UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

MATCO ELECTRONICS GROUP, INC. Debtor	CASE NO. 02-60835 Chapter 11 Jointly Administered

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IN RE:

U.S. ASSEMBLIES NEW ENGLAND, INC. Debtor	CASE NO. 02-60836

IN RE:

U.S. ASSEMBLIES IN FLORIDA, INC. Debtor	CASE NO. 02-60837

IN RE:

U.S. ASSEMBLIES RALEIGH, INC. Debtor	CASE NO. 02-60838

IN RE:

MATCO TECHNOLOGIES Debtor	CASE NO. 02-60839

IN RE:

U.S. ASSEMBLIES SAN DIEGO, INC. Debtor	CASE NO. 02-60840

IN RE:

CAROLINA ASSEMBLIES, INC. Debtor	CASE NO. 02-60841

IN RE:

U.S. ASSEMBLIES HALLSTEAD, INC. CASE NO. 02-60842

Debtor

IN RE:

U.S. ASSEMBLIES IN GEORGIA, INC. CASE NO. 02-60843

Debtor

IN RE:

U.S. ASSEMBLIES ENDICOTT, INC. CASE NO. 02-60844

Debtor

THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF
THE MATCO ELECTRONICS GROUP, INC., etc.

Plaintiff

vs. ADV. PRO. NO. 02-80095

THE MATCO ELECTRONICS GROUP, INC.
et al.

Defendants

APPEARANCES:

NIXON PEABODY LLP
Attorneys for the Plaintiff
Omni Plaza
30 South Pearl Street, Suite 900
Albany, New York 12207-3497

DANIEL J. HURTEAU, ESQ.
Of Counsel

ROBERT J. O'NEILL, ESQ.
Attorney for Larry Hargreaves
485 Andover Street

North Andover, MA 01845

HINMAN, HOWARD & KATELL, LLP
Attorneys for American Manufacturing Services, Inc.
700 Security Mutual Building
80 Exchange Street - P.O. Box 5250
Binghamton, NY 13902-5250

ALBERT J. MILLUS, JR., ESQ.
Of Counsel

LACY, KATZEN, RYEN & MITTLEMAN, LLP
Attorneys for Debtors
The Granite Building
130 East Main Street
Rochester, NY 14604-1686

DAVID D. MAC KNIGHT, ESQ.
Of Counsel

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

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

Presently before the Court is a motion filed on September 23, 2003 by the Official Committee of Unsecured Creditors (the "Committee") of Matco Electronics Group, et al. (the "Debtors") seeking to dismiss the counterclaims of American Manufacturing Services, Inc. ("AMS") and Larry Hargreaves, AMS's former chief executive officer ("Hargreaves" and together with AMS, the "Counterclaimants"), pursuant to Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). AMS and Hargreaves separately filed objections to the motion on October 28, 2003 and October 29, 2003, respectively. A hearing on the motion was held on November 11, 2003 at the Court's regular motion term in Syracuse, New York, after which the Court provided the parties an opportunity to file memoranda of law. On January 6, 2004, at the Court's regular motion term in Syracuse, the Court heard further oral argument. The matter was submitted for decision on January 13, 2004.

JURISDICTIONAL STATEMENT

The Court has jurisdiction to determine whether the instant counterclaims fall within its core or related to jurisdiction pursuant to 28 U.S.C. § 157(b)(3). *C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 170 B.R. 760, 766 (N.D.N.Y. 1995).

FACTS

This motion arises from the Third Amended Complaint filed by the Committee on August 18, 2003 (the "Complaint") and responsive Answers filed by AMS and Hargreaves on August 17, 2003 ("AMS's Answer") and August 22, 2003 ("Hargreaves' Answer" and together with AMS's Answer, the "Answers"), respectively. The Court assumes the parties' familiarity with the procedural and factual history of this adversary proceeding, beginning with the Committee's first complaint filed on April 22, 2002 through the filing of the Complaint.

In the Complaint, the Committee alleges the following bases of relief against the Counterclaimants; American Board Cos. ("ABC"); T.L. Acquisitions Corp. ("TLA"); BSB Bank & Trust Co. ("BSB"); Matthews Holdings, Inc.; The Matco Group, Inc. ("Matco Group"); James Matthews ("Matthews"); and Lawrence Davis ("Davis") (collectively, the "Defendants"):

1. actual fraudulent transfer under § 548(a)(1)(A) of the Bankruptcy Code (11 U.S.C. §§ 101-1330)("Code") against the Defendants, Complaint ¶¶ 115-41;
2. fraudulent transfer under New York Debtor and Creditor Law against the Defendants, *id.* ¶¶ 142-51;

3. constructive fraudulent transfer under Code § 548(a)(1)(B) against the Defendants, *id.* ¶¶ 152-60;

4. breach of fiduciary duty by Matthews, Hargreaves, and Davis, *id.* ¶¶ 161-63;

5. violation of the notice provisions of Article 9 of the Uniform Commercial Code ("U.C.C.") against AMS, TLA, and BSB, *id.* ¶¶ 164-68;

6. equitable subordination of the claims of BSB, TLA, and Matthews under Code § 510(c), *id.* ¶¶ 169-74;

7. disallowance of Matthews' claim pursuant to Code § 502(d), *id.* ¶¶ 175-88;

8. marshaling of Matthews' assets for satisfaction of the claims of BSB and TLA, *id.* ¶¶ 189-99;

9. preferential transfer under Code § 547 against TLA, BSB, AMS, Matco Group, and Matthews Holdings, Inc., *id.* ¶¶ 200-09;

10. the establishment of a constructive trust over AMS's real property, tax assets, inventory, and income from sale of that inventory and a finding that they are property of the estate under Code § 541, *id.* ¶¶ 210-18;

11. a finding that postpetition transfers of payroll from AMS to TLA are postpetition transactions under Code § 549 and are property of estate under Code § 541, *id.* ¶¶ 219-25;

12. unjust enrichment against TLA, AMS, BSB, Matthews Holdings, Inc., Matco Group, Matthews, Hargreaves, and Davis, *id.* ¶¶ 226-28; and

13. an accounting and disgorgement of property under Code § 542 from TLA,

ABC, AMS, BSB, Matthews Holdings, Inc., Matco Group, Matthews, Hargreaves, and Davis. *Id.* ¶¶ 229-33.

The Committee alleges that the causes of actions and related remedies arise out of various prepetition and postpetition acts by the Defendants devised to purportedly funnel the Debtors' assets to other entities through the mechanism of U.C.C. Article 9 secured sales, or what the Committee refers to as "staged auctions." *Id.* ¶¶ 120-21; *see id.* ¶¶ 23-137.

In the Answers, AMS and Hargreaves each assert against the Committee the following substantially similar Counterclaims:

1. breach of contract, AMS's Answer ¶¶ 257-336; Hargreaves' Answer ¶¶ 257-337;
2. breach of covenant of good faith and fair dealing, AMS's Answer ¶¶ 337-39; Hargreaves' Answer ¶¶ 338-40;
3. unfair competition, AMS's Answer ¶¶ 340-43; Hargreaves' Answer ¶¶ 341-44;
4. tortious interference with contract, AMS's Answer ¶¶ 344-48; Hargreaves' Answer ¶¶ 345-49; and
5. tortious interference with prospective contractual relations (the "Counterclaims"). AMS's Answer ¶¶ 349-54; Hargreaves' Answer ¶¶ 350-55.

The contract claims concern a stipulation executed on March 4, 2002 by various creditors,[1] the Debtors, and TLA (the "Stipulation"), which the Court approved on March 8,

[1] As of the date of the Stipulation, the creditor group then known as the "Petitioning Creditors" was comprised of Arrow Electronics, Inc; Dynamic Details, LP; Future Electronics;

2002. AMS's Answer ¶¶ 296-99; Hargreaves' Answer ¶¶ 296-99. The only aspect of the Stipulation involving the Counterclaimants is the provision requiring AMS to comply with a request for documents and to participate in examinations pursuant to Fed.R.Bankr.P. 2004. Stipulation ¶ 1. The remaining Counterclaims sound in tort and allege, *inter alia*, that officers employed by members of the Committee, in furtherance of the Committee's strategy to ruin AMS, disparaged AMS to its then existing and prospective customers, which caused AMS to suffer a decline in business and Hargreaves to lose compensation, benefits, and value in his holdings in AMS's stock plan. AMS's Answer ¶¶ 341-43, 346-47, 350-53; Hargreaves' Answer ¶¶ 341-43, 346-47, 350-53.

Additionally, the Debtors' have allegedly reserved their right to commence an action against the Committee irrespective of the outcome of the Counterclaims. *See* Protective Declaration of Potential Claim in the Subject Matter Underlying the AMS Counterclaims and Debtor's [*sic*] Reservation of Rights, filed Nov. 3, 2003.

ARGUMENTS

The Committee contends that the Counterclaims must be dismissed because the Court lacks subject matter jurisdiction over them. Specifically, the Committee argues that the

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Heiland Electronics, Inc.; Insight Electronics, LLC; Jaco Electronics, Inc.; Partminer, Inc.; Pioneer Standard Electronics, Inc.; Unique Electronics, Inc.; and Tyco Electronics Corp. The Office of the U.S. Trustee appointed the Committee on March 27, 2002. The Committee is comprised of the Petitioning Creditors (excluding Dynamic Details, LP; Insight Electronics, LLC; and Unique Electronics, Inc.), Avnet, Inc., and Mentec, LLC.

Court does not even have "related to" jurisdiction over the Counterclaims because they have no effect on the administration of the Debtors' estates.

The Counterclaimants argue that core jurisdiction exists under 28 U.S.C. § 157(b)(2)(A) on the ground that acts by the Committee concern the administration of the estates because the Committee is a product of the bankruptcy proceeding and is directly involved in the administration of the estates. They further contend that the Court must try the Counterclaims because once the case is closed the Committee will no longer exist, thereby imperiling the rights of the Counterclaimants to litigate the Counterclaims. Alternatively, they submit that the Counterclaims are triable by this Court as compulsory counterclaims.

DISCUSSION

The controversy at bar is whether this Court has any subject matter jurisdiction over counterclaims brought by a non-debtor defendant against a creditors' committee in an adversary proceeding instituted by the creditors' committee on behalf of the debtor where the counterclaims allege that the creditors' committee, through the conduct of its members, breached a postpetition stipulation and committed business torts.

A. Bankruptcy court jurisdiction

28 U.S.C. § 1334 vests original and exclusive jurisdiction over bankruptcy cases in the district courts, 28 U.S.C. § 1334, while 28 U.S.C. § 157(a) permits a district court to refer to a bankruptcy judge any case under the Code and the following three types of civil proceedings:

(1) those arising under the Code, (2) those arising in a bankruptcy case, and (3) those related to a bankruptcy case. *Id.* § 157(a). 28 U.S.C. § 157(b)(1) empowers bankruptcy courts to enter final orders and judgments in "core" proceedings, *i.e.*, those arising in a bankruptcy case or under the Code. *Id.* § 157(b)(1), (b)(2). In contrast, after hearing matters that are "non-core," or related to a bankruptcy case, a bankruptcy judge may only enter a final order if the parties so consent. *I d* . § 157(c)(1). Otherwise, a bankruptcy judge must submit non-final findings of fact and conclusions of law to the district court, which can review *de novo* any matter to which a party objects. *Id.*

Proceedings concerning any of the fifteen subject matter categories listed in 28 U.S.C. § 157(b)(2) are considered core, though core jurisdiction need not be limited to the those categories. *See* 28 U.S.C. § 157(b)(2)(A)-(O). Core proceedings may involve state law claims that "are at the heart of the administration of the bankruptcy estate." *Ben Cooper, Inc. v. Ins. Co. of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1395, 1399 (2d Cir. 1990); *accord Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 191 (2d Cir. 2003). When determining whether a proceeding falls within its core jurisdiction a court may inquire into the "nature of the proceeding," *S.G. Phillips Constructors, Inc. v. City of Burlington*, 45 F.3d 702, 706 (2d Cir. 1995), or whether "the ramifications of the dispute on the administration of the estate are of sufficient importance." *Shugrue v. Air Line Pilots Assoc., Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 994 (2d Cir. 1990). "Related to" jurisdiction over a proceeding, on the other hand, may be found if the matter may conceivably have an effect on the debtor's estate. *Publicker Inds. Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); *Urban Box Office Network, Inc. v. Interfase Managers, LP (In re Urban*

Box Office Network, Inc.), No. 01 Civ. 8854 (LTS), 2003 WL 22971510, at *2 (S.D.N.Y. Dec. 18, 2003); *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995).

The Court's analysis of the Counterclaims will begin with the broader "related to" standard. If the Counterclaims fail that test, the Court need not consider whether this is a core proceeding. *See Turner v. Borobio*, No. 01 Civ. 7458 (SAS), 2001 WL 1602965, at *3 (S.D.N.Y. Dec. 14, 2001). The Court notes that the burden of proving jurisdiction rests with the party alleging its existence, which in this case is the Counterclaimants. *Levovitz v. Verrazano Holding Corp. (In re Verrazano Holding Corp.)*, 86 B.R. 755, 762 (Bankr. E.D.N.Y. 1988).

B. "Related to" jurisdiction

The Court's analysis of "related to" jurisdiction must focus on the effect the hypothetical success or failure of the Counterclaims would have on the Debtors' estates. The Debtors' non-participation in this action does not preclude a finding of "related to" jurisdiction. *Pacor*, 743 F.2d at 994. Proceedings involving non-debtor parties that "affect how much property is available for distribution to the creditors of a bankruptcy estate or the allocation of property among such creditors" fall under the "related to" umbrella. *Geron v. Schulman (In re Manshul Constr. Corp.)*, 225 B.R. 41, 45 (Bankr. S.D.N.Y. 1998); *see Gen. Elec. Capital Corp. v. Pro-Fac Coop., Inc.*, No. 01 Civ. 10215 (LTS), 2002 WL 1300054, at *2 (S.D.N.Y. June 11, 2002). Before commencing its analysis of jurisdiction, the Court finds it instructive to review the powers, duties, rights, and liabilities of the entity whose status is critical to resolving the present matter—the Committee.

1. Considering creditors' committees

Creditors' committees are creatures of the Code, which empowers them to undertake the following actions:

> (1) consult with the trustee or debtor in possession concerning the administration of the case;
> (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
> (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
> (4) request the appointment of a trustee or examiner . . . ; and
> (5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c). Though the right to bring suit on behalf of the debtor is not a power expressly enumerated in Code § 1103(c), in this Circuit a creditors' committee may institute an adversary proceeding, provided the bankruptcy court authorizes the action. *Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 99 (2d Cir. 2001); *Unsecured Creditors' Comm. v. Noyes (In re STN Enters., Inc.)*, 779 F.2d 901, 904 (2d Cir. 1985) (citing Code §§ 1103(c)(5) and 1109(b) as bases for a creditors' committee's derivative standing to sue on a debtor's behalf). Additionally, Code § 330(a) authorizes the disbursement of funds from a debtor's estate for compensation for, and expenses related to, necessary services rendered by attorneys or other professionals employed by a creditors' committee in furtherance of its statutory duties, 11 U.S.C. § 330(a)(1), and Code § 503(b)(3)(F) provides that necessary expenses of a committee member are payable from the estate as an administrative expense. *Id.* § 503(b)(3)(F). A creditors' committee is also immune from liability for any actions committed within the scope of its powers.[2] *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 514 (S.D.N.Y. 1994).

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[2] Though the Court has no cause here to analyze the elements of the business torts alleged by the Counterclaimants, it is worth noting that in New York an absolute immunity shields parties from liability for communications they make in the course of judicial proceedings. *See Weissman v. Hassett*, 47 B.R. 462, 468-69 (S.D.N.Y. 1985) ("Actions to augment the assets of a bankrupt estate are considered part of a judicial proceeding."); *Park Knoll Assocs. v. Schmidt*, 59 N.Y.2d 205, 209 (1983).

However, a creditors' committee can be sued for ultra vires conduct. *Id.* Moreover, individual members of a creditors' committee can be named in such a suit if they are alleged to be personally involved in the actionable conduct. *Prince v. Zazove*, 959 F.2d 1395, 1401 (7th Cir. 1992). Therefore, the Counterclaimants can theoretically sue the Committee and its members. That does not, however, answer the question of jurisdiction, namely whether the Counterclaims would have an effect on the administration of the estates.

2. Analysis

"Related to" jurisdiction exists in this case if trying the Counterclaims "could alter the [Debtors'] rights, liabilities, options, or freedom of action [and] in any way impact[] upon the handling and administration of the [Debtors'] estate[s]." *Pacor*, 743 F.2d at 994. Despite the seemingly expansive language that courts have used to describe "related to" jurisdiction, there is a limit to its scope. *Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir. 1983); *Nemsa Establishment, S.A. v. Viral Testing Sys. Corp.*, No. 95 Civ. 0277 (LAP), 1995 WL 489711, at *3 (S.D.N.Y. Aug. 15, 1995).

The Counterclaimants direct special attention toward the Committee's formation, status, and powers for support in finding an effect on the estates. That the Committee is a entity specially created in the bankruptcy case, taken alone, does not suffice as a jurisdictional hook by which this Court can haul the Counterclaims into its purview, despite the Counterclaimants' argument to the contrary. Adjudication of the Counterclaims must have a greater impact on the Debtors' estates than the mere presence of an adversary whose appointment was approved by this Court. To this end, buried within the Counterclaims are the seeds of their own demise. This is true because, assuming *arguendo* that the Counterclaimants' allegations that the Committee engaged in ultra vires conduct are true, bankruptcy principles concerning committee powers and

compensation would release the Debtors and their estates from their usual financial obligation to the Committee. In other words, any conduct by the Committee that establishes liability in this case—*viz.* breaching the Stipulation[3] or committing business torts—would be by its very nature ultra vires, which would not trigger any general duty of the Debtors to compensate the Committee for authorized activities, thus relieving the Debtors of any obligation to pay damages attributed to the Counterclaims. *See First Merchants Acceptance Corp. v. J. C. Bradford & Co.*, 198 F.3d 394, 399 (3d Cir. 1999); *McDow v. Official Comm. of Equity Sec. Holders*, 247 B.R. 146, 150-51 (D. Md. 1999); *In re County of Orange*, 179 B.R. 195, 200-01 (Bankr. C.D. Cal. 1995).

The Counterclaimants further submit that jurisdiction exists on the ground that if they emerge victorious on any of the Counterclaims, the Debtors will be encouraged to sue the Committee on similar causes of action and recover damages, which would flow to the Debtors' estates. This line of reasoning fails simply because any rights that the Debtors have against the Committee exist independent of the Counterclaimants' rights. The Debtors, if they wish, can freely sue the Committee, provided there is jurisdiction over their claims. Adjudicating the Counterclaims in the present action would not birth into being the Debtors' right to litigate similar causes of action; if they exist, they exist now, and their ripening need not await the consideration of the Counterclaims in this Court.

The Counterclaimants' argument that their right to bring the Counterclaims will lapse once the case is closed because the Committee will cease to exist is also incorrect. Without

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[3] Were the Court considering the factual matter of breach, there would be serious questions regarding the Counterclaimants' standing because they were not parties to the Stipulation.

considering their merit, the Counterclaims are derived from state law and seem to be actionable against the individual Committee members and their officers who are alleged to have committed the conduct pleaded in the Counterclaims. These parties would appear to be the only viable adversaries if immunity attaches to the Committee's actions.[4] Further, independent of any determination of whether the Committee's conduct was ultra vires, it is conceivable that the alleged defendants committed the conduct giving rise to the Counterclaims solely in their individual corporate capacity, not pursuant to their duties as members of the Committee, thus casting doubt on whether the Committee is an appropriate adversary in the action altogether. Lest the Counterclaimants be concerned that their rights may be extinguished by the instant decision, there apparently are ample parties, existing independent of the Committee and this bankruptcy case, potentially amenable to personal jurisdiction in another forum.

Because the Debtors or their estates cannot be answerable for the potentially ultra vires actions of the Committee, because there is no conceivable effect on the estates resulting from the Counterclaims' hypothetical success or failure at bar, and because the Counterclaimants' right to litigate the Counterclaims will not cease to exist absent a grant of jurisdiction here, the Court finds that it has no "related to" jurisdiction over the Counterclaims.[5]

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[4] The Court does not presume to answer the hypothetical question of whether the Committee's immunity under the Counterclaims would run to its individual corporate members in actions lodged against them in another federal or state court.

[5] In their oral argument, the Counterclaimants summarily argued that a positive effect on the estates would manifest by the exercise of their setoff rights in the event they recovered on the Counterclaims. Because this argument was not fully substantiated in their papers, the Court can only speculate that the Counterclaimants intended either of the following two arguments: (1) that they would apply their recovery to reduce the amount of any existing claim they have against the estates (assuming of course that one exists) or (2) that they would set off the recovery against a debt that the Debtors were found to owe to the Counterclaimants by virtue of the actions of the Committee.

C. Compulsory counterclaims in bankruptcy

The Counterclaimants also assert that the Counterclaims are compulsory counterclaims subject to the Court's exercise of what they call "ancillary jurisdiction" but what is correctly identified as supplemental jurisdiction under 28 U.S.C. § 1367. Indeed, Fed.R.Bankr.P. 7013 provides that Rule 13 of the Federal Rules of Civil Procedure ("Rule 13")[6] applies in adversary proceedings. Fed.R.Bankr.P. 7013. However, the Court is not empowered to "read jurisdictional statutes broadly." *Finley v. United States*, 490 U.S. 545, 549 (1989). As such, the only categories of jurisdiction under which a bankruptcy court can determine counterclaims, compulsory or otherwise, are those set forth in 28 U.S.C. § 157, as discussed above; any additional grant of jurisdiction would render that whole section of the United States Code superfluous.[7] *See Walker v. Cadle Co. (In re Walker)*, 51 F.3d 561, 572-73 (5th Cir. 1995)*;*

Regarding the first argument, there is no provision in the Code that would compel the Counterclaimants to reduce a separate claim it has already asserted against the estates with the proceeds of a judgment in their favor on the Counterclaims. Any reduction of an existing claim would have to be undertaken by the Counterclaimants gratuitously, a prospect too speculative to warrant granting "related to" jurisdiction over the Counterclaims. Answering the second argument, the Court is not aware of any debt that the Debtors owe the Counterclaimants. In any case, this argument appears to rely on the proposition that the Debtors' estates would be liable for any damages arising from the Counterclaims, which the Court dismissed in its discussion above.

[6] In pertinent part, Rule 13 provides:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .

Fed.R.Civ.P. 13(a).

[7] The Second Circuit's approval of the exercise of supplemental jurisdiction in *Cuyahoga*—in which the controversy involved intertwined disputes arising in a chapter 11 case in the Bankruptcy Court of the Southern District of New York and a district court proceeding from outside the Circuit—pertained to the exercise of supplemental jurisdiction by a district court

Halvajian v. Bank of New York, N.A., 191 B.R. 56, 58-59 (D.N.J. 1995). *See generally* Ralph

and did not ratify an extension of such jurisdiction to bankruptcy courts. *Cuyahoga*, 980 F.3d at 115. And the Court of Appeals' further mention of supplemental jurisdiction in *Klein v. Civale & Trovato (In re Lionel Corp.)*, 29 F.3d 88 (2d Cir. 1994), is merely that—a passing mention without analytic content that was not germane to the issue the court decided in that case. *Id.* at 92. *Lionel* has not been followed on the issue of supplemental jurisdiction by courts within and without this Circuit; in fact, the Bankruptcy Court of the Southern District of New York noted *Lionel* but did not decide the question of whether to exercise or decline supplemental jurisdiction. *Cassirer v. Sterling Nat'l Bank & Trust Co. (In re Schick)*, 223 B.R. 661, 664 n.3 (Bankr. S.D.N.Y. 1998). Another bankruptcy court questioned the applicability of supplemental jurisdiction in bankruptcy cases and elected not to exercise it. *Masterwear Corp. v. Rubin Baum Levin Constant & Friedman (In re Masterwear Corp.)*, 241 B.R. 511, 517 & n.6, 519-20 (Bankr. S.D.N.Y. 1999).

In addition, this Court's decision in *Nat'l Westminster Bancorp v. ICS Cybernetics, Inc. (In re ICS Cybernetics, Inc.)*, 123 B.R. 467 (Bankr. N.D.N.Y. 1989), briefly discussed the application of ancillary jurisdiction over certain counterclaims and cross-claims. *Id.* at 471-72. The decision in *ICS Cybernetics* was rendered before the enactment of 28 U.S.C. § 1367 and in any case determined that the motions asserting those claims were subject to the Court's core jurisdiction. *Id.* at 472. Therefore, the analysis the Court undertook in that case cannot alone determine the issue at bar.

Furthermore, the Counterclaimants' citation to the Court's decision in *In re Layton*, 220 B.R. 508, 513 (Bankr. N.D.N.Y. 1998), is wholly irrelevant to the issue of supplemental jurisdiction because the counterclaim analysis in *Layton* concerned a debtor's counterclaim following a governmental unit's submission of a proof of claim and whether the governmental unit had sovereign immunity under Code § 106(b), which employs phraseology similar to that found in Rule 13. *See* 11 U.S.C. § 106(b) ("A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.").

In any event, the actions alleged in the Complaint concern the Defendants' connection to generally prepetition transfers of assets from the Debtors to various entities and the Defendants' participation in related financial transactions. These alleged activities have no connection to the Counterclaims, which allege that several communications made generally postpetition by Committee members to AMS's then existing and prospective customers caused AMS to lose business. Facially, these two series of transactions are neither the same nor part of the same series of transactions nor are they logically related. The only conceivable overlap—albeit one too remote to qualify the Counterclaims as compulsory—consists of the Counterclaimants' participation in the acts alleged in the Complaint and their role as victims of the breaches of contract and torts allegedly committed by members of the Committee. In addition, trying the Counterclaims would not serve the interests of judicial economy because the discovery that would be produced and the documentary and testimonial evidence that would be elicited during the adjudication of the Counterclaims involves a wholly new set of facts and the cooperation of individuals—for example, AMS's customers and individual officers of Committee members—who would not be involved in the trial of the Complaint.

Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. and Mary L. Rev. 743, 800-941 (2000) (positing a constitutional framework supporting a test for supplemental jurisdiction in bankruptcy cases); Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 Fordham L. Rev. 721, 757-832 (1994) (discussing expansively the issue of supplemental jurisdiction in bankruptcy courts and arguing against it on constitutional and policy grounds). Hence, the Court must heed the Supreme Court's admonition to lower courts regarding jurisdiction: "[T]wo things are necessary to create jurisdiction . . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . . To the extent that such action is not taken, the power lies dormant." *Mayor v. Cooper*, 73 U.S. 247, 252 (1868). And so it does here.

Based on the foregoing, the Court finds that it has no subject matter jurisdiction over the Counterclaims under 28 U.S.C. § 157(a) and Fed.R.Bankr.P. 7013. The Court notes that dismissal of the Counterclaims from this adversary proceeding does not impinge on the rights of the Counterclaimants to assert their claims in another forum. Therefore, it is

ORDERED that the Committee's motion is granted and the Counterclaims referred to herein are dismissed without prejudice to their pursuit in another forum having the appropriate jurisdiction.

Dated at Utica, New York

this 30th day of January 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge