UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In Re: **G-I HOLDINGS, INC. f/k/a GAF CORPORATION, et al.** **Debtors.**

Case Nos.: 01-30135 (RG) and 01-38790(RG)
(Jointly Administered)

OPINION

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ROSEMARY GAMBARDELLA, BANKRUPTCY JUDGE

MATTER BEFORE THE COURT

Before the Court is a Renewed Motion by Debtor G-1 Holdings, Inc. (the "Debtor") to enforce the Plan injunction (the "Injunction Motion") against Ashland, LLC ("Ashland"), International Specialty Products, Inc. ("ISP"), and ISP Environmental Services, Inc. ("IES") (collectively the "Ashland Parties," or "Ashland") by barring Ashland from seeking payment from the Debtor under a 1996 Indemnification Agreement (the "Agreement") which the Debtor assumed under the confirmed Plan. Ashland has filed an objection and a separate Cross-Motion for permissive and mandatory abstention under 28 U.S.C. § 1334(c)(1) and (c)(2) in favor of a state court action, which is a Complaint for declaratory judgment and other relief filed by Ashland against the Debtor in Superior Court of New Jersey, Law Division, Morris County, Dkt. No. MRS-L-2331-15 (the "State Court Action" or the "Complaint"). The Debtor and Ashland filed replies. The issue underlying this Motion and Cross-Motion is whether confirmation of the Plan foreclosed the recovery which Ashland now seeks from the Debtor under the 1996 Agreement. A hearing was conducted on the motions on June 23, 2017 at which time the Court reserved decision. The following constitutes this Court's findings of fact and conclusions of law.

The Court previously entertained a prior version of the Injunction Motion filed by the Debtor on January 10, 2017 (the "First Injunction Motion") *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11029. The Court denied the First Injunction Motion without prejudice, as explained below, because arguments raised therein by the Debtor were also under consideration by the District Court in its then-pending review of a Remand Order in a related adversary proceeding. *In re G-I Holdings, Inc.*, 568 B.R. 731 (Bankr. D.N.J. 2017) (May 1, 2017 Opinion denying First Injunction Motion for lack of jurisdiction during pendency of appeal). On May 5,

2017, the District Court issued an Order and Opinion affirming this Court's Remand Order. *G-I Holdings, Inc. v. Ashland, Inc.*, Civ. No. 17-0077 (ES), ECF Nos. 29 and 30. The Debtor renewed its Injunction Motion on May 12, 2017.

For the reasons set forth below, the Bankruptcy Court permissively abstains under 28 U.S.C. § 1334(c)(1) from hearing the Injunction Motion.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1334, and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984 and amended September 18, 2012.

STATEMENT OF FACTS

The corporate histories and prior relationship of the Debtor and Ashland are set forth at length in prior Opinions of this Court and are reiterated here. *In re G-1 Holdings, Inc.*, 564 B.R. 217, 222-28 (Bankr. D.N.J. 2016), *aff'd, G-1 Holdings, Inc. v. Ashland, Inc.*, Civ. No. 17-0077 (ES) (May 5, 2017), ECF Nos. 29 and 30; and *In re G-1 Holdings, Inc.*, 568 B.R. 731, 733-43 (Bankr. D.N.J. 2017) (May 1, 2017), ECF No. 11076, 2-13.

A. The LCP Site

The dispute concerns liability for the environmental remediation of a certain Superfund site located in Linden, New Jersey – the LCP Site.

The LCP Site is the location of a former chemical manufacturing facility on an approximately 26-acre parcel of property in Linden, New Jersey. The LCP Site was acquired by GAF Corporation[1] prior to 1950. GAF Corporation constructed a chlor-alkali plant at the LCP Site, which it operated until it sold the property to Linden Chlorine Products, Inc. in 1972. The

[1] This is a different entity from GAF that is a party to the instant motion.

operations of the former chlor-alkali plant by GAF Corporation at the LCP Site resulted in the contamination of the LCP Site and off-site areas with various hazardous substances, including mercury. The LCP Site ceased production permanently in 1985.

B. Corporate History

The issue of who now bears responsibility for the LCP Site depends upon a series of complex corporate transactions and contractual agreements that span the course of three decades.

In 1989, GAF was liquidated, and its liabilities were transferred to five separate entities: Dorset Inc. ("Dorset"), GAF Building Materials Corporation (formerly known as Edgecliff Inc.), Merick Inc., Perth Inc., and Clover Inc. According to G-I, Dorset received "all the assets and liabilities, known and unknown, relating to [GAF's] acetylenic chemicals, surfactants, specialty chemicals, organometalics, mineral products, industrial filters and filter vessels business (collectively, the 'Chemical Businesses')," while GAF Building Materials Corporation, formerly known as Edgecliff Inc., received "all the assets and liabilities, known and unknown, relating to [GAF's] commercial and residential roofing materials business."[2] *See* Motion to Dismiss Adversary Proceeding at 6, *Ashland Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 12 (citing the 1989 Liquidation Plan). To effectuate the Liquidation Plan, on April 10, 1989, GAF entered into instruments of Assignment and Assumption with Dorset and GAF Building Materials Corporation, which transferred, in relevant part, "100% of the liabilities arising out of . . . environmental claims arising out of plants currently operating in the Chemical Businesses" to Dorset, and "100% of all liabilities arising out of . . . environmental claims from plants no longer operating and from oil waste pollution" to GAF Building Materials Corporation. *Id.* at 7.

[2] "[The t]hree other companies – Merick Inc., Perth Inc., and Clover Inc. – acquired [GAF's] broadcasting, insurance, and export operations, respectively." *Id.*

Ashland claims that the liabilities in connection with the LCP Site were transferred to Edgecliff Inc., which later became GAF Building Materials Corporation, because such liability fell under the umbrella of "environmental liabilities associated with plants no longer operating," such as the LCP site, whereas G-I claims the liabilities in connection with the LCP Site were transferred to Dorset, because such liability is related to the Chemical Businesses. Ashland asserts here that ISP and IES were later incorporated in 1991 as subsidiaries of GAF, and thus ISP and IES were never in the corporate lineage of Edgecliff Inc./GAF Building Materials (one of the Defendant-Indemnitors), which assumed responsibility for the LCP site before ISP and IES were even formed.

G-I, however, takes the position that none of the G-I Parties are responsible for any environmental liabilities or obligations at the LCP Site as these liabilities and obligations were assumed by IES in 1991 and that even if these liabilities resulted in G-I following the series of corporate transactions referred to herein, which G-I claims they did not, these liabilities were discharged in G-I's bankruptcy case.

Subsequently, in 1989, GAF Chemicals Corporation ("GAF Chemicals"), a subsidiary of GAF, merged with Dorset. G–I claims that because Dorset acquired liability in the 1989 Liquidation, liability in connection with the LCP Site was again transferred to GAF Chemicals when it merged with Dorset.

In 1991, ISP and IES were incorporated as subsidiaries of GAF Chemicals. On May 8, 1991, GAF Chemicals, GAF, and ISP 9 Corporation ("ISP 9")[3] entered an agreement whereby ISP 9 assumed certain liabilities and obligations of GAF Chemicals, including "[a]ll liabilities and obligations relating to the manufacture and sale of specialty chemicals at Linden, NJ, known and

[3] ISP 9 later changed its name to IES.

unknown, contingent or otherwise, including liabilities for the remediation of the Linden site...." (the "1991 Agreement"). Additionally, the 1991 Agreement stated that IES:

> shall indemnify, defend, and hold harmless [GAF Chemicals], GAF and its other subsidiaries from and against any and all [liabilities and obligations described in the 1991 Assumption Agreement Schedule] and any and all liabilities, costs and expenses in connection with any investigations, claims, actions, suits or proceedings arising out of or resulting from the conduct of any business, ownership or any assets or incurrence of any liabilities or obligations on and after May 9, 1991 by [IES].

Id. at 1. Therefore, G-I alleges that IES assumed all GAF and GAF Chemicals' liabilities, including those associated with the LCP Site. The Ashland Parties allege, conversely, that because liability originally passed from GAF to GAF Buildings Materials Corporation, and not to Dorset/GAF Chemicals, liability in connection with the LCP Site was not transferred to ISP and IES in the 1991 Agreement.

In 1994, GAF Buildings Materials Corporation formed a new corporation as a wholly-owned subsidiary known as Building Materials Corporation of America (now Standard Industries, Inc.) ("BMCA").[4] BMCA, which is also an indirect subsidiary of G-I, is the primary operating subsidiary and principal asset of G-I. BMCA acquired the operating assets and certain liabilities of GAF Building Materials Corporation's roofing commercial and residential roofing materials business. G-I asserts that BMCA did not assume any liabilities associated with "closed manufacturing facilities," and therefore cannot be held liable in connection with the LCP Site.

On October 18, 1996, GAF Corporation (including its successor "GAF"), G-I, G Industries Corp., GAF Chemicals, and ISP Holdings Inc. (the parent of ISP and IES at the time) entered into an indemnification agreement in connection with certain "Spin Off Transactions" involving GAF

[4] On or about January 26, 2016, BMCA changed its name to Standard Industries, Inc. *See* Letter from Mark Hall, Esq., dated March 1, 2016, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 21.

and its subsidiaries (the "Indemnification Agreement"). Section 2.2(a) of the Indemnification Agreement entitled "Indemnification and Release" provides at subsection (a)(1):

> GAF and G-I [] shall jointly and severally indemnify, defend and hold harmless ISP Holdings, its Post Spin Subsidiaries and each of their respective present and future Representatives and Affiliates from and against all GAF Liabilities and any and all Indemnifiable Losses of ISP Holdings, its Post Spin Subsidiaries and each of their respective Representatives and Affiliates arising out of or due to, directly or indirectly, the GAF Liabilities, whether such GAF Liabilities arose before, or arise after, the Spin Off Date.

See Indemnification Agreement, Appx. 6 at 6, Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 9-7.

As part of the spin-off transactions, ISP Holdings and its subsidiaries, including IES and ISP, were spun off from the GAF Entities. At that time, Samuel J. Heyman owned 96% of ISP Holdings and its subsidiaries.[5] On or around August 23, 2011, Ashland Inc.[6] acquired ISP Holdings and its subsidiaries, and is currently the parent company of ISP and IES.

C. G-I's Bankruptcy Filing and Confirmation of the Plan of Reorganization

On January 5, 2001, G-I, a Delaware corporation with its principal place of business in the State of New Jersey, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Chapter 11 Voluntary Petition, *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 1. The Court's docket entries for the same day reflect that the first meeting of creditors was scheduled for 9:00 a.m. on January 31, 2001 and that the last day to assert claims of non-dischargeability was April 2, 2001. On August 3, 2001, ACI, Inc. ("ACI"), a subsidiary of G-I, also filed a voluntary petition for relief under Chapter 11. Chapter 11 Voluntary Petition, *In re ACI, Inc.*, Case No. 01-

[5] After the conclusion of the confirmation hearing on November 7, 2009, Mr. Heyman, the Plan Sponsor, died of natural causes. Subsequently, Ronnie Feuerstein Heyman, Mr. Heyman's wife, received all of the same signatory powers as Mr. Heyman pursuant to appropriate corporate resolutions.

[6] Ashland, Inc. recently changed its name to Ashland, LLC. Ashland is a leading global specialty chemical company incorporated under the laws of the State of Kentucky.

38790, ECF No. 1. On October 10, 2001, this Court entered an Order directing the joint administration of the G-I and ACI bankruptcy cases. Order Directing Joint Administration of Chapter 11 Cases, *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 630.

The Official Committee of Unsecured Creditors was appointed on January 18, 2001 by the United States Trustee pursuant to Section 1102(a) of the Bankruptcy Code to represent those individuals who allegedly suffered injuries related to asbestos exposure from products manufactured by the predecessors of G-I. *See* 11 U.S.C. § 1102(a). On October 10, 2001, this Court appointed C. Judson Hamlin as the Legal Representative, a fiduciary to represent the interests of persons who hold present and future asbestos-related claims against G-I.

On August 21, 2008, G-I filed a Joint Plan of Reorganization. Chapter 11 Plan, *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 8190. After a number of modifications to the Plan, G-I filed an Eighth Amended Joint Plan of Reorganization on October 5, 2009 (the "Plan" or "Confirmed Plan"). Eighth Amended Chapter 11 Plan, *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 9644. The District Court for the District of New Jersey and this Court held hearings concerning confirmation of the Plan on September 30, 2009, October 5, 6, and 15, 2009, and November 7, 2009. *See* Hearing Transcripts, *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF Nos. 9708-12.

On November 12, 2009, the District Court for the District of New Jersey, by Hon. Garrett E. Brown, Jr., Chief Judge, and this Court entered an Order Confirming the Eighth Amended Joint Plan of Reorganization of G-I Holdings Inc. and ACI Inc. (the "Confirmation Order") pursuant to Chapter 11 of the Bankruptcy Code. Order Confirming Eighth Amended Joint Plan of Reorganization of G-I Holdings Inc. and ACI Inc., *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 9787. The Plan became effective on November 17, 2009, as described in the November

20, 2009 Notice of Plan Confirmation. Notice of (A) Entry of Order Confirming Eighth Amended Joint Plan of Reorganization and (B) Occurrence of Effective Date, *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 9825.

The 1996 Indemnification Agreement, an executory contract, was assumed by G-I when the plan was confirmed.

The discharge provision of the Confirmation Order at Paragraph 76 reads as follows:

> In accordance with and not in limitation of sections 524 and 1141 of the Bankruptcy Code and, except as provided in the Plan, upon the Effective Date, all Claims against the Debtors' estates and the Reorganized Debtors shall be, and shall be deemed to be, discharged in full, and all holders of Claims shall be precluded and enjoined from asserting against the Debtors' estates and the Reorganized Debtors, or any of their assets or properties, any other or further Claim based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date, whether or not such holder has filed a proof of Claim. Upon the Effective Date, all Entities shall be forever precluded and enjoined, pursuant to section 524 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against the Debtors' estates and the Reorganized Debtors.

Confirmation Order, *supra*, ¶ 76. Thus, the Confirmation Order provided that all Claims against the Reorganized Debtors would be discharged, and that all holders of such claims would be barred from asserting them against Reorganized G-I. *Id.*

The Confirmation Order further directed that any claimants holding Claims were also:

> permanently enjoined, from and after the Effective Date, from (a) commencing or continuing in any manner any action or other proceeding of any kind on any such Claim or other debt or liability pursuant to the Plan against the . . . Reorganized Debtors, the Debtors' estates or properties or interests in properties of the Debtors or the Reorganized Debtors . . . .

Id. at ¶ 79.

The Plan defined "Claim" to mean:

> a "claim" as defined in section 101(5) of the Bankruptcy Code, against G-I or ACI, whether or not asserted, whether or not the facts of or legal bases therefor are known or unknown, and specifically including, without express or implied limitation, any rights under sections 502(g), 502(h), or 502(i) of the Bankruptcy Code, any claim

> of a derivative nature, any potential or unmatured contract claims, and any other contingent claim; (ii) any Environmental Claim, whether or not it constitutes a "claim" under section 101(5) of the Bankruptcy Code; and (iii) any rights to any equitable remedy.

Confirmed Plan, *supra*, at 8, § 1.1.43.

Further, the Plan defined the term "Environmental Claim" as:

> any Claim relating to alleged hazardous materials, hazardous substances, contamination, pollution, waste, fines or mine or mill tailings released, threatened to be released or present in the environment or ecosystem, including without limitation, alleged contamination under federal or state environmental laws, codes, orders or regulations, common law, as well as any entitlements to equitable remedies, including, without limitation, investigation, restoration, natural resource damages, reclamation, remediation and cleanup, including without limitation, any Environmental Claim for Remedial Relief and any Other Environmental Claim; *provided, however*, for the avoidance of doubt, the term "Environmental Claim" shall not include or pertain to any Asbestos Claim, Asbestos Property Damage Claim, Asbestos Property Damage Contribution Claim, Bonded Asbestos Personal Injury Claim, CCR Claim, Workers' Compensation Claim, or Claim of an Affiliate.

Id. at § 1.1.67 (emphasis in original).

Pursuant to the Plan, G-I assumed the Indemnification Agreement.[7] Part VI of the Confirmation Order (Executory Contract and Unexpired Lease Provisions and Related Procedures)

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[7] Article VII, Section 7.1 of the Plan provides, in pertinent part:

> Assumption and Rejection of Executory Contracts and Unexpired Leases. . . . Any executory contracts or unexpired leases of the Debtors that are set forth on Schedule 7.1 of the Plan Supplement shall be deemed to have been assumed by the Debtors and the Plan shall constitute a motion to assume such executory contracts and unexpired leases. Any executory contracts or unexpired leases of the Debtors that are set forth on schedule 7.1 of the Plan Supplement that have been designated as being assumed and assigned to one of the Debtors' Affiliates shall be deemed to have been assumed and assigned by a Debtor to that Affiliate and the Plan shall constitute a motion to assume and assign such executory contracts and unexpired leases. Each executory contract or unexpired lease assumed, or assumed and assigned, hereunder shall include any modifications, amendments, supplements or restatements to such contract or lease. Entry of the Confirmation Order by the Clerk of the Bankruptcy Court shall constitute approval of such assumptions pursuant to section 365(a) of the Bankruptcy Code, and approval of such assumptions and assignments pursuant to section 365(f) of the Bankruptcy Code, and a finding by the Bankruptcy Court that each such assumed, or assumed and assigned, executory contract or unexpired lease is in the best interest of the Debtors, their bankruptcy estates, and all parties in interest in the Chapter 11 Cases . . . .

Confirmed Plan, § 7.1.

notes, in relevant part: "Unless a proof of claim was timely filed with respect thereto, all cure amounts and all contingent reimbursement or indemnity claims for prepetition amounts expended by the non-debtor parties to assumed executory contracts and unexpired leases are discharged by the entry of this Confirmation Order." Confirmation Order, *supra*, at ¶ 25; *see also* Confirmed Plan, *supra*, at §§ 7.1-7.3.

Section 9.2 of the Plan states:

> Discharge of Claims. In accordance with and not in limitation of sections 524 and 1141 of the Bankruptcy Code, and except as provided in the Plan, upon the Effective Date, all Claims against the Debtors shall be, and shall be deemed to be, discharged in full, and all holders of Claims shall be precluded and enjoined from asserting against the Reorganized Debtors, or any of their assets or properties, any other or further Claim based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date, whether or not such holder has filed a proof of Claim. Upon the Effective Date, all Entities shall be forever precluded and enjoined, pursuant to section 524 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against the Debtors.

On November 16, 2009, G-I filed a Notice of Amendment to Schedule 7.1 of the Plan Supplement. *See In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 9806. The Amended Schedule 7.1 included the Indemnification Agreement. *See id.*, Ex. A.

Section 7.3 of the Plan provides:

> Cure of Defaults and Survival of Contingent Claims under Assumed Executory Contracts and Unexpired Leases. Except as may otherwise be agreed to by the parties, on or before the thirtieth (30th) day after the Effective Date, provided the non-debtor party to any such assumed executory contract or unexpired lease has timely filed a proof of claim with respect to such cure amount, the Reorganized Debtors shall cure any and all undisputed defaults under each executor contract and unexpired lease assumed by the Debtors pursuant to the Plan, in accordance with section 365(b) of the Bankruptcy Code. All disputed defaults required to be cured shall be cured either within thirty (30) days of the entry of a Final Order determining the amount, if any, of the Reorganized Debtors' liability with respect thereto, or as may otherwise be agreed to by the parties. Unless a proof of claim was timely filed with respect thereto, all cure amounts and all contingent reimbursement or indemnity claims for prepetition amounts expended by the non-debtor parties to assumed executory contracts and unexpired leases shall be discharged upon entry of the Confirmation Order by the Clerk of the Bankruptcy Court.

Confirmed Plan, § 7.3.

Confirmed Plan, *supra*, § 9.2.

Section 11.1 of the Plan further states, in relevant part:

> Retention of Jurisdiction. The Bankruptcy Court shall retain jurisdiction and retain all exclusive jurisdiction it has over any matter arising under the Bankruptcy Code, arising in or related to the Chapter 11 Cases or the Plan, or that relates to the following:
>
> (a) to interpret, enforce, and administer the terms of the Plan, the Plan Documents (including all annexes and exhibits thereto), and the Confirmation Order.
>
> (b) to resolve any matters related to the assumption, assignment, or rejection of any executory contract or unexpired lease to which a Debtor is a party or with respect to which a Debtor may be liable and to hear, determine and, if necessary, liquidate, any Claims arising therefrom. . .;
>
> . . .
>
> (o) to determine the scope of any discharge of any Debtor under the Plan or the Bankruptcy Code[.]

Id. at § 11.1; *see also* Confirmation Order, *supra*, at ¶ 97.

Ashland did not file a proof of claim in G-I's bankruptcy. Ashland alleges that it was not required to file a proof of claim because indemnification claims under the Indemnification Agreement are not "claims" as defined by the Plan. Additionally, Ashland asserts that because it did not acquire IES and ISP until 2011, it was unable to timely file a proof of claim in G-I's bankruptcy case. Ashland further asserts that it was not required to file a proof of claim because G-I expressly assumed the Indemnification Agreement.

G-I claims, conversely, that any claim Ashland might assert against it was discharged.

D. Investigation of the LCP Site

Ashland asserts that beginning in or about 1994, prior to entry of the Indemnification Agreement and G-I's Bankruptcy Petition, the Environmental Protection Agency ("EPA") began investigating the LCP Site for environmental contamination. In 1998, before the Petition Date,

the EPA sent information requests to GAF and other parties regarding the LCP Site and sought commitments to investigate and study remediation options for the LCP Site. Ashland asserts here that "on information and belief," Mr. Heyman, who along with members of his family owned and controlled both IES and GAF at the time, volunteered IES to enter into an Administrative Order on Consent ("AOC") for Remedial Investigation and Feasibility Study with the EPA. Ashland claims that the EPA misidentified IES as a responsible party, rather than G-I, but because Mr. Heyman controlled both IES and GAF at that time, the misidentification was not remedied. The EPA issued a Record of Decision for the cleanup of the LCP Site in 2014, estimating costs for the site cleanup at $36.3 million. *See* Complaint, Appx. 3, ¶ 3, Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 9-4. Subsequently, the EPA issued a Unilateral Administrative Order ("UAO") for the Remedial Design to IES and Praxair, Inc. for the LCP Site, which became effective June 26, 2015 and which required IES to conduct and complete the remedy set forth in the Record of Decision. Because Reorganized G-I has not assumed responsibility for this expense, Plaintiffs assert that they have expended, and may be ordered to continue to expend, significant sums of money to investigate and remediate contamination at and from the LCP Site.

In or around 1999, after the Indemnification Agreement but before the Petition Date, the National Oceanic and Atmospheric Administration ("NOAA") and the U.S. Department of the Interior ("DOI") began to investigate the potential impacts and releases of hazardous substances at and from the LCP Site on natural resources in and around the site. The NOAA and DOI thereafter commenced a natural resource damage assessment (the "NRDA"). On March 22, 2012, IES entered into an agreement with the NOAA and the DOI to contribute resources to the investigations being conducted in support of the NRDA, but Plaintiffs assert specifically that the

agreement disavowed any liability on the part of IES in connection with the LCP Site, noting that the agreement provided "[t]his Agreement shall not constitute, or be interpreted or used as an admission of fault, liability, law or fact by [IES]." Contribution to Sampling Agreement, Appx. 10, ¶ 8, Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 9-11. Plaintiffs claim on information and belief that NOAA and DOI have already expended more than $600,000 on investigations in support of the NRDA and will continue to expend substantial sums, and that, on July 21, 2015, NOAA and DOI notified Plaintiffs that they intend to recover any unreimbursed portions of the investigative costs from Plaintiffs.

RELEVANT PROCEDURAL HISTORY

A. State Court Action

On September 30, 2015, the Ashland Parties filed a Complaint in the Superior Court of New Jersey, Law Division, Morris County ("ISP Litigation" or "State Court Action")[8] seeking a declaratory judgment that Defendants G-I, Building Materials Corporation of America d/b/a GAF Materials Corporation, GAF Corporation, John and Jane Does 1-20, and ABC Companies 1-20 (collectively, "Defendants") are in breach of the Indemnification Agreement and pursuant to the Indemnification Agreement must indemnify Plaintiffs for any costs or liabilities incurred in connection with the investigation and remediation of the LCP Site, that Plaintiffs do not bear any responsibility for same, that G-I is the successor to the entity or entities that owned and operated the LCP Site between the early 1950s and 1972, and that Plaintiffs are not successors to any such entity. Plaintiffs also seek recovery of costs incurred, and that they may be ordered to incur, in connection with the investigation and remediation of the LCP site.

[8] *See* Complaint for Declaratory Judgment, *Ashland, Inc., et al. v. G-I Holdings Inc., et al.*, Docket No. MRS-L-2331-15 (N.J. Super. Ct., Law Div. Sept. 30, 2015), Appx. 3, Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 9-4.

Count One of the Complaint seeks a declaratory judgment: "[d]eclaring that G-I or its successor, if any, is the successor to GAF Corporation and GAF Chemicals Corporation, and is responsible for all liabilities associated with those companies' ownership and operation of the LCP Site;" "[d]eclaring that none of the Plaintiffs is a successor to GAF Corporation or GAF Chemicals Corporation, and that none of the Plaintiffs is responsible for any liabilities associated with those companies' ownership and operation of the LCP Site;" and requesting any other and further relief, including costs.

Count Two of the Complaint, sounding in breach of contract, seeks a declaratory judgment declaring among other things that Defendants are contractually obligated under the Indemnification Agreement to indemnify ISP and IES for all Claims of Environmental Liability related to the LCP Site, including payments of defense costs, environmental remediation costs incurred by Plaintiffs in the past and the future and that Defendants are in breach of those obligations, and entering judgment in Plaintiffs' favor awarding damages in the amount expended by Plaintiffs in accordance with the proof to be presented, with the maximum lawfully allowable interest thereon.

Count Three of the Complaint alleges a breach of the implied covenant of good faith and fair dealing asserted by ISP and IES against all Defendants.

Count Four of the Complaint alleges unjust enrichment asserted by Ashland and IES against all Defendants.

On November 4, 2015, Plaintiffs filed a Motion in the State Court Action to Proceed Summarily and for Entry of Judgment Against Defendants. Plaintiffs argued that pursuant to Rule 4:67-1 *et seq.* of the New Jersey Rules of Court, which permits a court to dispose of a matter on the record or on minimal testimony in open court on short notice, the state court should resolve the

dispute in a summary fashion. Plaintiffs asserted that the issues are straightforward and "limited to the interpretation and application of an uncomplicated contract and the details of a few corporate changes." Therefore, Plaintiffs requested that the state court resolve the action in a summary fashion.

B. Removed and Remanded State Court Action

On November 4, 2015, before any substantive proceedings in the state court occurred, G-I filed a Notice of Removal, arguing that the Bankruptcy Court retained jurisdiction for proceedings such as the State Court Action under both the Confirmation Order and Confirmed Plan. Notice of Removal, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 1. G-I alleged that the State Court Action is a "core proceeding" under 28 U.S.C. § 157(b)(2) because:

> The State Court Action is a proceeding 'arising in' G-I's Chapter 11 bankruptcy case…[and] is fundamentally a matter concerning events that occurred prior to the commencement of G-I's bankruptcy case that will implicate the administration of the Plan, will require the interpretation of various provisions of the Plan, and will entail an assessment and determination as to whether to allow or disallow such causes of action in light of the discharge of Claims provided for by the Confirmation Order and the Plan.

Id. at ¶ 23. In the alternative, G-I asserted that that the State Court Action is at a minimum "related to" G-I's bankruptcy case, and that the Defendants consent to entry of final orders or judgment by the Bankruptcy Court pursuant to Federal Rule of Bankruptcy Procedure 9027(a)(1) if the Court deems the State Court Action a non-core proceeding.

On November 20, 2015, Ashland filed a Motion to Remand the proceeding to state court ("Motion to Remand"). Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 9. On December 18, 2015, G-I filed a response in opposition to the Motion to Remand. Opposition to Ashland, Inc., Int'l Specialty Prod., Inc., & ISP Envtl. Servs., Inc.'s Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 14.

On January 22, 2016, Ashland filed a reply in further support of its Motion to Remand. Plaintiffs' Reply in Further Support of Motion for Remand, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 18.

On December 11, 2015, G-I filed the Motion to Dismiss Ashland's Adversary Proceeding. Motion to Dismiss Ashland, Inc., Int'l Specialty Products, Inc. and ISP Envtl. Servs., Inc.'s Complaint for Declaratory Judgment, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 12. On February 2, 2016, Ashland filed a Response in Opposition to G-I's Motion to Dismiss. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 19. On March 11, 2016, G-I filed a Reply in support of its Motion to Dismiss. Reply Memorandum of Law in Further Support of Motion Dismiss Ashland, Inc., Int'l Specialty Prod. Inc., & ISP Envtl. Servs., Inc.'s Complaint for Declaratory Judgment, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 25. On April 21, 2016, G-I filed a letter in further support of its Motion to Dismiss, which Ashland argued was an unauthorized sur-reply. Apr. 21, 2016 Letter from A. Rossman, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 31. On May 18, 2016, Ashland filed a letter response to the Motion to Dismiss. Letter Response to Sur-Reply, *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 32.

On May 26, 2016, the Court held a telephone conference call with the parties to discuss the schedule for oral argument of the pending motions. The Court determined that the Motion to Remand would be heard and decided before the Court and parties expended additional time and resources on the Motion to Dismiss. Therefore, the Court adjourned the Motion to Dismiss and determined that the Motion to Remand and certain supplemental motions pending before the Court

would be heard together as scheduled.[9] The Court acknowledged, however, that parties may necessarily need to refer to the Motion to Dismiss to the extent such reference informed the arguments for or against remand.

The Court held a telephone conference call with the parties on June 1, 2016. During the telephone conference call, the Court determined to adjourn the hearing on the supplemental motions to a date after the Motion for Remand was decided.

C. This Court's Remand Decision and Subsequent History

On December 21, 2016, this Court issued a written Opinion granting Ashland's Motion to Remand (the "Remand Decision"). *Ashland, Inc. v. G-I Holdings, Inc. (In Re G–I Holdings, Inc.)*, 564 B.R. 217 (Bankr. D.N.J. 2016), *aff'd sub nom. In re G-I Holdings Inc.*, No. 01-30135 (RG), 2017 WL 1788656 (D.N.J. May 5, 2017). In it, the Court found that (1) the proceeding did not confer "arising under" jurisdiction because Ashland's Complaint did not include federal causes of action, nor did it seek to invoke substantive rights provided for under bankruptcy laws; (2) the proceeding did not confer "arising in" jurisdiction because Ashland's causes of action exist outside of bankruptcy; and (3) the proceeding, however, satisfied the "close nexus" test set forth in *In re*

[9] Also pending before the Court at that time were the following motions filed in the adversary proceeding: Plaintiffs' Motion for *In Camera* Inspection and Determination That Certain Documents Are Not Privileged and Should Be Considered in Deciding Defendants' Dismissal Motion [ECF. No. 33]; (2) the ISP Plaintiffs' Motion for Authority to File Under Seal and Unredacted (I) Exhibits E and F to Plaintiffs' Response to Defendants' Sur–Reply on the Dismissal Motion, and (II) Plaintiffs' Memorandum of Law in Support of Motion for *In Camera* Inspection and Determination that Certain Documents are Not Privileged and Should be Considered in Deciding Defendants' Dismissal Motion [ECF. No. 34]; (3) the G–I Defendants' Motion for Authority to File, Under Seal, Their Opposition to Plaintiffs' Motion for *In Camera* Inspection and Determination That Certain Documents Are Not Privileged and Should Be Considered in Deciding Defendants' Dismissal Motion and Response to Plaintiffs' Motion for Authority to File Under Seal and the Exhibits Thereto [ECF. No. 46]; (4) the ISP Plaintiffs' Motion For Authority to File Under Seal and Unredacted (I) Plaintiffs' Reply Memorandum of Law in Further Support of Motion for *In Camera* Inspection and Determination That Certain Documents Are Not Privileged and Should Be Considered in Deciding Defendants' Dismissal Motion, Generally in the Context of This Litigation and Elsewhere; and (II) Exhibit A to Plaintiffs' Reply Memorandum of Law (the "August 3 Motion to Seal") [ECF No. 51]; and (5) Defendant's Motion for Authority to File, Under Seal, their Response to Plaintiff's Second Motion for Authority to File Under Seal and Further Opposition to Plaintiff's Motion for In *In Camera* Inspection and Determination That Certain Documents Are Not Privileged and Should Be Considered in Deciding Defendants' Dismissal Motion and the Exhibit Thereto [ECF No. 56].

Resorts International, 372 F.3d 154 (3d Cir. 2004), and so this Court had "related to" jurisdiction over the proceeding. This Court determined Ashland's claims "related to" the bankruptcy case because, although the litigation in large part involves application of state contract and corporate law, G-I's affirmative defense that Ashland's claims are barred by the Confirmation Order and discharge injunction may require interpretation of the Plan and the Confirmation Order and application of the bankruptcy law concerning discharge. *See G–I Holdings*, 564 B.R. at 252. The Court further determined that (4) both mandatory and permissive abstention and equitable remand were appropriate under 28 U.S.C. Sections 1334(c)(2), 1334(c)(1) and 1452(b), respectively. In reaching this determination, the Court found among other things that Ashland's Motion to Remand was timely made and the Complaint asserting state law claims for breach of contract and other related relief was appropriately filed in state court, that the state court had the ability to efficiently adjudicate the matter, and that such adjudication, while it may require interpretation of the Bankruptcy Code and Confirmed Plan, "will not affect the distribution to creditors and is unlikely to unduly impact the administration of the estate." *Id.* at 254.

On January 4, 2017, the Debtor filed a Notice of Appeal of this Court's Remand Order. *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 65. On January 6, 2017, the G-I Defendants filed an Application to Shorten Time and a Motion for Stay Pending Appeal of this Court's Remand Order. *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No 69. After a January 9, 2017 telephone conference, this Court on January 11, 2017 entered an "Order On Motion To Remand" that granted the Motion for Remand and ordered that "neither this order nor the file be transmitted to the New Jersey Superior Court, Law Division, Morris County by the Bankruptcy Court or otherwise until directed to do so by this Court." *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 74. On February 14, 2017, this Court entered

an Order denying the Motion for Stay Pending Appeal but granting an Interim 30-Day Stay to allow G-I to pursue a stay order from the District Court.[10] *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-02379, ECF No. 91.

D. G-I's First Motion to Enforce the Plan Injunction

On January 10, 2017, during the pendency of the appeal of the Remand Order, the Debtor filed its original Motion to Enforce the Plan Injunction against the Ashland Parties in the main bankruptcy proceeding (the "First Injunction Motion"). *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11029. The Court heard oral argument on February 16, 2017 and issued an Opinion on May 1, 2017 denying the Debtor's motion on the grounds that the Bankruptcy Court lacked jurisdiction to decide the matter during the pendency of the appeal. *In re G-I Holdings, Inc.*, 568 B.R. 731, 769-70 (Bankr. D.N.J. 2017).

E. Denial of Debtor's Appeal and Affirmance of the Remand Order by District Court

On May 5, 2017, the District Court issued an Opinion and Order which denied Debtor's appeal of the Remand Order and ordered the Complaint immediately transferred to State Court. *In re G-I Holdings Inc.*, No. 01-30135 (RG), 2017 WL 1788656 (D.N.J. May 5, 2017). The District Court concurred with all three Bankruptcy Court rulings which the Debtor had appealed:

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[10] On March 9, 2017, the District Court entered an Order Granting Consensual Extended Interim Stay Pending Appeal and Expedited Appeal, dated March 8, 2017. *G-I Holdings, Inc. v. Ashland, Inc. (In re G-I Holdings Inc.)*, Case No. 17-cv-00077-ES, ECF No. 17. The District Court's order granted an extended interim stay for 45 days from the expiration of the interim stay, until April 30, 2017, and set forth an expedited briefing and hearing schedule for the appeal of this Court's Remand Order. *Id.* at 3.

On April 26, 2017, the District Court, on consent of the parties, entered an Order further extending the interim stay for 14 days from the expiration of the extended interim stay, until May 14, 2017. *G-I Holdings, Inc. v. Ashland, Inc. (In re G-I Holdings Inc.)*, Case No. 17-cv-00077-ES, ECF No. 28 at 3.

(1) that the Bankruptcy Court lacks "arising in" subject matter jurisdiction over the Complaint;

(2) that the Bankruptcy Court did not err in concluding that it was required to abstain from exercising jurisdiction under 28 U.S.C. § 1334(c)(2) (mandatory abstention); and

(3) that the Bankruptcy Court did not abuse its discretion in permissively abstaining under 28 U.S.C. § 1334(c)(1) from hearing the Complaint.

In re G-I Holdings Inc., 2017 WL 1788656 at *10, 12, 14-15.[11]

E. G-I's Second Motion to Enforce the Plan Injunction.

On May 12, 2017, the Debtor filed the instant motion, its second and renewed motion to enforce the Plan injunction against the Ashland Parties (the "Injunction Motion"). *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11078. The Court entered a Scheduling Order on May 30, 2017. *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11091. Pursuant to this Order, the Ashland Parties filed an objection and cross motion. *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF Nos. 11097 and 11098, respectively. The Debtor filed a single reply to both. *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11101. The Ashland Parties filed a sur-reply. *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11104. The Court heard oral argument on the Motion To Enforce the Plan Injunction and the Cross-Motion for Abstention on June 23, 2017. *In re G-I Holdings, Inc.*, Case No. 01-30135, June 23, 2017 Hearing Transcript, ECF No. 11106.

[11] On December 11, 2015, Debtor filed a Motion to Dismiss the Complaint. *Ashland, Inc. v. G-I Holdings, Inc.*, Adv. Pro. No. 15-2379, ECF No. 12). This Motion was last scheduled for a hearing on December 14, 2016 and was mooted by the remand on December 21, 2016. Ashland reports in its instant objection that the State Court held a May 18, 2017 case management conference at which Debtor indicated that it would file a motion in State Court to dismiss the Complaint and the Ashland Parties would refile a motion to proceed in a summary manner pursuant to New Jersey Court Rule 4:67. *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF No. 11097, Ashland Br., 10; The State Court set a briefing schedule and scheduled a hearing on both motions for September 1, 2017. *In re G-I Holdings, Inc.*, Case No. 01-30135, ECF, Ashland Br., 10. *See also In re G-I Holdings, Inc.*, ECF No. 11101-1, Certification of Sylvia E. Simson in support of Debtor's combined reply to renewed Injunction Motion and to Ashland's Cross Motion, Ex. A, Transcript of May 18, 2017 case management conference in State Court.

Argument of G-I in Initial Brief

G-I argues that the bankruptcy court is the proper forum to enforce the Plan Injunction and the Discharge Provision based on both (i) the retention of jurisdiction provisions in the Plan at Section 11.1(a) and in the Confirmation Order at ¶ 97; and (ii) the recognized "core" jurisdiction of the bankruptcy court to interpret and to enforce its own orders. Brief in Support of Injunction Motion, ECF 11078-1, at 14 (citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009); *In re SemCrude,* 2011 WL 4711891 (Bankr. D. Del. 2011), rev'd in part, 2012 WL 5554819 (D. Del. 2012), rev'd 796 F. 3d 310 (3d Cir. 2015); *In re CD Liquidation Co., LLC,* 2012 WL 6737478 (Bankr. D. Del. 2012); *In re AMR Corp.,* 2016 WL 1559294 (S.D.N.Y. 2016)). Specifically, G-I argued that the bankruptcy court should enforce the Plan Injunction and Discharge Provision to Bar the ISP Parties from pursuing the ISP Litigation against G-1, that IES had assumed the Linden liabilities and obligations in the 1991 Assumption Agreement and conducted itself for years in a manner consistent with its having assumed responsibility for the LCP Parcel Liabilities. Brief in Support of Injunction Motion, ECF 11078-1, at 17. G-I relied particularly on *In re Christ Hosp.*, 2014 WL 4613316 (D.N.J. Sept. 12, 2014) and on *In re Charter Comm.*, 2010 WL 502764 (Bankr. S.D.N.Y. Feb. 8, 2010). At oral argument on June 23, 2017, G-1 characterized its Motion as a "procedural vehicle" for enforcing the Confirmation Order. June 23, 2017 Hr'g Tr., ECF 11106, T7:4-7.

Next G-I argues that the claims which Ashland seeks to enforce are based on a written contract, arose prepetition when the contract was executed and are therefore discharged under the confirmed Plan and specifically by the Confirmation Order at ¶ 76. Brief in Support of Injunction

Motion, ECF 11078-1, at 18-19, 20 (citing *In re M. Frenville*, 744 F.2d 332, 336 (3d Cir. 1984), *overruled o.g.*, *In re Grossman's, Inc.*, 607 F.3d 114, 121-22 (3d Cir. 2010)). As a corollary, G-I argues that Debtor's assumption of the 1996 Indemnification Agreement does not change this *res judicata* analysis because Ashland (the ISP Parties) failed to allege any defaults before the Debtor assumed the Agreement despite being well aware of the LCP Parcel environmental liabilities and years of CERCLA activity concerning the LCP Parcel. Brief in Support of Injunction Motion, ECF 11078-1, at 22 (citing *In re Diamond Manufacturing Co.,* 164 B.R. 189, 201-203 (Bankr. S.D. Ga. 1994)). At oral argument on June 23, 2017 G-I indicated that the impact of the claims alleged in the Complaint falls on the reorganized Debtor, rather than on the Creditors. June 23, 2017 Hr'g Tr., ECF 11106, T:22:5-12; T23:19-23; T73:15-20.[12]

Next G-I argues that Ashland is estopped from making indemnification claims against the Debtor because Ashland "accepted substantial insurance proceeds" from the Environmental Coverage Action without representing that clean-up costs for the LCP Parcel were the responsibility of G-I. Brief in Support of Injunction Motion, ECF 11078-1, at 22. G-I argues that the doctrine of quasi-estoppel prevents Ashland from seeking "100% distribution" on a prepetition claim after the Plan was confirmed and this liability, discharged. Brief in Support of Injunction Motion, ECF 11078-1, at 24 (citing *In re Price*, 361 B.R. 68, 79 (Bankr. D.N.J. 2007)).

Argument of Ashland in Opposition to Motion of G-I and in Support of Cross Motion for Abstention under 28 U.S.C. § 1334(c)(1) and (c)(2)

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[12] THE COURT: "[W]hat is the impact on the creditors?
MR. ROSSMAN (for G-I): "Well, Your Honor, the impact is on the reorganized debtor. We're not making the argument. There have been distributions to creditors. The impact is on the reorganized debtor." June 23, 2017 Hr'g Tr., ECF 11106, T22:5-12. . . .
MR. ROSSMAN: "[T]he idea that okay . . . money has already gone to creditors and now it's just a matter of . . . sticking it to the reorganized debtor, I think that's fundamentally at odds with the whole purpose of the bankruptcy code.. . . ." June 23, 2017 Hr'g Tr. ECF 11106, T23:19-23. . . .
MR. ROSSMAN: "So, Your Honor, I would submit notwithstanding the fact that we're post-confirmation, it's not affecting payouts to creditors, it's not property of the estate . . . it is still the core function of the bankruptcy court to protect reorganized debtors from claims that were discharged in the confirmation order. June 23, 2017 Hr'g Tr., ECF 11106, T73:15-20.

Ashland first argues that, consistent with the findings of the District Court in its May 5, 2017 Opinion which affirmed the December 21, 2016 Remand Opinion of this Court, the Bankruptcy Court has only "related to" jurisdiction over the Ashland claims which are subject to permissive abstention under 28 U.S.C. § 1334(c)(1) or to mandatory abstention under 28 U.S.C. § 1334(c)(2). Brief in Support of Cross Motion, ECF 11098, ¶¶ 16, 24 (citing *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006); *Burke v. Donington, Karcher, Salmond, Ronan & Rainone, P.A. (In re Donington, Karcher, Salmond, Ronan & Rainone, P.A.),* 194 B.R. 750, 759-60 (D.N.J. 1996)). Ashland argues that its indemnification demand, which G-I seeks to enjoin by the instant Motion to enforce the plan and discharge injunction, is the subject of the State Court Action and that the G-I Motion to enforce the injunction is the same as the its "affirmative discharge defense" in the State Court Action. Brief in Support of Cross Motion, ECF 11098, ¶ 22. Consistent with the affirmance by the District Court of the remand of the State Court Action, Ashland argues, the Bankruptcy Court must abstain from hearing the G-I Motion (which is equivalent to its affirmative defense in the State Court Action). Brief in Support of Cross Motion, ECF 11098, ¶¶ 22, 24.

Ashland argues furthermore that, consistent with the December 21, 2016 Remand Opinion, the Bankruptcy Court already found that G-I's affirmative defense of Plan and injunction enforcement belong in State Court and that the Bankruptcy Court is bound by law of the case doctrine from deviating from that finding by hearing the instant Motion. Brief in Opposition to Motion, ECF 11097, at 12-13 (citing *Hamilton v. Leavy*, 322 F.3d 776, 786 (3d Cir. 2003); *United States v. Kikumura,* 947 F.2d 72, 77 (3d Cir. 1991); *In re City of Philadelphia Litig,* 158 F.3d 711, 717-718 (3d Cir. 1998)).

If this Court were to hear the G-I Motion, Ashland argues, its present claims are not

Environmental Claims within the meaning of the Plan and were not discharged under the Confirmation Order. Brief in Opposition to Motion, ECF 11097, at 7. Ashland rests this argument on multiple provisions in the Plan and Confirmation Order. First, ISP and IES were affiliates of G-I "at the time of the bankruptcy," and Plan expressly excluded the claims of affiliates from Environmental Claims. Brief in Opposition to Motion, ECF 11097, at 7, 14-15 (citing Plan §§ 1.1.67, 1.1.86, 1.1.93(c)). Ashland argues that G-I admits that affiliates were not required to file a proof of claim pursuant to their own Bar Order. *Id.* at 19. Second, with respect to assumed executory contracts, Plan § 7.3 provides for a waiver of cure amounts and contingent reimbursement or indemnity claims for prepetition amounts *expended*, unless the claimant had timely filed a proof of claim. *Id.* at 7, 16-17. Third, Plan §§ 7.3 and 9.2 removed from discharge under the Confirmation Order contingent claims arising under the Indemnification Agreement assumed by G-I. *Id.* at 7-8. Ashland urges that default did not occur until "New G-I" rejected the indemnification demand of Ashland in 2015. *Id.* at 20.

Argument by G-I in Opposition to Cross Motion and in Reply to Opposition

G-I argues in its combined Opposition to Ashland's Cross Motion and Reply to Ashland's Opposition ("G-I Reply Brief") that the Bankruptcy Court has "arising in" jurisdiction to enforce its own Orders, and thus "arising in" jurisdiction over G-I's Renewed Motion. G-I Reply Brief, ECF 11101, at 7 (citing *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 151 (2009); *In re SemCrude,* 2011 WL 4711891 (Bankr. D. Del. 2011), rev'd in part, 2012 WL 5554819 (D. Del. 2012), rev'd 796 F. 3d 310 (3d Cir. 2015); *In re CD Liquidation Co., LLC,* 2012 WL 6737478 (Bankr. D. Del. 2012); *In re Texaco, Inc.,* 182 B.R. 937 (Bankr. S.D.N.Y. 1995)). G-I argues that Ashland overstates this Court's ruling in the Remand Opinion and that, even if the Court found that the "whole" of the ISP litigation in which Ashland asserted primarily state law claims belongs in State

Court, G-I's Motion to enforce the Confirmation Order is a procedurally distinct, merits-based request not addressed previously by this Court or the District Court that should be heard by the Bankruptcy Court. *Id.* at 7, 10. To this end, G-I argues that law of the case doctrine does not apply because only issues actually decided or necessarily decided by implication are barred from relitigation. *Id.* at 19 (citing *Bouchet v. Nat'l Urban League, Inc.*, 730 F.2d 799, 806 (D.C. Cir. 1984)). In further support G-I asserts that "[t]his Court has not previously determined that is should abstain from deciding debtor G-I's request to construe and enforce the Discharge Injunction as to the prepetition liabilities asserted against it in the ISP Litigation. Accordingly, the law of the case has no bearing on the Renewed Motion." *Id.* at 18.

As a consequence, G-I argues that this Bankruptcy Court has "arising in" and "arising under" jurisdiction over this Renewed Motion and that mandatory abstention under 11 U.S.C. § 1334(c)(2) cannot apply. *Id.* at 12.

As to permissive abstention under 11 U.S.C. § 1334(c)(1), G-I argues that "not one of the relevant factors weighs heavily" in its favor. *Id.* at 13 (emphasis deleted) (citing *In re Global Outreach, S.A.,* 2009 WL 1606-769, at *10 (Bankr. D.N.J. June 8, 2009)). G-I asserts that "by invoking the Court's authority to construe the Confirmation Order, the Renewed Motion seeks to effectuate 'the overriding purpose of the Bankruptcy Code'" – "to relieve debtors from the weight of oppressive indebtedness and provide them with a fresh start," thereby implicating the first and fifth factors. *Id.* at 14. As to the first factor – the effect on the efficient administration of the bankruptcy estate – G-I argues that "the re-assertion of claims based on purported liabilities that were discharged against G-I undermines the very integrity of the Plan and the carefully formed compromises on which the Plan was founded." *Id.* For the same reason, factor five – the degree of relatedness or remoteness of the proceeding to the main bankruptcy case – is satisfied as the

Renewed Motion "is inextricably intertwined with G-I's reorganization and this Court's authority to oversee it." *Id.* G-I asserts "judicial efficiencies and economies" are achieved by this Court deciding the Renewed Motion. Further, this "Court's approximately 16-year track record overseeing the G-I bankruptcy case supports declining [] permissive abstention." The second, third, and fourth factors, the extent to which issues of state law predominate, the difficulty or unsettled nature of the applicable state law and comity, disfavor abstention "because the Renewed Motion is fundamentally an invocation of federal bankruptcy law and this Court's core competencies." *Id.* at 16. In furtherance of such argument, G-I states "[t]o decide G-I's Renewed Motion, the Court need look only to its own order – the Confirmation Order – and various provisions of the Bankruptcy Code, including 11 U.S.C. §§ 101, 524, and 1141." *Id.* G-I notes that the plaintiffs to the state court action, ISP and IES, took part in the bankruptcy proceeding, which resulted in the Confirmation Order without objection, but "now seek to undermine this Court's Plan and Confirmation Order." *Id.* at 17. G-I concludes its argument by providing "there is no reason to defer to the state forum, notwithstanding any assertion by G-I of a bankruptcy discharge defense in a response to the complaint to preserve its rights," as "[t]he mere fact that a New Jersey state court action exists in which certain state-law causes of action have been pled does not justify abstention under the circumstances presented here." *Id.* at 16-17.

G-I argues that the claims of Ashland, even if premised purely on contractual indemnification by virtue of the 1996 Indemnification Agreement, were still discharged by operation of the Confirmation Order, ¶ 76, and Plan, §§ 9.2, 1.1.43 (the latter including "contingent claim[s]") and by the definition of "claim" under 11 U.S.C. 101(5) ("contingent 'right to payment'"). *Id.* at 22 (citing *In re M. Frenville Co.,* 744 F.2d 332, 336 (3d Cir. 1984), *overruled o.g., In re Grossman's, Inc.*, 607 F.3d 114, 121-22 (3d Cir. 2010)). G-I reargues that the claims

of Ashland were *prepetition* on the grounds that IES knew of its jeopardy when it entered the AOC with the EPA in 1999. *Id.* at 23.

G-I argues that Ashland misreads Plan § 7.3 to provide an exception to the proof of claim requirement for contingent and unexpended claims under the 1996 Indemnification Agreement as an executory contract assumed by G-I in its bankruptcy case. *Id.* at 25. G-I argues that the relevant language of § 7.3, in context, requires a proof of claim for contingent claims for prepetition liabilities under an assumed executory contract and that failure to file such proof of claim results in discharge of those prepetition liabilities. *Id.* at 25-27. Similarly, G-I argues that "IES began incurring costs and expenses in connection with compliance with the AOC in 1999," so that that IES clearly had a cognizable prepetition claim prior to the confirmation of G-I's plan. *Id.* at 27.

G-I also argues that the Bar Order has no effect on the subsequent discharge and injunctive provisions of the Confirmation Order and Plan because the Plan's definition of claim and the discharge and injunctive provisions of the Confirmation Order and Plan do not provide for any exceptions related to claims of G-I Affiliates. *Id.* (citing Plan §§ 1.1.43, 9.2, 9.3, Confirmation Order ¶¶ 76, 79).

Argument by Ashland in Reply/Surreply

Ashland observes in its Reply to G-I's opposition to Ashland's Cross Motion and Surreply to G-I's Reply ("Ashland Reply Brief") that G-I filed the instant "enforcement" motion in reaction to Ashland's having filed the State Court Action and has misconstrued the nature of Ashland's claims in the State Court Complaint. Ashland Reply Brief, ECF 11104, at 3. Ashland argues that it is "not asserting environmental liabilities on the part of the G-I debtors" but "that **New G-I** has a **new**, post-confirmation **contractual liability** that did **not** arise prior to or during the bankruptcy case." Ashland Reply Brief, ECF 11104, at 3 (emphases in original). Ashland has had to bear

these costs "because New G-I refuses to indemnify them." Ashland Reply Brief, ECF 11104, at 3-4.

Ashland further argues that the law of the case doctrine bars reconsideration of this Court's decision to abstain from adjudicating the parties' dispute, as such doctrine bars parties from relitigating issues previously raised and actually decided in the same case. *Id.* at 7-8 (citing *Hamilton v. Leavy*, 322 F.3d 776, 786 (3d Cir. 2003)). Ashland takes issue with G-I's assertion that the law of the case doctrine is not applicable because this Court "has not previously determined that it should abstain from deciding debtor G-I's request to construe and enforce the Discharge Injunction as to the prepetition liabilities asserted against it in the ISP Litigation," arguing that this is precisely "what [this] Court decided, and the District Court affirmed." *Id.* at 7 (citing Opposition, at 18). Ashland continues that "[t]he argument that [this] Court's decision to abstain was not a decision to abstain from ruling on the discharge/injunction defense is belied by the plain language of both the Remand Opinion and the Appellate Decision, and by the factual and procedural history of the parties' dispute." *Id.* Ashland notes this Court considered the realities of the chapter 11 cases, the remoteness of this dispute to those cases, whether the State Court was capable of resolving the affirmative defense of the discharge, and G-I's arguments concerning "(i) their Plan Injunction and discharge defenses to the Ashland Parties' state law claims, and (ii) the propriety of exercising federal bankruptcy jurisdiction over the same dispute," and decided to abstain. *Id* at 7-8. Therefore, Ashland concludes that the decision to abstain satisfies the law of the case doctrine, and "must be respected as such." *Id.* at 8.

Next, Ashland argues that there is no arising-in jurisdiction over this dispute, which includes the Renewed motion, and therefore, mandatory abstention is required. Ashland asserts that the parties' dispute concerns state law contract rights, a dispute that could arise outside of

bankruptcy. *Id.* (citing *Stoe v. Flaherty,* 436 F. 3d 209 (3d Cir. 2006); *Gupta v. Quincy Med. Ctr.,* 2017 U.S. App. LEXIS 9814 (1st Cir. 2017)). Ashland continues that the requested relief in the Renewed Motion goes beyond a simple request to interpret the Plan, as New G-I desires adjudication by this Court of the merits of the Ashland Parties' state law Complaint by ruling on the affirmative defenses under the Plan. *Id.* at 9. Ashland asserts that it is unnecessary for this Court to reconsider its own orders to forestall adjudication on a post-confirmation dispute between New G-I and the Ashland Parties. *Id.* Ashland distinguishes *In re SemCrude*, 2011 Bankr. LEXIS 3801 (Bankr. D. Del. Oct. 7, 2011), noting that the respective dispute involved a post-confirmation lawsuit by the debtors' limited partners against SemCrude's executive officers, asserting claims that were previously settled against the same defendants in an action brought by the debtors' post-confirmation litigation trust; Thus, the bankruptcy court was required to determine whether the claims being asserted were property of the bankruptcy estate. *Id.* at 10.

Ashland further notes that in *SemCrude* the dispute was much closer to the proceedings in the main bankruptcy cases, coming approximately one year after confirmation. *Id.* Distinguishing *In re Christ Hosp.*, 2014 U.S. Dist. LEXIS 128409 (D.N.J. Sept. 12, 2014), Ashland asserts that the dispute stemmed from a bankruptcy sale process, the respective claims were Section 363(f) interests, the sale was integral to the bankruptcy case, and the state court lawsuit was filed prior to confirmation. *Id.* at 10-11. Ashland also distinguishes *In re Texaco Inc.*, 182 B.R. 93 (Bankr. S.D.N.Y. 995), stating the respective dispute concerned myriad pre-bankruptcy claims related to non-executory oil and gas contracts, the motion to enforce the plan's discharge provision was filed after lengthy proceedings in state court in consultation with both the bankruptcy court and the state court, and the motion was not filed as a means to obtain reconsideration of arguments previously rejected, which Ashland asserts is the purpose of the present Motion. *Id.* at 11. Ashland concludes

the argument noting that the Renewed Motion is brought in defense of state law claims for breach of an assumed executory contract, was brought nearly a decade after Confirmation, and the Renewed Motion has no existence apart from the underlying dispute. *Id.* Ashland also argues that it is a well-settled rule that executory contracts must be assumed *cum onere*. *Id.* In response to G-I Defendants' assertion that one purpose of chapter 11 is providing a reorganized debtor a fresh state, Ashland argues that New G-I has been given a fresh state, but it comes with the burdens and benefits of an assumed executory contract, here the Indemnification Agreement. *Id.*

Lastly, Ashland argues that the G-I Defendants' Renewed Motion has no effect on the underlying facts and law that support permissive abstention. *Id.* As such, Ashland argues that even if this Court finds it has "arising in" jurisdiction over the Renewed Motion, it should determine permissive abstention is appropriate. *Id.* at 11-12. Ashland asserts that this Court and the District Court have already grappled with whether or not a confirmed plan's discharge and injunctive provision can be enforced, and found the State Court to be fully capable of interpreting and enforcing the Plan Injunction and discharge. *Id.* at 12. Ashland argues that the fact that the same underlying issues are presented under a different procedural posture does not warrant a difference result, and the presence or absence of the permissive abstention factors and whether they favor abstention has already been previously determined. *Id.* at 13. Ashland emphasizes that although the Renewed Motion was filed in the main G-I chapter 11 case, this does not qualify the present Motion as being inextricably intertwined with G-I's reorganization, as such simplistic view ignores the previous findings of this Court and the District Court. *Id.* Ashland distinguishes *Motors Liquidation*, as the case involved a significant threat to the ongoing administration of the estate consisting of over 100 pending actions against the estate and other creditors' rights. *Id.* at 14. In response to G-I Defendants relying on the finding made by the *Motors Liquidation* court that its

"comparable familiarity with the prior proceedings" weighed against abstention, that argument has previously been rejected by this Court and the District Court respecting the instant dispute, and the unique facts in each bankruptcy case coupled with the equitable and discretionary nature of permissive abstention, reliance on specific and unique facts in other cases is of limited utility. *Id.* Ashland concludes that the Renewed Motion raises no arguments that were not already raised in the Remand Motion and in the Appeal, and this Court and the District Court already determined that the State Court was best suited to hear them. *Id.* at 15. As such, the same result is warranted. *Id.* Ashland lastly noted that its Complaint asserts exclusively state law claims, and therefore, was filed in the most appropriate forum to resolve such claims, and the lack of any "unsettled" issues of state law in the parties' dispute was of little importance to Judge Salas' abstention analysis. *Id.*

June 23, 2017 Hearing

G-I commenced the argument that the Motion to Enforce the Plan Discharge and the Plan Injunction is entirely distinct from the state court action that had been removed to federal court and then referred to the bankruptcy court which was the subject of this Court's prior opinion. The removed state court action was larger in scope than what is presently before this Court. This procedural vehicle is a matter of core bankruptcy jurisdiction and device to ensure the Reorganized Debtors' fresh start. G-I contends that this Court's previous December 21, 2016 Remand Opinion should not inform this Court on the present matter because they are an entirely different procedural context. G-I asserts a different analysis is warranted for permissive abstention than this Court previously engaged in for its December 21, 2016 Remand Opinion. G-I asserts that the sole federal question before this Court is what does this Court's "confirmation order mean and what is the impact of the discharge and the plan injunction on claims against the debtor only." June 23, 2017 Hr'g Tr. 11, ECF No. 11106. G-I argues that this

matter is analogous to the *SemCrude* case. G-I emphasizes the well-pleaded complaint rule barred this Court from having jurisdiction as the state court complaint only alleged state law claims and a federal based defense was asserted. Here, however, the well-pleaded complaint rule does not bar this Court from hearing the present Injunction Motion.

G-I further asserted that "the impact is on the reorganized debtor," which could not "have provided $775 million in a trust to pay present and future asbestos claimants unless G-I knew it had "all claims before the Court and a feasible plan of reorganization so that G-I could have a viable business after the bankruptcy." Hr'g Tr. 22. G-I continues that although the creditors have already received distributions under the plan, it is "fundamental to the purpose of the bankruptcy code to protect the reorganized debtor even after … substantial consummation of the plan…" Hr'g Tr. 24. G-I continued by emphasizing various cases that have found Motions to Enforce a Plan Injunction as a core matter, citing *Charter Communications, DC Liquidation Co., AMR* and *Texaco*. G-I argues that *Frenville*, 744 F. 2d 332 (3d Cir. 1984), binding Third Circuit caselaw, that held a contractual indemnity claim is a claim under Section 101(5) of the Bankruptcy Code "and it is a claim that exists from the date of the agreement," which here is 1996 and pre-petition. Hr'g Tr. 28. G-I argued that Ashland's contention that the claim was triggered when the request for indemnification was refused is incorrect. G-I asserts when the claim arose is the dispute between the parties, and the subject of the Superior Court action. G-I continues that even if an event was required to trigger liability, this would have occurred in 1999 when ISP subsidiaries entered into an administrative consent order with the EPA regarding liability on the LCP site – still pre-petition. G-I asserts that Ashland is bringing a contract claim, distinct from environmental claim, under the plan, Section 7.3, thereby implicating the general discharge provision. G-I takes the position that all pre-petition claims were discharged including

Ashland's. G-I also argues that the ISP entities receipt of insurance proceeds demonstrates ISP's knowledge of its liability.

G-I further argued that law of the case, which is a narrowly construed doctrine, is inapplicable from a "hyper technical perspective" because this Court's December 21, 2016 Remand Opinion was a different action from the present matter, and the present matter is a different procedural vehicle. G-I asserts differences include the lack of non-debtors, the lack of state law claims, and the well-pleaded complaint rule being inapplicable. Hr'g Tr. 33.

Ashland commenced its argument by stating that assuming the present Motion is a core proceeding and further assuming that arising in jurisdiction is applicable, this Court's previous decision noted the state court is fully capable of resolving the claims that may require interpretation of the bankruptcy code and confirmed plan, and Judge Salas' decision noted the state court is fully capable of interpreting the plan in connection with new G-I's affirmative defense. Ashland emphasized G-I's statement that this litigation has no impact on creditors, only affecting the reorganized debtor, new G-I, so there is no impact on the distribution creditors received or the bankruptcy estate. Ashland continued that G-I chose to assume the indemnification contract, thereby taking the benefits along with the burdens of the contract. If such contract was not of value to G-I, Ashland asserts the debtor would not have chosen to assume it. Ashland notes that there was no compromise regarding the indemnification agreement, but it was rather assumed by the debtor in its entirety.

Ashland proffered that it distinguishes *Frenville* as that the case did not involve an indemnification agreement, which there was here, but here, it was also assumed. Therefore, the claims that arose from the indemnification agreement must be post-petition because otherwise, new G-I receives all the benefits of the agreement without the burdens. Ashland argues that

under *Frenville* the court must ascertain when a right to payment for an indemnity or contribution claim arises. Ashland asserts here that in 2015 when the DEP and other entities started making claims against it, that triggered Ashland's indemnification claim in this case and as such *Frenville* is consistent with Ashland's current position. Ashland argues that the assumption of the indemnification agreement at confirmation or prior to confirmation is determinative, and therefore, why Ashland's claims under the assumed indemnification agreement are viable.

Ashland referred this Court's attention to Section 7.3 of the Plan, which states in relevant part, "Unless a proof of claim was timely filed with respect thereto, all cure amounts and all contingent reimbursement or indemnity claims for prepetition amounts expended by the non-debtor parties to assumed executory contracts and unexpired leases shall be discharged upon entry of the Confirmation Order." However, Ashland argued that its claims here are not "for prepetition amounts expended," and therefore, a proof of claim was not required.

Ashland continued that insurance proceeds were in recognition of G-I's indemnity obligation, which G-I directed to the ISP entities, realizing this was an expense that had to be reimbursed or indemnified. Otherwise G-I would have kept such proceeds. Ashland posits that under the 1999 administrative order on consent, the only responsibility of ISP and IES was for remedial investigation/feasibility study and that no continuing environmental obligations befell ISP afterwards under the administrative consent. Under the administrative order on consent, Ashland emphasized that its only responsibility was for the remedial investigation and feasibility study, which ISP did and that any expense it had was reimbursed or paid for with insurance proceeds or otherwise.

Ashland noted the findings of Judge Salas that weighed in favor of abstention, including: claims bear only a coincidental relationship to G-I's bankruptcy case; the degree of relatedness and remoteness of ISP's claims to the main bankruptcy case also weigh in favor of abstention; G-I's bankruptcy plan was confirmed some seven years ago and is virtually fully consummated with the exception of certain residual claims; ISP's claims will not affect the distribution of creditors; the needs of G-I's bankruptcy case are minimal because resolution of ISP's claims are unlikely to unduly impact the administration of the estate, the presence of non-debtor parties in the case; the state court is fully capable of resolving claims such as this that may require interpretation of bankruptcy court orders; resolution of ISP's state law claims by the New Jersey Superior Court would serve the goals of judicial economy and comity. Therefore, Ashland urges that even assuming the present motion is a core proceeding and arising in jurisdiction is applicable and mandatory abstention is not appropriate, this Court should find permissive abstention appropriate. Ashland concluded that the same factors exist that existed in this Court's prior decision, so that this Court should permissively abstain from this matter.

Ashland argues here that an executory contract is assumed *cum onere*, or the benefits are taken with the burdens, rather than turning the contract into a unilateral, one-party contract with the benefits, but without the burdens. Ashland further argues that G-I's argument that ISP's indemnification or reimbursement claims are discharged here is contrary to Section 365 of the Bankruptcy Code.

In rebuttal, G-I argued that no state law issues are at play in the present Motion, and therefore, issues of comity are not raised. G-I continued that the state law claims against G-I only exist if "not wiped out by virtue of the bankruptcy plan and discharge." Hr'g Tr. 63. Regarding abstention, G-I emphasized that no unsettled issues of state law have been presented,

which weigh in its favor. Further, BMCA was a defendant in the state court action and is not a debtor, which previously weighed in favor of abstention. However, BMCA is not a party to the present Motion. G-I continued that the position Ashland is taking would upset the entire construct of the bankruptcy plan "by allowing one particular creditor to get special treatment." Hr'g Tr. 67. G-I argues that Ashland inherited a company that has particular liabilities and as a matter of law and equity, they are responsible for such liabilities. G-I concludes that regarding administrative order on consent, the only relevant question for this Court is did ISP know about the potential liability at the time of the plan, which G-I asserts ISP knew, as they were designated as a potentially responsible party by the EPA for the LCP site, a claim that Ashland disputes. Relying on *Frenville*, G-I asserts such liability existed as of the date of the indemnification agreement.

G-I argued that the ISP entities knew there was a potential liability and a potential claim under the indemnification agreement and that it was probable they would incur remedial cost at the LCP site, so ISP should have made an indemnification claim back at the time of the plan. If Ashland had a claim, it should have made that claim at the time of the plan, and that such claim, like any other affiliate or contractual claim, was extinguished by virtue of the plan injunction and the discharge.

Ashland's Brief Status Update

Ashland filed a brief status update regarding the remanded proceedings in the Superior Court of New Jersey, Morris County, Law Division dated November 21, 2017, indicating that the case has been designated a complex commercial case assigned to the Honorable Frank J. DeAngelis, J.S.C. Ashland Brief Status Update, ECF 11112, at 1. Ashland stated that G-I Holdings answered Plaintiffs' Complaint asserting, *inter alia*, discharge in bankruptcy as an affirmative

defense. *Id.* Ashland filed a renewed Motion to Proceed Summarily pursuant to New Jersey Court Rule 4:67, which was denied, but notwithstanding the denial, at a case management conference after oral argument, Judge DeAngelis entered a case management order which according to Ashland places the parties on a fast track toward resolution of the dispute. *Id.* Further, Defendant non-debtor BMCA filed a Motion to Dismiss, which was also denied by the state court. *Id.* Ashland argues that the State Court proceedings will continue regardless of further developments in the bankruptcy court, as BMCA was not party to the G-I bankruptcy proceedings. G-I's third affirmative defense reads, "The ISP Parties' claims are barred, in whole or in part, by the bankruptcy discharge provided to G-I Holdings when G-I Holdings' chapter 11 bankruptcy plan was confirmed on November 12, 2009." *Id.* at 1-2. Ashland asserts that "the discharge defense is presently before the New Jersey State Court in the form of the G-I Defendants' affirmative defense and may soon be the subject of motion practice in that forum so that there is no legitimate rationale for litigating the identical issue in two forums. *Id.* at 2.

G-I Holding's Response to the ISP Parties' Letter

G-I Holdings asserts in a letter to this Court dated November 27, 2017 that Ashland's November 21, 2017 letter does not indicate how the described events in the ISP Litigation have any bearing on this Court's consideration of the pending motions and "[f]or that reason alone, it should not be considered by the Court in ruling on the Renewed Motion and Cross-Motion." G-I Response Letter, ECF 11111, at 1. G-I further asserts that the ISP Parties appear to suggest this Court should exercise permissive abstention in light of the events in the State Court, but such events do not change the fact that the ISP Parties have failed to meet their burden because not one of the relevant factors for permissive abstention weigh heavily in favor of permissive abstention. *Id.* at 1-2.

G-I continues that the ISP Parties mischaracterize the State Court proceeding as on a "fast track" when the State Court's November 17, 2017 Case Management Order makes plain, discovery in the state court litigation is scheduled to last for nearly a year, and a trial date has not even been set. *Id.* at 2. The litigation remains assigned to Track IV in State Court, which G-I argues is the longest available track in this state, reserved for only the most complex disputes. *Id.* G-I continued that the ISP Parties have long maintained that the availability of summarily proceeding weighed in favor of abstention, but such motion has been denied by the state court and Judge DeAngelis explained in his denial that the litigation "is incongruent with the fast track nature of summary proceedings which are typically reserved for more clearcut matters." *Id.* (citing Exhibit A, Transcript of Motion Hearing dated November 17, 2017, at 97:11-12).

Next, G-I takes issue with ISP Parties characterization of G-I's assertion in state court of the bankruptcy discharge as an affirmative defense to suggest that the scope of the discharge in G-I's Plan of Reorganization is being simultaneously litigated in both courts. *Id.* G-I argues that its counsel has always been unequivocal that the bankruptcy discharge affirmative defense has only been raised as a means to preserve G-I's bankruptcy discharge and injunction arguments, and G-I would pursue them only if necessary following a ruling on the Renewed Motion. *Id.* At the State Court November 17, 2017 Hearing, G-I advised that the bankruptcy court would consider the bankruptcy issues first, explaining to the state court it "emerged from bankruptcy in 2009 with a discharge and an injunction under the plan that bars the [ISP Parties'] claim. We don't have to hear that today. That is subject of a motion that is currently pending in the Bankruptcy Court." *Id.* (citing Ex. A, at 53:23-60:2). As such, G-I disputes the ISP Parties' suggestion that G-I is "litigating the identical issue in two forums." *Id.*

Lastly, G-I argues that Ashland's suggestion that the State Court's denial of BMCA's motion to dismiss should inform this Court in electing whether to grant the Renewed Motion is meritless and should be categorically rejected. *Id.* G-I claims the ISP Litigation proceeding against BMCA, a party without a role in the Renewed Motion and which was not and is not a debtor, is irrelevant. *Id.* at 2. G-I again urges that this Court has "arising in" jurisdiction to consider the Renewed Motion and should not permissively abstain from doing so. *Id.* at 3.

LEGAL STANDARDS

1. Bankruptcy Court Jurisdiction Generally

Pursuant to 28 U.S.C. §§ 1334 and 157 and the Standing Order of Reference entered on September 12, 2012, bankruptcy jurisdiction extends to four types of title 11 matters pending referral from the District Court: (1) cases "under" title 11; (2) proceedings "arising under" title 11; (3) proceedings "arising in" a case under title 11, and (4) proceedings "related to" a case under title 11. *See Stoe v. Flaherty,* 436 F.3d 209, 261 (3d Cir. 2006).

The *Stoe* court further clarified:

> The category of cases "under" title 11 "refers merely to the bankruptcy petition itself." A case "arises under" title 11 "if it invokes a substantive right provided by title 11." Bankruptcy "arising under" jurisdiction is analogous to 28 U.S.C. § 1331, which provides for original jurisdiction in district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States." The category of proceedings "arising in" bankruptcy cases "includes such things as administrative matters, orders to turn over property of the estate and determinations of the validity, extent, or priority of liens." Proceedings "arise in" a bankruptcy case, "if they have no existence outside of the bankruptcy." Finally, a proceeding is "related to" a bankruptcy case "if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."

Id. (internal citations and footnote omitted).

Further, the Third Circuit in *In Resorts International* stated:

> Cases under title 11, proceedings arising under title 11, and proceedings arising in a case under title 11 are referred to as "core" proceedings; whereas proceedings

> "related to" a case under title 11 are referred to as "non-core" proceedings. Congress vested the bankruptcy courts with full adjudicative power with regard to "core" proceedings, subject to appellate review by the district courts. 28 U.S.C. §§ 157(b)(1), 158(a), (c). At the same time, it provided that, for 'non-core' proceedings that are otherwise related to a case under title 11, the bankruptcy court 'shall submit proposed findings of fact and conclusions of law to the district courts' subject to de novo review by that court." 28 U.S.C. § 157(c)(1).

Resorts Int'l, 372 F.3d 154, 162 (3d Cir. 2006) (internal citation omitted).

Accordingly, bankruptcy judges maintain the power to adjudicate all core proceedings pursuant to 28 U.S.C. § 157(b)(1). *See* 28 U.S.C. § 157(b)(2) (enumerating a list of core proceedings). The Third Circuit has concluded that a proceeding is core under § 157(b)(1) "if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Marcus Hook Dev. Park, Inc.,* 943 F.2d 261, 267 (3d Cir. 1991) (citing *Beard v. Braunstein,* 914 F.2d 434, 444 (3d. Cir. 1990)).

Alternatively, "proceedings 'related to' a case under title 11 are referred to as 'non-core' proceedings." *Resorts Int'l,* 372 F.3d at 162. Bankruptcy judges may hear non-core proceedings which are related to a case under title 11 pursuant to 28 U.S.C. § 157(c)(1). The test for "related to" jurisdiction in the Third Circuit is "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984), *overruled on other grounds by Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995). "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.* In *Resorts International*, the Third Circuit found that although bankruptcy courts have jurisdiction to hear a matter when its outcome "could conceivably have any effect on the estate being administered in bankruptcy," the bankruptcy court's jurisdiction "does not extend

indefinitely, particularly after the confirmation of a plan and the closing of a case." 372 F.3d at 165 (citing *Donaldson v. Bernstein,* 104 F.3d 547, 553 (3d. Cir. 1997)). The Third Circuit noted in *Stoe* and *Resorts International* that "[f]or 'related to' jurisdiction to exist at the post-confirmation stage, 'the claim must affect an integral aspect of the bankruptcy process—there must be a close nexus to the bankruptcy plan or proceeding.'" *Stoe,* 436 F.3d at 216 n.3; *Resorts Int'l,* 372 F.3d at 167. The Third Circuit noted that "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Resorts Int'l,* 372 F.3d at 167. However, "the critical component of the *Pacor* test is that 'bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor.'" *Resorts Int'l,* 372 F.3d at 164 (quoting *Celotex Corp. v. Edwards,* 514 U.S. 300, 308 n.6, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995)).

In *Resorts International,* the debtor's reorganization plan resulted in the creation of a Litigation Trust. 372 F.3d at 158–59. The Trust was assigned claims originally held by the debtor against Donald J. Trump and affiliated entities, arising from Trump's 1988 leveraged-buy-out of the Taj Mahal Resort. *Id.* Following a post-confirmation settlement between the Trust and the Trump defendants, the Trustee brought a malpractice action against the defendant accountant firm that was retained to provide auditing and tax-related services to the Trust. *Id.* The accounting firm challenged the bankruptcy court's jurisdiction. *Id.* at 159. On the issue of "related to" jurisdiction, the Third Circuit found that the malpractice action "lacks a close nexus to the bankruptcy plan or proceeding and affects only matters collateral to the bankruptcy process." *Id.* at 169. The court noted that the resolution of the malpractice claims would only have an "incidental effect on the reorganized debtor," but would not affect the estate or interfere with the implementation of the reorganization plan. *Id.*

By contrast, in *In re Shenango Grp. Inc.,* the issue was whether the reorganized debtor was obligated under the confirmed chapter 11 plan to fully fund its pension plan to cover an increase in benefits to certain beneficiaries. 501 F.3d 338, 341 (3d Cir. 2007). Certain beneficiaries objected to the reorganized debtor's approval of a pension plan, which was not fully funded, on the basis that the confirmation plan imposed such an obligation. *Id.* at 342. The plaintiffs filed motions to reopen the bankruptcy case and to compel the reorganized debtor to comply with the confirmation plan's provisions. *Id.* The bankruptcy court noted that "the parties relied upon the text of the Reorganization Plan to support their respective positions in the funding dispute." *Id.* Looking to the history of the negotiations relating to the debtor's reorganization and the provisions in the plan itself, the bankruptcy court determined that the reorganized debtor was required to fund the pension plan at least up to the value of the benefits. *Id.* at 343. The bankruptcy court reached this determination, in part, to protect the beneficiaries from dilution of their interests under the plan. *Id.* at 343. The district court adopted the bankruptcy court's opinion and recommendation and an appeal followed. *Id.* On appeal, the reorganized debtor argued that the bankruptcy court lacked "related to" jurisdiction to decide the dispute post-confirmation. *Id.* Distinguishing *Resorts International,* the Third Circuit reasoned that "the dispute did have a 'close nexus' to the bankruptcy under Resorts [International] as its resolution required the court to interpret the plan's provision relating to the obligation of the debtor, who was a party to the suit, to fund pension benefit increases." *In re Seven Fields Dev. Corp.,* 505 F.3d 237, 260 n.21 (3d. Cir. 2007) (discussing the Third Circuit's holding in *In re Shenango Grp.*).

Similarly, in *In re Sportsman's Warehouse, Inc.*, the Bankruptcy Court for the District of Delaware held that litigation regarding an assumption of a lease agreement in a Chapter 11

confirmation order conferred "related to" jurisdiction on the bankruptcy court because "[r]esolution of the various defenses that [Debtor] asserts...ultimately requires the court to interpret, validate, and enforce the Assumption Order...[and] [w]ell settled law supports this court's jurisdiction to interpret its own orders." 457 B.R. at 387.

2. Law of the Case

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Daramy v. Attorney Gen. of the U.S.*, 365 F. App'x 351, 354 (3d Cir. 2010) (quoting *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 816 (1988)) (further citations omitted); *see also ACLU v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008). "'Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997) (quoting 18 Charles A. Wright, Arthur R. Miller, Edward Cooper, *Federal Practice and Procedure* § 4478 at 788 (1981)). "The doctrine is designed to protect traditional ideals such as finality, judicial economy, and jurisprudential integrity." *In re City of Phila. Litig.*, 158 F.3d 711, 717-18 (3d Cir. 1998).

"The law of the case doctrine, however, acts to preclude review of only those legal issues that the court actually decided, either expressly or by implication; it does not apply to dicta." *Id.* at 718. Nor does the law of the case apply between separate actions. *See Daramy*, 365 F. App'x at 354-55.

3. Quasi-Estoppel

Quasi-estoppel is different from "garden-variety" equitable estoppel. *In re Price*, 361 B.R. 68, 78–79 (Bankr. D.N.J. 2007) (Kaplan, J.). Equitable estoppel is "an equitable doctrine, founded

in the fundamental duty of fair dealing imposed by law, that prohibits a party from repudiating a previously taken position when another party has relied on that position to his detriment." *Capitalplus Equity, LLC v. Prismatic Dev. Corp.*, No. CIV. A. 07-321 (WHW), 2008 WL 2783339, at *3 (D.N.J. July 16, 2008) (quoting *Casamasino v. City of Jersey City*, 158 N.J. 333, 354 (N.J. 1999) (further citations omitted)). In contrast, the doctrine of *quasi-estoppel* has no requirement of a change in position in reliance upon another's prior conduct. *Price*, 361 B.R. at 78–79 (citing *In re Guterl Special Steel Corp.*, 316 B.R. 843, 856 (Bankr. W.D. Pa. 2004)).

As noted by the court in *In re Price*:

> The doctrine, which has its basis in equity, precludes a party from asserting, to another's prejudice, a position that is inconsistent with a previously-held position. *See Erie Telecommunications, Inc. v. City of Erie,* 659 F.Supp. 580, 585 (W.D.Pa.1987). The doctrine applies where it would be unconscionable to permit a person to maintain a position inconsistent with one in which he acquiesced or where he accepted a benefit. *Id.* The "conscience of the court" is repelled by the inconsistency. In common parlance, quasi-estoppel translates into the maxim that "one cannot blow both hot and cold". *Guterl Special Steel, supra,* 316 B.R. at 856 *(quoting, Erie Telecommunications,* 659 F.Supp. at 585). Another court has explained the principal in even clearer terms: "one cannot eat his cake and have it too". *Western Resources, Inc. v. Union Pacific Railroad Co.,* 2002 WL 1462004 (D.Kan.2002).

361 B.R. 68, 79 (Bankr. D.N.J. 2007) (Kaplan, J.).

4. Effect of Confirmation of a Plan

Section 1141 of the Bankruptcy Code describes the effect of confirmation of a plan in a chapter 11 case. Pursuant to Section 1141(a):

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a).

A bankruptcy court's order of confirmation is treated as a final judgment with *res judicata* effect. *In re G–I Holdings, Inc.*, 514 B.R. 720, 747–48 (Bankr. D.N.J. 2014) (Gambardella, J.), *aff'd,* 654 F. App'x 571 (3d Cir. 2016) (citing *Stoll v. Gottlieb,* 305 U.S. 165, 170–71 (1938); *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 138–39 (2009) (holding that once an order becomes final, it is *res judicata* as to parties and those in privity with them)).

Further, Section 1141 (d)(1) provides:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—
>
> (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
>
> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan; and
>
> (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

11 U.S.C. § 1141(d)(1).

"Principal among the effects of the determination when a claim arises is the effect on the dischargeability of a claim." *In re Grossman's Inc.*, 607 F.3d 114, 122 (3d Cir. 2010). A "debt" is defined as liability on a "claim" under Section 101(12), which in turn is defined as a "right to payment" under Section 101(5). *Id.*

5. Definition of "Claim" Under the Bankruptcy Code

The term "claim" is defined in the Bankruptcy Code at Section 101(5) as follows:

> (5) The term "claim" means—

> (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; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

The term "claim" has been defined very broadly. The Third Circuit has recognized the intentionally broad definition of "claim" in *In re Grossman's Inc.*, 607 F.3d 114 (3d Cir. 2010). *Grossman's* overruled the "accrual test" in *In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984), finding that it imposed "too narrow an interpretation of a 'claim' under the Bankruptcy Code" and holding that "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." *Grossman's,* 607 F.3d at 121, 125 (citing 11 U.S.C. § 101(5)).

In the contractual indemnification context, a contingent right to payment of an indemnification claim under an express agreement exists "upon the signing of the agreement." *Frenville*, 744 F.2d at 336. Therefore, if the contract was executed prior to the petition date, any damages arising from the contract constitute "claims" within the meaning of the Bankruptcy Code and are therefore subject to discharge. *See In re Huffy Corp.*, 424 B.R. 295, 305 (Bankr. S.D. Ohio 2010) (finding that retailer was aware, pre-petition, of potential tort liability from retailer's sale of debtor-manufacturer's products such that the retailer could have filed a contingent, prepetition claim for indemnity and could have filed a proof of claim). This is so even if the obligations under the contract arose post-confirmation. *See In re Chateaugay Corp.*, 102 B.R. 335, 352 (Bankr. S.D.N.Y. 1989) ("... Indemnity Loss claims which arise as a result of post-confirmation triggering or disqualifying events, although presently contingent, cannot escape unaffected by the Debtors'

reorganization, and are thus subject to a confirmed plan of reorganization in these Chapter 11 cases. Therefore, post-confirmation triggering or disqualifying events shall give rise to 'claims' which are cognizable in these reorganization proceedings.")

6. Assumption of Executory Contracts

Section 365 authorizes trustees or debtors-in-possession to assume or reject any executory contract or unexpired lease of the debtor, subject to court approval. *In re Kiwi Int'l Air Lines, Inc.*, 344 F.3d 311, 317-18 (3d Cir. 2003) (citing 11 U.S.C. § 365(a)); *In re Carlisle Homes, Inc.*, 103 B.R. 524, 534 (Bankr. D.N.J. 1988) (Gambardella, J.). In order to assume such an agreement, the debtor-in-possession must cure defaults and provide assurance of future performance. *Kiwi Int'l*, 344 F.3d at 318. Specifically, Section 365 provides, in relevant part:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property . . .;
> >
> > (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> >
> > (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1)).

As the Third Circuit of Appeals explained, "Section 365 enables the [debtor] to maximize the value of the debtor's estate by assuming executory contracts and unexpired leases that benefit

the estate and rejecting those that do not." *In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 298 (3d Cir. 2000) (citing 11 U.S.C. § 365(a)). The purpose of Section 365(b)(1) in particular is "'to restore the debtor-creditor relationship . . . to pre-default conditions,[] bringing the loan back into compliance with its terms.'" *In re DBSI, Inc.*, 405 B.R. 698, 704 (Bankr. D. Del. 2009) (quoting *In re U.S. Wireless Data, Inc.*, 547 F.3d 484, 489 (2d Cir. 2008) (internal citations omitted)). If the debtor satisfies the requirements of Section 362(b)(1) and the debtor's decision to assume such executory contract or unexpired lease is supported by valid business justifications, the executory contract or unexpired lease may be assumed. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136, 162 (D. Del. 2006).

Once an executory contract is properly assumed, the debtor is bound to assume all of its terms *cum onere* – with all of its benefits and burdens. *See N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531-32 (1984). A debtor may not "cherry-pick" the provisions of an assumed contract with which it will comply. *See AGV Prods., Inc. v. Metro-Goldwin-Mayer, Inc.*, 115 F. Supp. 2d 378, 390-91 (S.D.N.Y. 2000); *In re Kopel*, 232 B.R. 57, 63-64 (Bankr. E.D.N.Y. 1999) ("A debtor cannot simply retain the favorable and excise the burdensome provisions of an agreement."); *see also In re Vill. Rathskeller, Inc.*, 147 B.R. 665, 671 (Bankr. S.D.N.Y. 1992)).

7. Mandatory Abstention under 28 U.S.C. § 1334(c)(2)

The doctrine of mandatory abstention derives from 28 U.S.C. § 1334(c)(2), which provides that:

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

28 U.S.C. § 1334(c)(2).

> The Third Circuit has stated that the legislative history of this provision tends to confirm...that, out of deference to state courts and concern over the constitutional validity of the broad statutory reach of bankruptcy jurisdiction, Congress sought to give effect to the preferences of litigants who prefer a state forum, when state court adjudication would not unduly interfere with the administration of the bankruptcy estate.

Stoe, 436 F.3d at 214 n.1.

Therefore courts must abstain from hearing a claim in "non-core" proceedings if: (1) a timely motion is made; (2) the proceeding is based upon a state law claim or state law cause of action; (3) the claim or cause of action is "related to" a case under title 11, but does not "arise under" title 11 or "arise in" a case under title 11; (4) federal courts would not have jurisdiction absent its relation to a bankruptcy case; (5) an action is "commenced" in a state forum of appropriate jurisdiction; and (6) the action can be timely adjudicated in the state forum. *In re Exide Techs.,* 544 F.3d 196, 218 n.14 (3d Cir. 2008); *Stoe,* 436 F.3d at 213; *see also In re Mid–Atlantic Handling Sys., LLC,* 304 B.R. at 121; *In re Marcus Hook Dev. Park, Inc.,* 153 B.R. 693, 701 (Bankr. W.D. Pa. 1993) (both applying a similar test based on pre-*Stoe* case law from federal district courts and bankruptcy courts).

When assessing "timely adjudication" in this context, "[t]he question is not whether the action would be *more quickly* adjudicated in the bankruptcy court than in state court, but rather, whether the action can be *timely adjudicated* in the state court." *Exide Techs.,* 544 F.3d at 218 n. 14 (emphasis in original) (internal citations omitted) ("Here, the state court action was moving along expeditiously; the judge had made clear his intent to move the case forward; and the action had been placed in the docket of the Cook County Circuit Court, designed to facilitate the adjudication of commercial disputes. Accordingly, we believe that this action can be timely adjudicated in the state court."); *see also In re Mid–Atlantic Handling Sys., LLC,* 304 B.R. at 125

("Importantly, notions of comity and judicial economy warrant a conclusion that the state court is the proper forum for adjudicating this dispute. There is no legitimate reason to believe that the necessary time frame will be short-circuited by having the federal court adjudicate this matter. To the contrary, logic dictates that it may take more time to bring this case to trial in federal court because the Court would need time to familiarize itself with the voluminous record and pending motions presently before the state court."); *In re Marcus Hook Dev. Park, Inc.,* 153 B.R. at 702 (rejecting mandatory abstention because the state-law cause of action was "in the preliminary stage," no trial date had been set, and "resolution most likely will take several years," whereas the parallel adversary proceeding in bankruptcy court was "scheduled for trial in approximately three (3) months" and "[a] decision on the merits will be rendered by this court shortly thereafter.").

8. Permissive Abstention under 28 U.S.C. § 1334(c)(1)

The doctrine of permissive abstention, under 28 U.S.C. § 1334(c)(1) provides as follows.

> [e]xcept with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). Under the "permissive abstention" doctrine, bankruptcy courts "have broad discretion to abstain from hearing state law claims whenever appropriate in the interest of justice, or in the interest of comity with State courts or respect for State law." *In re Gober,* 100 F.3d 1195, 1206 (5th Cir. 1996). The decision to exercise permissive abstention is committed to the sound discretion of the court. *See id.* at 1207.

The equitable considerations relevant to determine the appropriateness of equitable remand and permissive abstention under Sections 1452(b) and 1334(c)(1), are essentially identical, and therefore a court's analysis is substantially the same for both types of relief. *See In re Donington,*

Karcher, Salmond, Ronan & Rainone, 194 B.R. at 759–760 (citing *Balcor/Morristown Ltd. P'Ship,* 181 B.R. at 788; *In re Joshua Slocum, Ltd.,* 109 B.R. 101, 105 (E.D. Pa. 1989)).

"The determination by a court of whether to exercise discretionary abstention and remand a matter is 'necessarily fact driven.'" *Mid–Atlantic Handling Sys., LLC,* 304 B.R. at 126 (citing *Balcor/Morristown Ltd. P'Ship,* 181 B.R. at 788). Various factors have been developed for the court to consider when determining whether to exercise its discretionary abstention power. Some courts rely on a twelve-part test, while others utilize a seven-part test. *See In re Vanhook,* 468 B.R. 694, 700–01 (Bankr. D.N.J. 2012).

Although the Third Circuit has not formally adopted either of these sets of factors for analyzing permissive abstention, courts in this Circuit recognize that the "two sets of factors are substantially similar, and courts have stated that not all the factors necessarily need to be considered." *Shalom Torah Ctrs. v. Phila. Indem. Ins. Cos.,* 2011 WL 1322295, at *4 (D.N.J. Mar. 31, 2011). Accordingly, "courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." *In re Earned Capital Corp.*, 331 B.R. 208, 221 (Bankr. W.D. Pa. 2005), *aff'd sub nom. Geruschat v. Ernst & Young LLP*, 346 B.R. 123 (W.D. Pa. 2006), *aff'd sub nom. In re Seven Fields* Dev. Corp., 505 F.3d 237 (3d Cir. 2007).

In deciding whether to abstain from hearing a matter, a court will consider the following factors in the seven-part test: 1) the effect on the efficient administration of the bankruptcy estate; 2) the extent to which issues of state law predominate; 3) the difficulty or unsettled nature of the applicable state law; 4) comity; 5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; 6) the existence of the right to a jury trial; and 7) prejudice to the involuntarily removed defendants. *See Shalom Torah Ctrs.,* 2011 WL 1322295, at *4; *Jazz Photo*

Corp. ex rel. Moore v. Dreier LLP, at *7–8 (D.N.J. 2005); *In re Donington, Karcher, Salmond, Ronan & Rainone,* 194 B.R. at 760.

The twelve part test includes: (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the court's docket; (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. *See In re Earned Capital Corp.,* 331 B.R. 208, 220 (Bankr. W.D. Pa. 2005); *In re Vanhook,* 468 B.R. at 701.

ANALYSIS

A. Jurisdiction

A cursory synopsis of the current procedural posture to the Renewed Motion to Enforce the Discharge Injunction is as follows: The Debtor first raised the discharge injunction as an affirmative defense in state court to the pending litigation by Ashland. The Debtor then raised the issue before the bankruptcy court by removing the state law action to federal court. After this Court remanded the state law action to state court, the Debtor raised the issue before this Court by way of the First Motion to Enforce the Discharge Injunction. As the remand decision was

pending appeal before the District Court, this Court determined that it did not have jurisdiction to decide the motion during the pending appeal. Subsequently, this Court's decision to remand the state court action was affirmed by the District Court. By way of the instant Renewed Motion to Enforce the Discharge Injunction, the Motion is now ripe for review.

Bankruptcy jurisdiction under 28 U.S.C. § 1334 includes the power to adjudicate cases 'under' title 11; and proceedings "arising under," "arising in," or "related to" a case under Title 11. 28 U.S.C. §§ 1334(b), 157(a); *Celotex Corp. v. Edwards,* 514 U.S. 300, 307, 115 S.Ct. 1493 (1995). As previously noted, a case "arises under" title 11 if it invokes a substantive right provided by title 11. Proceedings "arise in" a bankruptcy case, if they have no existence outside of the bankruptcy. Finally, a proceeding is "related to" a bankruptcy case if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. *See Stoe,* 436 F.3d at 261.

Courts "have attempted to balance the need to retain jurisdiction post-confirmation with the need to end the reorganization process at some time" such that "the bankruptcy court's retention of post-confirmation jurisdiction, while limited, exists to ensure compliance with the provisions of title 11 and to ensure the proper execution and consummation of the debtor's plan." *In re Pioneer Inc. Services Co.*, 141 B.R. 635, 641 (Bankr. E.D. Tenn. 1992). The Third Circuit has stated:

> [t]he jurisdiction of the non-Article III bankruptcy courts is limited after confirmation of a plan. But where there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement, retention of post-confirmation bankruptcy court jurisdiction is normally appropriate.

Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.), 372 F.3d 154, 168-69 (3d Cir. 2004). "Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its

business without further supervision or approval. The firm also is without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens." *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991).

As with bankruptcy plan and discharge injunctions, "[a] court retains jurisdiction to enforce its injunctions." *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 916 (7th Cir. 2001); *Napleton Enters., LLC v. Bahary*, Case No. 15 C 3146, 2016 WL 792322, at *6 (N.D. Ill. Mar. 1, 2016) ("[T]he bankruptcy court had jurisdiction to interpret and enforce the discharge injunction."). The U.S. Supreme Court has clearly indicated bankruptcy courts have subject matter jurisdiction to hear matters relating to their own orders. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009) ("[T]he Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders.")

Bankruptcy courts will generally "retain jurisdiction only to the point of substantial consummation of the plan, as that term is defined in § 1101(2) of the Code, and subject to the restrictions in § 1127(b) of the Code." *In re BankEast Corp.*, 132 B.R. 665, 667-68 (Bankr. D.N.H. 1991). "[T]he literal language of Section 1142(b) provides that [the] particular point-in-time when post-confirmation jurisdiction ceases, [is] the point at which a creditor's action will not affect the administration of the plan." *In re Carey Metal*, 152 B.R. 927, 931-32. (Bankr. N.D. Ill. 1993). In *Peerless Weighing*, the Second Circuit stated in a case decided under the Bankruptcy Act, that,

> [s]ince the purpose of reorganization clearly is to rehabilitate the business and start it off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility. It is not consonant with the purposes of the Act, or feasible as a judicial function, for the courts to assume to supervise a business somewhat indefinitely. Nevertheless the court must retain some jurisdiction after confirmation of a plan *to see that it is consummated.* We have, therefore, pointed out the existence of such complementary and auxiliary jurisdiction of the court to protect its

> original confirmation decree, prevent interferences with the execution of the plan, and otherwise aid in its operation.

N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp., 143 F.2d 938, 940 (2d Cir. 1944)(emphasis added).

Enforcing the discharge injunction is within this Court's "core jurisdiction because it is enforcing this Court's confirmation order based on rights provided in the Code: the discharge in 11 U.S.C. § 1141(d) and the discharge injunction in 11 U.S.C. § 524(a)(2)," and therefore, is a proceeding "arising in" a case under title 11. *In re Conseco, Inc.*, 330 B.R. 673, 682 (Bankr. N.D. Ill. 2005) (citing *Kewanee Boiler,* 270 B.R. 912, 918 (Bankr. N.D. Ill. 2002) ("Proceedings to enforce the statutory injunction under § 524(a)(2) are core proceedings under 28 U.S.C. § 157(b)(2)(O).") (citations omitted); *See also In re SemCrude*, 2011 WL 4711891, at *4-5 (Bankr. D. Del. 2011), rev'd in part, 2012 WL 5554819 (D. Del. 2012), rev'd 796 F. 3d 310 (3d Cir. 2015) (finding that the bankruptcy court had core subject matter jurisdiction to enforce the provisions of the confirmation order and confirmed bankruptcy plan); *In re CD Liquidation Co.*, 2012 WL 6737478 at *4, 6 (finding core subject matter jurisdiction to issue an order enforcing confirmation order that released and enjoined claims asserted in district court action); *see also In re CD Realty Partners,* 205 B.R. 651, 655 (Bankr.D.Mass.1997) (stating that a proceeding "to enforce the Court's confirmation order and determine the dischargeability of a debt is a core proceeding"); *In re Pettibone Corp.,* 121 B.R. 801, 805 (Bankr.N.D.Ill.1990) (finding core jurisdiction to enforce the reorganization plan)).

A debtor seeking to assert a "violation of the discharge injunction may *either* 'assert the discharge as an affirmative defense ... in state court' *or* 'bring an Adversary Complaint in bankruptcy court to enforce the statutory injunction under § 524(a)(2) of the Code.'" *In re Conseco, Inc.*, 330 B.R. at 680 (citing *In re Kewanee Boiler Corp.,* 270 B.R. at 918).

28 U.S.C. § 1334(b) confers upon the district and by the standing order of reference upon this Court "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Accordingly, this Court's jurisdiction under the statute is not exclusive. This Court finds that enforcing the discharge injunction is within this Court's "arising in" core jurisdiction, but is also concurrent with the state court's jurisdiction. Citing to the Supreme Court's decision in *Local Loan,* the bankruptcy court in *Kimball Hill* stated that "[w]hile a court cannot confer subject matter jurisdiction on itself, if it has such jurisdiction, it appears that it may retain such…But the court cannot change the fact that such jurisdiction is concurrent, even if its assumed jurisdiction (as was the case here) purports to be exclusive." *In re Kimball Hill, Inc.*, 565 B.R. 878, 890 (Bankr. N.D. Ill. 2017) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 239–42, 54 S.Ct. 695, 78 L.Ed. 1230 (1934); *Olsen*, 559 B.R. at 883–84).

B. Mandatory Abstention

As previously noted, courts must abstain from hearing a claim in "non-core" proceedings if: (1) a timely motion is made; (2) the proceeding is based upon a state law claim or state law cause of action; (3) the claim or cause of action is "related to" a case under title 11, but does not "arise under" title 11 or "arise in" a case under title 11; (4) federal courts would not have jurisdiction absent its relation to a bankruptcy case; (5) an action is "commenced" in a state forum of appropriate jurisdiction; and (6) the action can be timely adjudicated in the state forum. *In re Exide Techs.*, 544 F.3d at 218 n.14; *Stoe*, 436 F.3d at 213; *see also In re Mid-Atlantic Handling Sys., LLC*, 304 B.R. at 121; *In re Marcus Hook Dev. Park, Inc.*, 153 B.R. at 701. Here, the Renewed Injunction Motion is a "core" proceeding, and therefore, mandatory abstention is inapplicable to the present proceeding.

C. Permissive Abstention

As previously discussed, bankruptcy courts have broad discretion to abstain from hearing state law claims under the permissive abstention doctrine, and such decision is committed to the sound judgment of the court. *See In re Gober,* 100 F.3d at 1206. Under the "permissive abstention" doctrine, bankruptcy courts "have broad discretion to abstain from hearing state law claims whenever appropriate in the interest of justice, or in the interest of comity with State courts or respect for State law." *Id.* The determination of whether to exercise discretionary abstention is fact driven, and the factors should be applied flexibly.

"The United State Supreme Court has found that permissive abstention is most appropriate when a case is dominated by state law issues or raises unsettled issues of state law." *In re U.S.H. Corp. of New York*, 280 B.R. 330, 337 (Bankr. S.D.N.Y. 2002) (citing *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483, 60 S.Ct. 628, 84 L.Ed. 876 (1940)). As noted in this Court's December 21, 2016 Remand Opinion, the analysis is substantially grounded in equity. *In re G-I Holding Inc.,* 564 B.R. at 249.

The seven-part test includes the following factors: 1) the effect on the efficient administration of the bankruptcy estate; 2) the extent to which issues of state law predominate; 3) the difficulty or unsettled nature of the applicable state law; 4) comity; 5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; 6) the existence of the right to a jury trial; and 7) prejudice to the involuntarily removed defendants. *See Shalom Torah Ctrs.,* 2011 WL 1322295, at *4; *Jazz Photo Corp. ex rel. Moore v. Dreier LLP,* at *7–8 (D.N.J. 2005); *In re Donington, Karcher, Salmond, Ronan & Rainone,* 194 B.R. at 760.

The twelve-part test includes: (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues

predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the court's docket; (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. *See In re Earned Capital Corp.,* 331 B.R. 208, 220 (Bankr. W.D. Pa. 2005); *In re Vanhook,* 468 B.R. at 701.

Consistent with the District Court's Remand Opinion, this Court's analysis will refer to the factors noted therein. Courts have noted that bankruptcy court post-confirmation jurisdiction is generally retained only to the point of substantial consummation of the plan and post-confirmation jurisdiction generally ceases when actions will no longer affect administration of the plan. *See In re BankEast Corp.*, 132 B.R. 665, 667-68 (Bankr. D.N.H. 1991); *In re Carey Metal*, 152 B.R. 927, 931-32. (Bankr. N.D. Ill. 1993); *Pettibone Corp. v. Easley*, 935 F.2d at 122; *N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944).

Regarding the factor of the effect on the efficient administration of the bankruptcy estate, this Court and the District Court have previously addressed this factor. Judge Salas, citing this Court's remand decision, upheld this Court's finding that the resolution of "ISP Appellees' claims "will not affect the distribution to creditors and [are] unlikely to unduly impact the

administration of the estate..." *In re G-I Holdings Inc.*, No. 01-30135 (RG), 2017 WL 1788656, at *14 (D.N.J. May 5, 2017). The District Court continued that "[i]ndeed, G-I Appellants virtually conceded this point by failing to indicate how G-I's *bankruptcy estate* would be affected..." *Id.* Then, the District Court stated in considering the factor of the degree of relatedness and remoteness of ISP Appellees' claims to the main bankruptcy case, that "G-I's bankruptcy plan was confirmed some seven [now eight] years ago and is virtually fully consummated with the exception of certain residual claims proceedings" and that, "this factor also substantially weighs in favor of abstention." *Id.* The reference to "virtually fully consummated" the court notes is a higher threshold than that of "substantial consummation,"[13] where bankruptcy court jurisdiction generally ceases.

Regarding the extent to which issues of state law predominate, the question presented before the state court, and even this Court, is predominately a state law determination – "when does an indemnification claim arise under state law?" The timing of when the claim arises will determine whether the discharge and plan injunction bars recovery. This is a specific question of state law requiring a separate analysis in addition to determining whether the discharge and plan injunction bars such a claim.

In the hearing on the Renewed Motion to Enforce the Discharge Injunction and the Cross-Motion for Abstention, the following discourse related to the claims occurred:

The Court: So your clients reject Ashland's contention that the claim was triggered when the request for indemnification was refused []?

[13] "Substantial consummation" is defined in the Bankruptcy Code as: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

Mr. Rossman (for G-I): Correct. That's not the law

The Court: But that is the dispute between the parties --

Mr. Rossman: Correct.

The Court: -- as to whether it is -- when the claim arose?

Mr. Rossman: Correct. But --

The Court: That is the subject of the Superior Court action or claims?

Mr. Rossman: That's right, Your Honor. We think that's dead wrong on the law…

June 23, 2017 Hr'g Tr., ECF 11108, T:29:1-14. G-I in the same hearing before this Court stated, "[the State Superior Court] case will continue except for the question of who's to enforce the plan and we now have put before the Court not the whole case, [], but the solely federal question of what does Your Honor's confirmation order mean and what is the impact of the discharge and the plan injunction on claims against the debtor only." *Id.*, T:11:19-25.

In *In re Kmart Corp.*, the bankruptcy court noted "that bankruptcy plans of reorganization, no matter how complicated, are contracts which can be interpreted by other courts of competent jurisdiction." 307 B.R. 586, 596 (Bankr. E.D. Mich. 2004) (citing *In re Beta Internat'l, Inc.,* 210 B.R. 279, 285 (E.D.Mich.1996) ("[i]nterpretation of a Chapter 11 plan is basically a matter of contractual interpretation"). "Orders of bankruptcy courts, like those of other courts, can also be interpreted by other courts of competent jurisdiction. Thus, state courts are qualified to interpret the language of bankruptcy plans and orders and routinely engage in such interpretation." *Id.* (citing *Icco v. Sunbrite Cleaners, Inc. (In re Sunbrite Cleaners, Inc.),* 284 B.R. 336, 342 (N.D.N.Y.2002) (state courts are capable of interpreting plans of

reorganization)). As such, in *In re Stabler*, the Bankruptcy Appellate Panel of the Eighth Circuit held:

> [t]he Debtors' first contention, that the state court cannot determine whether a debt has been discharged in bankruptcy, is legally flawed... Aside from determinations of dischargeability under 11 U.S.C. § 523(a)(2), (4), or (6), state courts have concurrent jurisdiction to determine the dischargeability of a debt. Here, the issue before the state court (and bankruptcy court) was … whether [the debts] constituted post-petition debts outside the penumbra of the discharge and discharge injunction…the Debtors' discharge and the discharge injunction were at issue in the state court litigation."

In re Stabler, 418 B.R. 764, 770–71 (B.A.P. 8th Cir. 2009). As noted in this Court's December 21, 2016 Remand Opinion:

> "Nor does this Court find that the claims are too complex for the state court forum. G–I asserts that this matter involves complex bankruptcy issues based upon its affirmative defense that the Confirmation Order and Discharge Injunction bar Ashland's claim. However, the Superior Court is fully capable to look to the Plan's discharge provisions to determine whether G–I's affirmative defense applies. Indeed, "discharge in bankruptcy" is an expressly enumerated affirmative defense under the New Jersey Rules of Court. N.J. Ct. R. 4:5–4. Further, state courts are often called upon, and are indeed sometimes obligated to interpret federal statutes. To the extent that the state court may need to interpret the Plan in connection with G–I's affirmative defenses, this Court finds that the Superior Court of New Jersey is fully capable of doing so. Finally, the fact that G–I's Plan was confirmed some seven years ago and is nearly fully consummated substantially supports abstention. . . ."

In re G-I Holdings, Inc., 564 B.R. 217, 253–54 (Bankr. D.N.J. 2016), *aff'd sub nom. In re G-I Holdings Inc.*, No. 01-30135 (RG), 2017 WL 1788656 (D.N.J. May 5, 2017) (citing *see, e.g., Manhattan Woods Golf Club v. Arai,* 312 N.J.Super. 573, 576–78, 711 A.2d 1367 (App. Div. 1998) (state court interpreted confirmation order to determine whether it had jurisdiction); *Wilkerson v. C.O. Porter Machinery Co.,* 237 N.J.Super. 282, 285–88, 293–99, 567 A.2d 598 (Law Div. 1989) (state court interpreting bankruptcy sale order and code provisions)). Further, as cited with approval in Judge Salas's Opinion, this Court has previously stated in the December 21, 2016 Remand Opinion that "[a]lthough resolution of the action may necessarily require interpretation of the Bankruptcy Code and Confirmed Plan, the state court is fully capable of

resolving claims, such as this, that may require interpretation of Bankruptcy Court orders." *In re G-I Holdings, Inc.*, 2017 WL 1788656, at *5 (citing *In re G-I Holdings, Inc.*, 564 B.R. at 254).

Another factor addresses the difficulty or unsettled nature of the applicable state law. The District Court noted that as to this factor, not all of the permissive abstention factors necessarily need to be considered. *Id.* at 14 (citing *Monmouth Inv'r, LLC v. Saker*, No. CIV.09-3063 (FLW), 2010 WL 143687, at *4 (D.N.J. Jan. 12, 2010). The District Court also noted, the state court action has been assigned to the Superior Court of New Jersey's Complex Business Litigation Program, which the District Court expressed "was created specifically for specialized attention to commercial cases, such as the instant matter." *Id.* at *12. G-I's Response to Ashland's Status Letter provided, "[t]he ISP Litigation also remains assigned to Track IV in State Court, which is the longest available track in this state and is reserved for only the most complex disputes." G-I Response Letter, ECF 11111, at 2. In doing so, "the State Court denied the ISP Parties' motion to proceed summarily." *Id.* The District Court noted that it "finds that the Adversary Proceeding is, indeed, a complex case suitable for the [Superior Court of New Jersey's Complex Business Litigation] Program." *In re G-I Holdings*, 2017 WL 1788656, at *12, n. 17. In the Response to the Status Letter, G-I continued that "Judge DeAngelis specifically explained that resolution of the issues in the ISP Litigation 'is incongruent with the fast track nature of summary proceedings which are typically reserved for more clear-cut matters.'" G-I Response Letter, ECF 11111, at 2 (citing Exhibit A at 97:11-12). This Court need not quantify the exact extent of difficulty of the applicable state law, but needless to say, the applicable state law has been characterized at a minimum as "complex."

Regarding the factor of comity, the District Court in the Remand Opinion acknowledged that resolution of ISP appellee's claims, characterized as involving a "state law breach of contact

claim and other related relief", by the New Jersey Superior Court would serve the goals of judicial economy and comity. As the claims involve a "state law breach of contract claim and other related relief, which the state court is fully capable of resolving", the District Court stated it is "mindful that resolution of ISP Appellees' state law claims by the New Jersey Superior Court would serve the goals of judicial economy and comity." *In re G-I Holdings*, 2017 WL 1788656, at *14 (citing *Triple T Constr. V. Twp. Of W. Milford*, No. 14-2522, 2017 WL 123434, at *4 (D.N.J. Jan. 12, 2017) (stating that remanding to state court to resolve state claims "[w]ould serve the goals of judicial economy and comity by allowing the New Jersey courts to apply New Jersey law")). As such, the District Court concluded that this "factor weighs in favor of abstention." *Id.*

Regarding the factor of the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, the District Court stated that "'the degree of relatedness and remoteness of [ISP Appellees' claims] to the main bankruptcy case' also weighs in favor of abstention." *Id.* (emphasis in original). This finding remains the same although the procedural vehicle before this Court has changed to a Motion to Enforce the Discharge and Plan Injunction. Considering the "needs" of G-I's bankruptcy case, the District Court noted that the "Plan was confirmed some seven [now eight] years ago and is nearly fully consummated with the exception of certain residual claims proceedings" and that "the needs of G-I's bankruptcy case are minimal because resolution of ISP Appellees' claims would not affect distributions to creditors and is unlikely to unduly impact administration of the estate." *Id.* at 11, 14. The District Court stated that "the Court finds it telling that, when asked by the Bankruptcy Court about the impact of ISP Appellees' claims on G-I's bankruptcy estate, G-I Appellants could point the Bankruptcy Court only to the impact on the legally distinct 'reorganized debtor – not the bankruptcy estate." *Id.* As

indicated in *In re Lacy*, 183 B.R. 890, 891-92, fn. 1 (Bankr. D. Colo. 1995), the reorganized debtor is a new legal entity. Furthermore, the reorganized "debtor may go about its business without further supervision or approval," as the jurisdiction of the bankruptcy court is limited after confirmation, and continues to decrease. *Pettibone Corp. v. Easley*, 935 F.2d at 122. The District Court noted the legal distinction between the reorganized debtor and the bankruptcy estate and added such "observations to underscore the propriety of [this Court's] findings regarding G-I's bankruptcy" in its remand decision. *In re G-I Holdings*, 2017 WL 1788656, at *11, n. 16. In finding the state court the appropriate forum for resolution of the present claims, the District Court continued that:

> Here, the Superior Court of New Jersey is fully capable of "timely adjudicat[ing]" the Adversary Proceeding because it 'primarily concerns resolution of a state law breach of contract claim and other related relief'...Not only is 'interpretation of contracts [] a matter of state law,'... but the New Jersey Rules of Court specifically permit parties to assert a 'discharge in bankruptcy' as an affirmative defense...Since the Bankruptcy Code treats a confirmed plan of reorganization as a 'contract that is binding on all parties, debtor and creditors alike,' ... the Court sees no reason why the Superior Court of New Jersey cannot interpret G-I's Plan to determine whether ISP Appelles' claims have been discharged."
>
> Indeed, New Jersey courts routinely resolve complicated state-law matters that intersect with the Bankruptcy Code's discharge provisions...

Id. at *11-12 (internal citations omitted).

This Court notes that the issue of the Discharge and Plan Injunction presented before this Court in this Renewed Motion has already been raised by G-I in state court as an affirmative defense to the state court action, so that it is pending in two forums. In *In re Kimball Hill*, the bankruptcy court noted that "in *Local Loan*, had the bankruptcy court declined to exercise jurisdiction, the parties would be forced to continue to litigate in a multitude of state courts," indicating the Court's deference to the efficiency and cost-effectiveness of a single point of resolution. *In re Kimball Hill, Inc.*, 565 B.R. 878, 889–91 (Bankr. N.D. Ill. 2017) (citing *Local*

Loan Co. v. Hunt, 292 U.S. 234, 241). Such are not the facts here. Coupled with the fact that this court along with the District Court entered the Confirmation Order in the G-I case in 2009, and the bankruptcy courts' jurisdiction post-confirmation continuously decreases, the circumstances surrounding the present matter support permissive abstention. Here, comity as well as judicial economy and efficiency supports this court's abstention as well. The debtors have raised the issue of the discharge and plan injunction in the state court prior to raising it before the bankruptcy court. In the December 21, 2016 Remand Opinion, this Court noted:

> "[t]his action primarily concerns resolution of a state law breach of contract claim and other related relief. Although resolution of the action may necessarily require interpretation of the Bankruptcy Code and Confirmed Plan, the state court is fully capable of resolving claims, such as this, that may require interpretation of Bankruptcy Court orders. Further, the resolution of this case will not affect the distribution to creditors and is unlikely to unduly impact the administration of the estate."

In Re G-I Holdings, Inc., 564 B.R. 217, 254 (Bankr. D.N.J. 2016), *aff'd sub nom. In re G-I Holdings Inc.*, No. 01-30135 (RG), 2017 WL 1788656 (D.N.J. May 5, 2017). This continues to remain the case today.

As noted above, bankruptcy court jurisdiction should not extend indefinitely after confirmation and decreases over time. *In re Superior Air Parts, Inc.,* 516 B.R. 85, 98 (Bankr. N.D. Tex. 2014) ("Simply because a debtor was once in bankruptcy does not mean that the bankruptcy court is an appropriate forum in which to litigate post-confirmation disputes."). Although this Court acknowledges the long history of G-I's bankruptcy case before this Court, the bankruptcy court will not oversee proceedings involving reorganized debtors indefinitely. *See Pettibone Corp. v. Easley,* 935 F.2d 120, 122 (7th Cir. 1991) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the *protection* of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens."). As stated

by this Court in its December 21, 2016 Remand Opinion, "G–I's Plan was confirmed some seven [now eight] years ago and is virtually fully consummated with the exception of certain residual claims proceedings." *In Re G-I Holdings, Inc.*, 564 B.R. 217, 254 (Bankr. D.N.J. 2016), *aff'd sub nom. In re G-I Holdings Inc.*, No. 01-30135 (RG), 2017 WL 1788656 (D.N.J. May 5, 2017).

This Court finds another factor regarding the permissive abstention test particularly relevant to the present circumstances and therefore, worth addressing. This factor relates to the substance rather than form of an asserted "core" proceeding. In the present matter, the substantive issue presented before this court is identical to that addressed in the remand decision, but the procedural vehicle has changed. The debtor in its Renewed Motion seeks to Enforce the Bankruptcy Discharge and Plan Injunction against the same claims asserted against G-I in the state court action. In the appeal of this Court's remand decision, the District Court concluded that it "agrees with the Bankruptcy Court that the Superior Court of New Jersey is 'fully capable' to timely adjudicate ISP Appellees' claims." *In re G-I Holdings*, 2017 WL 1788656, at *11. As well the District Court found that permissive abstention was warranted in this case. *Id.* at *15. The substantive issue presented is unchanged, when evaluating the substance rather than the form of the present Motion, such factor weighs in favor of abstention. The Superior Court of New Jersey remains "'fully capable' to timely adjudicate ISP Appellees' claims" including G-I's assertion of the Bankruptcy Discharge and Plan Injunction as an affirmative defense in the state court action. *Id.*

As previously noted, no particular formula is to be applied to the permissive abstention factors. Rather, they are to be flexibly applied to the facts of each individual case. Here, given the circumstances surrounding G-I's bankruptcy, the factors should also be considered in light of general bankruptcy jurisdiction principles that indicate bankruptcy court's jurisdiction is

generally retained only to the point of substantial consummation of the plan and post-confirmation jurisdiction generally ceases when a creditor's action will no longer affect the administration of the plan. *See In re BankEast Corp.*, 132 B.R. 665, 667-68 (Bankr. D.N.H. 1991); *In re Carey Metal*, 152 B.R. 927, 931-32. (Bankr. N.D. Ill. 1993); *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991); *N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944). As noted by the Third Circuit in *Resorts Int'l,* "[a]t the post-confirmation stage, the claim must affect an integral aspect of the bankruptcy process - there must be a close nexus to the bankruptcy plan or proceeding". 372 F.3d at 167.

The applicable factors for permissive abstention have been considered at length above. Notably, when balancing the aforementioned factors: the fact that the District Court for the District of New Jersey and this Court entered an Order Confirming the Eighth Amended Joint Plan of Reorganization of G-I Holdings Inc. and ACI Inc., on November 12, 2009; the claims being asserted in the ISP Litigation will not affect the distribution to creditors under the plan and are unlikely to unduly impact the administration of the estate; the Superior Court of New Jersey's Complex Business Litigation Program, which was created specifically for specialized attention to commercial cases, and the Superior Court is fully capable of adjudicating the ISP claims including G-I's assertion of the bankruptcy discharge and plan injunction and as an affirmative defense to ISP's claims.

Although not all the permissive abstention "factors necessarily need to be considered," *Monmouth Inv'r., LLC,* 2010 WL 143687, at *4, this Court has considered each factor as applied to the facts of this case, the procedural history of this case, and the currently pending state court proceeding, and for the reasons stated herein finds that permissive abstention is appropriate as to the Injunction Motion.

CONCLUSION

For the foregoing reasons, Ashland's Cross-Motion for Abstention is granted. This Court permissively abstains under 28 U.S.C. § 1334(c)(1) from hearing the Debtor's Injunction Motion in favor of the related State Court proceedings in the remanded state court action. In so ruling, the Court finds that it is unnecessary to reach the law of the case doctrine or quasi-estoppel arguments.

An Order shall be submitted in accordance with this Decision.

DATED: January 26, 2018

Rosemary Gambardella

ROSEMARY GAMBARDELLA
UNITED STATES BANKRUPTCY JUDGE