation has been 'whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization.' *See In re U.S. Lines, Inc.*, 197 F.3d 631, 637 (2d Cir. 1999).

In re G-I Holdings, Inc., 278 B.R. 376, 382 (Bankr. D.N.J. 2002) (clarifying the difference between the core test applied by the Second Circuit from that applied by the Third Circuit). Furthermore, if the Court determines that certain causes of action are not core, it must then consider whether the causes of action are "related to" the bankruptcy case for which the Court may submit proposed findings of fact and conclusions of law to the District Court for final determination. In *In re Turner*, 724 F.2d 338, 340-41 (2d Cir. 1983), the Second Circuit Court of Appeals held that in order to be found to be "related to," the proceeding must have a "significant connection" to the debtor's bankruptcy case. The Second Circuit subsequently "liberalized" its position in this regard in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992), in which it indicated that "The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *See id.* at 114 (citations omitted).

In examining the facts underlying this adversary proceeding, the Court finds three separate, though not necessarily distinct, scenarios that form the basis for the allegations in the Complaint. The first involves the purchase of the A and B Notes by Algonquin from Aetna under the terms of the Revised Loan Agreement and underlies the basis for the action pending in District Court, as well as Counts 7-13 of the Complaint. The other two factual scenarios involve the management of the Debtors' Power Projects by Algonquin in both New York and New Hampshire, the latter involving allegations against Newcourt and CIP, as well as certain Algonquin defendants, which are the subject of the litigation in New Hampshire Superior Court.

The Court agrees with the Debtors that the first, second, third and sixth causes of actions are core matters involving the avoidance of certain transfers as fraudulent and/or preferential, as well as the turnover of alleged property of the estate based on Code §§ 544, 547, 548 and 550.

See 28 U.S.C. § 157(b)(2)(E), (F) and (H).

The more difficult analysis involves the causes of action which are the subject of the Motions seeking summary judgment, namely counts 7-13 of the Complaint. They are, to a large extent, based on an interpretation of the Revised Loan Agreement with respect to the purchase of the A and B Notes. Debtors allege breach of contract, breach of fiduciary duty, conspiracy, conversion and tortious interference with the contract between Aetna and some of the Debtors by the Algonquin Defendants. The Debtors take the position that they are core pursuant to 28 U.S.C. §§ 157(b)(A) and (O).

As noted by the Second Circuit Court of Appeals in *Best Products*, to allow 28 U.S.C. § 157 (b)(2)(A) "to encompass '[a]ny [breach of] contract action that the debtor would pursue . . . [and that] would be expected to inure to the benefit of the debtor estate' would create an exception to *Marathon* that would swallow the rule." *See Best Products*, 68 F.3d at 32, quoting *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures)*, 4 F.3d 1095, 1102 (2d Cir. 1993).[7] Indeed, as one court aptly stated,

> this Court reads the language in *Best Products* as reaffirming the breadth of § 157(b)(2)(A) - and by implication, § 157(b)(2)(O) - and simply cautioning practitioners and the lower courts that such breadth is not a substitute for appropriate legal analysis in determining whether a matter is properly core, and determining whether a given matter passes muster under standards such as whether the matter at hand is "an integral and historic bankruptcy function," or goes to the "heart" of the bankruptcy process.

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[7] This Court recognizes that in *Orion* the defendant had not filed a proof of claim in the bankruptcy case, which was a factor the court considered in determining that the proceeding was not core. As noted previously, in this case certain of the Algonquin Defendants have filed proofs of claim, thereby acknowledging that a debtor-creditor relationship exists and arguably submitting themselves to the jurisdiction of this Court.

In re PSINet, Inc., 271 B.R. 1, 20 (Bankr. S.D.N.Y. 2001). The court went on to acknowledge that "an adversary proceeding involving the enforcement or construction of a pre-petition contract can be core if it does not seek recovery of damages for the prepetition breach of that contract and either is 'unique to or uniquely affected by' the bankruptcy case or the adversary proceeding 'directly affect[s] a core bankruptcy function.'" *Id.* at 26.

The agreement between the Debtors and Aetna was entered into prepetition, and the sale of the A and B Notes to the Algonquin Defendants occurred prepetition. The Debtors seek $20 million in damages. Their allegations, as set forth in Counts 7-13, involve actions which occurred prepetition and are not unique to the bankruptcy case and are not "uniquely affected" by the case, except that some of the Algonquin Defendants felt compelled to file proofs of claim to protect their interests. Indeed, some of those proofs of claim appear to be based on the relationship which arose once they acquired the A and B Notes. For example, the Fund filed proofs of claim against both TPI and CFC in the amount of $18,821,496 are described as being for monies loaned.

The resolution of Counts 7-13 will certainly impact on the case and ultimately may involve the claims allowance process. The Court does not believe that they represent an historic bankruptcy function so as to make them "core'; however, the Court does find that they are "related to" the case under the circumstances in that the outcome of the litigation is certain to have an effect on the bankruptcy estate.

The Court believes that even if causes of action 7-13 were determined to be core, the proper course would be to abstain from hearing them because the same matter has been pending in the District Court for approximately four years, and it certainly has original jurisdiction to determine the matter involving the sale of the A and B Notes, whether core or non-core, with

greater finality and more rapidly if this Court were to abstain.[8] *See In re Cache, Inc.*, 71 B.R. 851, 852 (Bankr. S.D. Fla. 1987); *see also In re Pittsburgh Corning Corp.*, 277 B.R. 74, 78 (Bankr. W.D. Pa. 2002) (noting that "[n]otwithstanding the strong presumption against withdrawal of the reference of core bankruptcy proceedings, the presumption can be overcome 'based on a finding by the Court that the withdrawal of reference is essential to preserve a higher interest. (citations omitted).)"

In *Pittsburgh Corning* the debtor had filed an action in the district court alleging age discrimination under 29 U.S.C. § 621 *et seq.* prepetition. She subsequently filed a claim in the bankruptcy case to which the debtor objected. There had been substantial discovery in the district court action prepetition and there was a motion by the debtor for summary judgment which was awaiting decision. The bankruptcy court recommended that in the interest of the efficient administration of justice, the district court was in the best position to decide the issues, which were the same as the debtor's objection to the claim. *Id.*

Accordingly, the Court recommends to the District Court that Counts 7-13 be severed from the adversary proceeding before this Court and that the reference be withdrawn as to those causes of action. It is further recommended that they be consolidated with the action now pending in the District Court.[9]

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[8] This Court believes that whatever the outcome of the action, whether heard by this Court or the District Court, the losing parties are likely to appeal given the amount in controversy and the impact any decision will have on the relationship of the parties. By allowing the matter to be decided by the District Court, one step in the appeal process would be eliminated, thus promoting judicial economy of the courts' resources.

[9] Code § 362(a) "stays only proceedings against a 'debtor' - the term used by the statute itself. 'The statute does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate.'" *Kilmer v. Flocar, Inc.*, 212 F.R.D. 66, 73 (N.D.N.Y. 2002)

The Court also deems it appropriate to *sua sponte* abstain from hearing those causes of action asserted in the Complaint which are the subject of the action in New Hampshire Superior Court commenced by some of the Debtors in 1999 pursuant to 28 U.S.C. § 1334(c)(1) for many of the same reasons. *See In re Farmland Industries, Inc.*, 2003 WL 1950004 at *4 (Bankr.W.D.Mo.) (indicating that a court may abstain *sua sponte* from hearing a proceeding, whether the proceeding is core or non-core in the interest of justice, or in the interest of comity with state courts or respect for state law pursuant to 28 U.S.C. § 1334(c)(1) (citations omitted)). The decision to abstain is within the discretion of the Court. *See Asousa Partnership v. Pinnacle Foods, Inc. (In re Asousa Partnership)*, 264 B.R. 376, 391 (Bankr.E.D.Pa.2001). In this regard, the courts examine a number of factors including,

> (1) the presence in the proceeding of nondebtor parties; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable 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 effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (10) the existence of a right to a jury trial; (11) the burden on the bankruptcy court's docket; and (12) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties.

In re Lehigh Valley Professional Sports Clubs, Inc., 2002 WL 975876 at *6 (Bankr. E.D.Pa.), (citations omitted). "These factors are applied with flexibility; no one factor is necessarily

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(Munson, Sr. D..J.), quoting *Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982). The court in *Kilmer* held that the plaintiff's bankruptcy filing did not stay the action and allowed a motion for summary judgment filed by the defendants to be decided. It is reasonable to believe that the action commenced by the Debtors in 1999 against Aetna and the Algonquin Defendants in the District Court is proceeding.

determinative and the relevance depends on the unique circumstances of the case." *Id.*

The matter pending in State Court is much more comprehensive than that pending in this Court and addresses more than simple allegations of breach of contract and breach of fiduciary duty, as well as breach of the duty of good faith and fair dealing. The adversary proceeding, as well as the action pending in State Court, involve nondebtors, some of whom have not filed proofs of claim. The issues involve the prepetition relationship between Franklin and others under the terms of various loan and management agreements over which this Court has only "related to" jurisdiction. The Court understands that the matter, which has been pending for approximately four years, is scheduled for trial in September. As with the causes of action for which this Court has recommended withdrawal of the reference, the Court believes it is appropriate that it abstain from hearing causes of action 14-18 asserted in the Complaint, as they apply to the New Hampshire Power Projects, and allow the State Court to resolve them.[10] *See In re Manufacturers Acceptance Corp.*, 82 B.R. 155, 156 (Bankr. S.D.Fla. 1988).

The Court recognizes that it will be bound by the determinations made by the District Court and the State Court and that *res judicata* and collateral estoppel may apply to the remaining causes of action asserted in the adversary proceeding. These include the Debtors' fourth cause of action which seeks the equitable subordination of the claims of the Algonquin Defendants and the Debtors' fifth cause of action, which seeks the imposition of a constructive trust. Both the fourth and fifth causes of action involve the claim allowance process and administration of the case and, therefore, fall within this Court's core jurisdiction to make a final determination. The

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[10] In the event that the Debtors are not successful in State Court, it would, of course, be appropriate that enforcement of any judgment be determined by this Court through the claim allowance and reorganization/liquidation process.

Court believes it appropriate, however, that they await the resolution of the actions in the District Court and the State Court before making its determination.

The Debtors' fourteenth cause of action in the adversary proceeding pending in this Court alleges a breach of fiduciary duty on the part of the Algonquin Defendants, requiring that they act in good faith, exercise loyalty and due care and also alleging that they engaged in self-dealing in connection with both the New York and New Hampshire Power Projects. Their fifteenth cause of action in the adversary proceeding alleges negligence on the part of the Algonquin Defendants in the operation and management of both the New York and New Hampshire Power Projects.

Insofar as the Debtors' allegations are based on the actions of the Algonquin Defendants in connection with their management and operation of the New Hampshire Power Projects, the Court has already indicated that the fourteenth and fifteenth causes of action should be heard by the State Court. To the extent that the fourteenth cause of action alleges a breach of fiduciary duty based on the alleged conversion of the A and B Notes and the misappropriation of revenues to purchase the same, the Court recognizes that the proof pertinent to some of these allegations is likely to overlap the proof pertinent to causes of action 7-13, which this Court has recommended be addressed by the District Court. Nevertheless, the Court believes that it can properly address them as being "related to" the case when it considers the core matters raised in causes of action 1-6 and is prepared to make recommendations to the District Court regarding the two unless the District Court chooses, in the interests of judicial economy, to withdraw the reference of the 14th and 15th causes of action, as well, to the extent that they involve the New York Power Projects and the relationship between the Debtors and the Algonquin Defendants under their management agreement.

The Debtors' nineteenth cause of action seeks what the Court views as "umbrella" relief

based on alleged unjust enrichment. The Debtors' request that the various defendants be required to disgorge all interests in the A and B Notes, the Franklin loan, the management fees charged by the Algonquin Defendants, monies misappropriated and all other benefits to which the Debtors were otherwise entitled. Such relief, if warranted, will only be available after the resolution of the other eighteen causes of action and is likely to have been ruled upon in connection with the other eighteen causes of action in some form or another by the State Court and the District Court. However, the Court will retain jurisdiction to determine the nineteenth cause of action should it be necessary based on a finding that it appears to be core to the claims allowance process, as well as to the administration of the case.

Based on the foregoing, it is hereby

ORDERED that pursuant to 28 U.S.C. § 1334(c)(1), this Court shall exercise its discretion to abstain from adjudicating causes of action14-18 to the extent that they involve matters now pending in New Hampshire Superior Court; it is further

RECOMMENDED to the United States District Court for the Northern District of New York pursuant to 28 U.S.C. § 157(c)(1) that it withdraw the reference of causes of action 7-13 of the Complaint for consolidation with the matter pending in District Court (99-CV-1238); it is further

RECOMMENDED to the United States District Court for the Northern District of New York that it consider withdrawal of the reference of the fourteenth and fifteenth causes of action in the interest of judicial economy to the extent that they involve the New York Power Projects; it is further

ORDERED that a pretrial be held in this Court concerning the balance of the Complaint on Tuesday, July 29, 2003 at 2 PM in Room 220, U.S. Courthouse, 10 Broad Street, Utica, New

York.

Dated at Utica, New York

this 20th day of June 2003

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge