

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GRUSS GLOBAL INVESTORS MASTER FUND, LTD.,
GRUSS GLOBAL INVESTORS MASTER FUND
(ENHANCED), LTD., PERRY PARTNERS
INTERNATIONAL, INC., PERRY PARTNERS L.P., TPG
CREDIT OPPORTUNITIES FUND, L.P., TPG CREDIT
OPPORTUNITIES INVESTORS, L.P., TPG CREDIT
STRATEGIES FUND, L.P., THE VÄRDE FUND, L.P., THE
VÄRDE FUND V-B, L.P., THE VÄRDE FUND VI-A, L.P.,
THE VÄRDE FUND VII-B, L.P., THE VÄRDE FUND VIII,
L.P., THE VÄRDE FUND IX, L.P., THE VÄRDE FUND IX-A,
L.P., VÄRDE INVESTMENT PARTNERS, LTD., VÄRDE
INVESTMENT PARTNERS, L.P., VR LIQUIDITY CRISIS
RECOVERY FUND, L.P., VR GLOBAL PARTNERS, YORK
CAPITAL MANAGEMENT, L.P., YORK INVESTMENT
MASTER FUND, L.P., YORK SELECT, L.P., YORK CREDIT
OPPORTUNITIES FUND, L.P., HFR ED SELECT FUND IV
MASTER TRUST, LYXOR/YORK FUND LIMITED, YORK
SELECT MASTER FUND, L.P., YORK GLOBAL VALUE
MASTER FUND, L.P., PERMAL YORK LIMITED, and YORK
CREDIT OPPORTUNITIES MASTER FUND, L.P.,
AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD.,
and THIRD POINT, LLC,

Plaintiffs,

-v-

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Defendant.

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Third-Party Plaintiff,

-against-

CAPMARK FINANCIAL GROUP, INC., CAPMARK
CAPITAL INC., CAPMARK FINANCE INC., CAPMARK
INVESTMENTS LP, COMMERCIAL EQUITY
INVESTMENTS, INC., MORTGAGE INVESTMENTS, LLC,
NET LEASE ACQUISITION LLC, SJM CAP, LLC and
CRYSTAL BALL HOLDING OF BERMUDA LIMITED,

Third-Party Defendants.

Case No: 09-CV-9723-AKH

**PLAINTIFFS'
OPPOSITION TO
DEFENDANT'S
MOTION TO
TRANSFER VENUE OF
REMOVED ACTION TO
DELAWARE**

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**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION
TO TRANSFER VENUE OF REMOVED ACTION TO DELAWARE**

For the reasons explained below, plaintiffs oppose defendant's motion to transfer venue of this action to the United States Bankruptcy Court for the District of Delaware. Plaintiffs respectfully request that the Court retain jurisdiction over plaintiffs' claims. Plaintiffs also request that the Court schedule oral argument on defendant's motion at the Court's earliest convenience.

PRELIMINARY STATEMENT

This lawsuit is, in essence, a straightforward contract dispute between non-debtor parties arising from a pre-bankruptcy financing. A group of noteholders has sued a bank which, in its capacity as trustee under the note indentures, amended the indentures without the noteholders' consent, thereby violating the plain terms of the indentures and state and federal law.

There are good reasons to honor the plaintiffs' decision to bring this action in New York: The defendant and a plurality of the plaintiffs remaining in the case are located here, the indentures are governed by New York law, and three of plaintiffs' four claims arise under New York law (while the fourth claim is federal). Yet, defendant seeks to transfer the case to Delaware bankruptcy court simply because the issuer of the notes has now filed for bankruptcy in Delaware and may (or may not) eventually be required to indemnify the defendant for its losses in this suit. As explained below, such a connection to the bankruptcy proceeding is simply too attenuated, and should not, under well settled legal principles, override the plaintiffs' choice of a New York forum.

According to defendant, however, a decision *not* to transfer plaintiffs' action to the bankruptcy court will have an array of unreasonable consequences, both for the debtor and for defendant itself. But defendant's parade of horrors is, in fact, a parade of red herrings:

First, this lawsuit will not unduly distract the debtor from its reorganization obligations. Plaintiffs' case against the defendant can—and should—be resolved based on the interpretation of a handful of documents, with little or no participation by the debtor. Defendant's speculation about the potential burdens on the debtor is based on its expectation that this case will require substantial parol evidence. It won't.

Second, this action will not result in unreasonably duplicative litigation. Plaintiffs will never ask this Court to decide whether the debtor engaged in a fraudulent transfer when it issued subsequent secured debt. And even if a fraudulent transfer action is later brought as an adversary proceeding in the bankruptcy court, the issues in that hypothetical, yet-unfiled proceeding will not overlap with the issues in this action. Moreover, this Court need not await the bankruptcy court's confirmation of the reorganization plan before calculating plaintiffs' damages in this action—the Court can determine the injury caused by defendant's actions in the same manner that it would have had the issuer never filed for bankruptcy. And there are no special efficiencies to remitting the parties to bankruptcy court; because this is a non-core matter (as we show below), the district court must review the bankruptcy court's proposed findings and conclusions in any event.

Finally, plaintiffs' suit will not increase the prospects of inconsistent liability judgments. With respect to the debtor, defendant's third-party claim is subject to the automatic stay, and thus all of the debtor's rights and responsibilities will be decided in bankruptcy, once and for all. As for defendant, the risks it faces are inherent in its status as a potentially indemnified party: On the one hand, it may be held liable for its breach of its duties as a trustee; on the other hand, it may fail in its subsequent effort to be indemnified. The present lawsuit does not exacerbate that risk in any way.

In sum, none of defendant's arguments warrants transferring this case from New York to the Delaware bankruptcy court, and the Court should accordingly deny defendant's motion.

FACTUAL BACKGROUND

A limited number of facts are necessary to decide this dispute, and those facts can largely be found in the indentures and the parties' own pleadings.¹

Plaintiffs ("Plaintiffs" or "Noteholders") are a group of investors presently holding several hundred million dollars worth of unsecured notes in Capmark Financial Group, Inc. ("Capmark" or "Issuer"). The notes were issued on May 10, 2007, under a series of indentures ("Indentures") designating Defendant Deutsche Bank Trust Company Americas ("Defendant") as indenture trustee. Answer ¶ 40.² The relevant terms of the Indentures are identical in all respects.

Section 4.04 of the Indentures imposes certain restrictions on the Issuer's ability to take on additional debt. Prior to May 20, 2009, under the plain language of Section 4.04, the Issuer was required to grant the Noteholders security, equally and ratably, in the event that the Issuer elected to incur new secured debt that left the company with more than \$1.5 billion in total indebtedness. See Ex. 1. The purpose of this restriction was simple: It protected the value of

¹ Defendant relies heavily on a declaration by its counsel as support for its factual allegations and argument. See Declaration of Alan Kolod ("Kolod Decl."). Numerous statements in the declaration are inadmissible, however, and should be stricken (or, at the very least, not considered by the Court). For example, the declaration: (a) attempts to introduce evidence of which Mr. Kolod has, at most, second-hand knowledge (*e.g.*, ¶¶ 2, 27); (b) contains legal argument that goes well beyond factual assertions (*e.g.*, ¶¶ 22-25); and (c) contains speculation about future events that is not grounded in fact (*e.g.*, ¶¶ 30, 32, 33). Defendant should not be permitted to restate or refine its arguments (let alone introduce new arguments) through a declaration of counsel.

² Throughout this filing, "Cplt." denotes Plaintiffs' Amended Complaint, dated November 9, 2009, and "Answer" denotes Defendant's Answer to Plaintiffs' Amended Complaint, dated December 4, 2009.

the Noteholders' investment by ensuring that subsequently incurred secured debt did not force the Noteholders to the back of the credit line.

On May 20, 2009, however, Defendant and the Issuer entered into a "First Supplemental Indenture" and removed this crucial restriction from the text of Section 4.04. See Ex. 2. It is undisputed that Defendant did not seek the Noteholders' consent to the amendment. In Defendant's view, it was not required to seek the Noteholders' consent because the amendment ostensibly "cure[d] an ambiguity, omission, defect or inconsistency" in the Indentures, within the meaning of Section 9.01(i). Mtn. at 5; Answer ¶ 76. Plaintiffs emphatically disagree: As the Complaint avers, Plaintiffs' consent was mandatory because, *inter alia*, the May 20th amendment "materially adversely affect[ed] the rights of [the] Holder[s]." See Cplt. ¶¶ 43, 47; Ex. 1 (Sections 9.01(vii) and 9.02). Deciding which party is correct on this issue is simply a matter of interpreting the Indentures—at its core, this lawsuit is a straightforward contract dispute.³

As trustee under the Indentures, Defendant owed fiduciary duties to the Noteholders. By surreptitiously amending the Indentures, Defendant breached those duties—and for self-interested reasons: No sooner did Defendant amend Section 4.04 than the Issuer entered into a secured \$1.5 billion Term Facility Credit and Guaranty Agreement, whose proceeds were used to repay a bridge loan owned, in part, *by Defendant's parent company*. See Ex. 4 (June 4, 2009

³ Defendant contends that, apart from the Indentures, this Court also must review the Offering Circular and Prospectus available to investors at the time the notes were issued, because those documents read differently from the original text of the Indentures. See Mtn. at 5; Answer ¶¶ 73-77. However, the Indentures are clearly the governing legal documents. See Ex. 3 (Offering Circular) at ii, 182, and 220. The Offering Circular explicitly states: "The following summaries of certain provisions of the notes and the Indentures do not purport to be complete and are subject to, and are qualified in their entirety by reference to, all the terms and conditions of the notes and the Indentures. . . . We urge you to read the Indentures because those documents, and not this 'Description of the Notes,' define your rights as a holder of notes." Ex. 3 at 182.

Capmark 8-K, bridge loan amendment, and press release) & Ex. 1 (Section 1.01 definitions of “Bridge Loan” and “Existing Credit Agreement” in Indentures). One hand washed the other. And in defiance of the original version of Section 4.04, the Noteholders were not equally and ratably secured when the Issuer took on the additional \$1.5 billion of secured debt. As a result, the new debt—used in part to repay Defendant’s parent—was placed ahead of the Noteholders’ interests.

On October 1, 2009, Plaintiffs initiated this action against Defendant in New York state court to recover damages for the loss in note value resulting from Defendant’s amendment of the Indentures. Plaintiffs contend that Defendant’s amendment of the Indentures was for its own individual benefit, was *per se* unreasonable, and amounted to willful misconduct, negligence, and/or bad faith. Plaintiffs brought claims under New York state law for breach of contract, breach of fiduciary duty, and negligence, and under federal law for breach of duties owed under the Trust Indenture Act of 1939 (“TIA”), 15 U.S.C. § 77aaa, *et seq.*

On October 16, 2009, Defendant filed its answer to Plaintiffs’ original complaint.⁴ Defendant also filed a third-party complaint seeking indemnification or contribution from certain Issuer entities that were listed as guarantors in the Indentures. See Ex. 5. To date, however, the Issuer entities have not conceded liability for either indemnification or contribution. See, *e.g.*, Mtn. Ex. J (Notice of Removal) ¶ 12; Ex. 5 ¶ 19 (“DBTCA has made written demand for indemnity and received no response.”).

On October 25, 2009—subsequent to both Plaintiffs’ filing of this lawsuit and Defendant’s filing of its answer—the Issuer and certain of its subsidiary guarantors filed

⁴ Defendant is due to file its answer to the second amended complaint on March 15, 2010. See Docket No. 21. Previous amendments to the complaint have been made only to update the identities of the Plaintiffs.

voluntary petitions for Chapter 11 bankruptcy.⁵ The Chapter 11 cases are being jointly administered and are currently pending in the United States Bankruptcy Court for the District of Delaware. Plaintiffs have not sued the Issuer entities in any court, and do not intend to pursue recovery against the Issuer entities under the trustee-specific legal theories advanced in this case. The Issuer entities themselves have filed an adversary proceeding complaint against Plaintiffs in the bankruptcy court. See Mtn. Ex. K. The only relief sought in that proceeding is a stay of this action.

Defendant now asks the Court to transfer this action to the bankruptcy court. Plaintiffs respectfully submit that the motion should be denied.

ARGUMENT

Plaintiffs' lawsuit ultimately asks a simple question: Were Defendant's May 2009 amendments to the Indentures—obtained as they were without Noteholders' consent—permissible? Each of Plaintiffs' four claims arises from that central question. Notwithstanding Defendant's attempts to muddy the water by focusing on an array of peripheral concerns, this case is nothing more than a straightforward contract interpretation.

As explained below, this lawsuit should not be transferred to the Delaware bankruptcy court. As an initial matter, Defendant's contingent claim for indemnification creates only the most tenuous connection to the bankruptcy proceeding, and as such Plaintiffs' claims fall outside of the bankruptcy court's limited jurisdiction. But even if the bankruptcy court *could* decide this case, it is a non-core proceeding that will not significantly affect, nor be affected by, Capmark's reorganization, and the case should still remain in this Court. More generally, Defendant has

⁵ At least one of the third-party defendants in this action (Crystal Ball Holding of Bermuda Ltd.) is *not* a debtor before the bankruptcy court. See Kolod Decl. ¶ 15.

failed to carry its burden of demonstrating that either the interests of justice or the convenience of the parties should override Plaintiffs' choice to litigate their claims in New York.

I. Plaintiffs' Claims Fall Outside The Limited Jurisdiction Of The Article I Bankruptcy Court

The Delaware bankruptcy court does not have jurisdiction over this pre-petition dispute between non-debtors, which rests entirely on the interpretation of a private agreement governed by New York law. The gravamen of Plaintiffs' complaint is that Defendant violated the Indentures and its duties owed toward Noteholders when, for the pecuniary benefit of its own parent corporation, and without the Noteholders' consent, Defendant amended Section 4.04 of the Indentures. Defendant's conduct gives rise to traditional common law claims for breach of contract, breach of fiduciary duty, and negligence. Neither those claims (nor Plaintiffs' related federal claim under the TIA) belongs in a Delaware bankruptcy court tasked with equitably sorting out the consequences of a third-party's insolvency.

It is important, at the outset, to set aside the canard that Plaintiffs have somehow conceded bankruptcy jurisdiction by declining to seek a remand to state court. See, e.g., Mtn. at 7, 14 n.8. Plaintiffs recognized that this Court has federal question jurisdiction in light of the TIA claim, and supplemental jurisdiction over Plaintiffs' related state law claims. Defendant's Notice of Removal recognized the same. See Mtn. Ex. J (Notice of Removal) ¶ 2 ("An action on [Plaintiffs'] claims could have been commenced in this Court under 28 U.S.C. § 1331 and the Trust Indenture Act."). Plaintiffs did not challenge removal only because it was pointless to dispute the removability of a case resting on federal question jurisdiction.

In any event, it is clear that, as the party now seeking to invoke the more limited jurisdiction of the bankruptcy court, Defendant "bears the burden of proving facts to establish that jurisdiction." *Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998). Defendant does not

(and cannot) attempt to carry that burden either by contending that Plaintiffs' claims arise under Title 11, or even arise in a case under Title 11. See 28 U.S.C. § 1334(b). Instead, Defendant maintains that Plaintiffs' claims are "related to" Capmark's Chapter 11 bankruptcy. See Mtn. at 1, 10. That is not so.

Defendant's primary argument for "related to" jurisdiction rests on the fact that it has brought a third-party indemnification claim against certain Capmark entities. Although Defendant urges that its "indemnification claims against the Debtors aris[e] *automatically* from Plaintiffs' underlying complaint" (Mtn. at 11) (emphasis added), its right to indemnification is anything but "automatic." Section 7.07 of the Indentures contains a crucial exception to indemnification (nowhere acknowledged by Defendant): "The Issuer need not reimburse any expense or indemnify against any loss, liability or expense incurred by an indemnified party through such party's own willful misconduct, negligence or bad faith." See Mtn. Ex. D. The Issuer—which has not conceded either indemnification or contribution liability—apparently recognizes the potential applicability of this exception, and noted it in its adversary proceeding complaint. See Mtn. Ex. K ¶ 85. Plaintiffs see no reason why such a defense to indemnification or contribution will fail: Defendant's amendment of the Indentures without consent clearly did amount to "willful misconduct, negligence or bad faith" (and thus fell squarely within this exception).

Numerous courts have held that such a contingent right to indemnification against a debtor is insufficient to create "related to" bankruptcy jurisdiction. See, e.g., *In re Federal-Mogul Global, Inc.*, 282 B.R. 301, 310-11 (Bankr. D. Del. 2002) ("[C]ases since *Pacor* have failed to endorse the proposition that *any* contract of indemnification will support an extension of related-to jurisdiction.") (referencing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)),

appeal dismissed and mandamus denied, 300 F.3d 368 (3d Cir. 2002); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 285 B.R. 519, 530 (M.D. Ala. 2002) (“[A]s the jurisprudence shows, cases in which related-to jurisdiction is founded solely on an indemnification agreement between otherwise unrelated parties are not the rule but the exception.”) (quoting *Federal-Mogul*, 282 B.R. at 312); *In re Asbestos Litig.*, 271 B.R. 118, 123-24 (S.D. W. Va. 2001) (refusing to rest bankruptcy jurisdiction on “tenuous support” of indemnification term, where question was “open” and “not easily resolved” as to whether term would bind debtor); *cf. Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 755-56 (5th Cir. 1995) (distinguishing between “procedural” indemnification agreement whose purpose is to eliminate formal suit against debtor, and “substantive” agreement whose purpose is to indemnify independent claims against third parties, and concluding that the latter does not create “related to” jurisdiction).

Ret. Sys. of Ala. v. J.P. Morgan Chase & Co., 285 B.R. 519 (M.D. Ala. 2002), is especially instructive here. In that case, the district court remanded state law securities claims brought by Alabama retirement funds against underwriters allegedly involved in the events leading to WorldCom’s bankruptcy. The underwriters argued that they were contractually indemnified by WorldCom, and that plaintiffs’ claims therefore fell within the bankruptcy court’s “related to” jurisdiction. *Id.* at 523. The district court observed that the “fact-specific line-drawing engaged in by the *Pacor* court and others” demanded a close reading of the indemnification agreement. *Id.* at 528-29. Upon such a close reading, the court concluded that the underwriters’ right to indemnification was contingent upon a finding that they had not made false statements or omissions in their representations to WorldCom. *Id.* at 529. Because WorldCom had not conceded indemnification liability, the court characterized the lawsuit’s

potential effect on the WorldCom bankruptcy estate as still “speculative and premature,” and rejected a finding of “related to” jurisdiction. *Id.*

Here, as well, Defendant’s “indemnification claims are contingent, not absolute.” *Ret. Sys. of Ala.*, 285 B.R. at 529. Capmark has not abjured its right to challenge either indemnification or contribution, and will be able to prove that Defendant’s conduct constituted “willful misconduct, negligence or bad faith”—which is an explicit exception to the indemnification provision in the Indentures. What is more, Plaintiffs are not seeking any recovery from the Issuer in this litigation. To the contrary, Plaintiffs seek recovery exclusively from Defendant, based on the Defendant’s own individual wrongdoing, and independent of any wrongdoing by the Issuer. Thus, Plaintiffs’ claims will *not* necessarily affect the bankruptcy estate. *Cf. Gen. Elec. Capital Corp. v. Pro-Fac Coop., Inc.*, 2002 WL 1300054 (S.D.N.Y. June 11, 2002) (granting motion to remand; claims asserted against non-debtor affiliates, and premised on actions by those affiliates rather than by debtor, were not “related to” bankruptcy, even though debtor was obligor under lease in question and affiliates had filed contingent contribution and indemnity claims in bankruptcy case).

Although a bankruptcy court’s “related to” jurisdiction is broad, it “cannot be limitless.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). Plaintiffs’ claims against Defendant fall outside of the limited Article I bankruptcy jurisdiction and should be decided by this Court, exactly where they are presently venued.

II. Plaintiffs’ Claims Are Quintessential Non-Core Claims

Even if the bankruptcy court technically could exercise “related to” jurisdiction over Plaintiffs’ claims, this is a non-core proceeding that belongs in this Court. All of the relevant events occurred prior to Capmark’s filing for bankruptcy, and the few issues to be decided do not

overlap with the bankruptcy proceeding. Indeed, the operative facts in Plaintiffs' lawsuit are narrow, well-defined, and largely (if not entirely) contained in documents already before this Court. This Court can and should decide in the first instance that Plaintiffs' claims are non-core. See *Northwest Airlines, Inc. v. City of Los Angeles (In re Northwest Airlines Corp.)*, 384 B.R. 51, 56-57 (S.D.N.Y. 2008) (following majority rule that district court make core/non-core determination, especially where bankruptcy court has no prior familiarity with case).

Defendant acknowledges that “bankruptcy judges may only ‘determine . . . core proceedings arising under title 11, or arising in a case under title 11.’” Mtn. at 30 n.20 (quoting 28 U.S.C. § 157(b)(1)). Defendant also acknowledges that, if a proceeding is not “core,” the bankruptcy judge may hear the matter, but cannot enter a final order without the consent of the parties, or until the district court has reviewed *de novo* the proposed findings of fact and conclusions of law. *Id.* (quoting 28 U.S.C. § 157(c)(1)). Defendant has not shown—and does not attempt to show—that Plaintiffs' claims arise under title 11 or arise in a case under title 11. And, “related to” proceedings are typically non-core. See *Ben Cooper, Inc. v. Ins. Co. of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1398 (2d Cir. 1990) (“[M]atters that merely concern the administration of the bankrupt estate tangentially are related, non-core proceedings”). Yet, Defendant still maintains that this is a “core” proceeding that should be transferred to the “home” bankruptcy court in Delaware. That is not the case.

Defendant invokes, but badly misapprehends, the two factors established by the Second Circuit for deciding whether a contract dispute is core or non-core. The first of these is “whether the contract is antecedent to the reorganization petition.” See *Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F.3d 436, 448 (2d Cir. 2005). Here, it is indisputable that the Indentures, and Defendant's amendment of those Indentures, pre-date Capmark's filing for bankruptcy in

October 2009. Thus, this factor weighs heavily toward a non-core determination. See *id.* at 450 (pre-petition nature of relevant contracts, and plaintiffs’ attempt to adjudicate rights of non-debtors only, both pointed toward non-core determination); *cf. Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1102 (2d Cir. 1993) (pre-petition contract actions brought by debtor are non-core).

Defendant’s also misapprehends the second factor: “the degree to which the proceeding is independent of the reorganization.” *Mt. McKinley*, 399 F.3d at 448. As explained below, Plaintiffs’ claims neither “directly affect” any core function of the bankruptcy court, nor are they “uniquely affected” by the bankruptcy proceedings. *Id.*⁶ Plaintiffs’ claims are against Defendant directly, which—in its capacity as Indenture Trustee, and owing special duties to the Noteholders—engaged in wrongdoing for its own benefit, independent of any wrongdoing by the Issuer. This action is a self-contained dispute between the Noteholders and the Indenture Trustee charged with safeguarding their interests.

A. Plaintiffs’ Suit Does Not “Directly Affect” Any Core Bankruptcy Function

Plaintiffs’ claims will not “directly affect” any core bankruptcy function. Defendant’s contrary view (Mtn. 32-36) rests on the flawed assumption that “Plaintiffs’ claims against DBTCA are *de facto* claims against the Debtors.” See Mtn. at 33. But a favorable outcome for Plaintiffs in this action will not necessarily come at the Issuer’s expense—both because Plaintiffs need not prove misconduct by the Issuer in order to prevail against Defendant, and because Defendant’s third-party indemnification rights are not automatic. In any event, any effect that this action may have on the bankruptcy proceeding is far too remote to qualify it as “core.” *Cf. Mt. McKinley*, 399 F.3d at 449.

⁶ Defendant does not argue (nor could it) that Plaintiffs’ claims are “unique to” the bankruptcy proceeding.

Nor will trying Plaintiffs' claims in this Court increase the risk of inconsistent results with respect to the bankruptcy. Capmark runs no risk of inconsistent results, because all of its rights and responsibilities will be decided by the bankruptcy court. As for Defendant, like any other indemnified party, it faces the risk that it might be held liable in one action, only to fail in a separate action for indemnification. Defendant also argues that it runs some risk of inconsistent results because "[o]nly a small percentage of Noteholders are Plaintiffs" in this action, and because the original noteholders and the secured debt holders are not parties to this action. Mtn. at 25. The latter group is not necessary—they would be implicated only in a fraudulent transfer action.⁷ The original noteholders, furthermore, are relevant to this action only insofar as they have claims for damages stemming from the May 20, 2009 amendment—not, as Defendant implies, merely because of their status as original noteholders. Moreover, Defendant's risk arises because of who Plaintiffs are, and not because of the forum in which this action has been brought. Another group of noteholders could sue Defendant in another federal court, and that action would present the same risk of inconsistent results. Transfer of this action to the bankruptcy court will not cure this problem. In addition, even if this case is transferred to the bankruptcy court, former noteholders will not necessarily be bound by the result—they will be bound only if they still hold the notes and have submitted claims. Thus, Defendant would still run the risk of inconsistent adjudications, because former noteholders unable to participate in the bankruptcy could bring TIA claims against Defendant outside of the Issuer's bankruptcy. See

⁷ More fundamentally, transferring this action to the bankruptcy court in anticipation of a hypothetical fraudulent transfer action is unwarranted. No such action has been filed. The Official Committee of Unsecured Creditors in Issuer's bankruptcy has not received—or even requested—permission to file such an action. Even in the event of such a lawsuit, the Committee would be required to prove either: (a) that the transfer was made “with actual intent to hinder, delay, or defraud” creditors, or (b) that Issuer was insolvent, possessed unreasonably small capital, or became unable to pay its debts as they matured on the date of the transfer and did not receive reasonably equivalent value. See 11 U.S.C. § 548(a).

Bluebird Partners, L.P. v. First Fidelity Bank, 896 F. Supp. 152, 156 (S.D.N.Y. 1995), *aff'd* 85 F.3d 970 (2nd Cir. 1996).

B. Plaintiffs' Suit Is Not "Uniquely Affected" By The Bankruptcy Proceeding

Defendant's arguments in the other direction—that Plaintiffs' suit will be "uniquely affected" by the Chapter 11 cases (Mtn. 36-37)—are equally unconvincing. Defendant first contends that the parties must await confirmation of the Chapter 11 plan before this Court can decide whether Plaintiffs have been injured, or the extent of those injuries. See Mtn. at 36. But if that were the case, courts would never be able to decide any suit where damages were calculated based on the value of a financial instrument with a future payout. This Court can, of course, determine Defendant's liability vis-à-vis Plaintiffs without any guidance from the bankruptcy court. It also can determine Plaintiffs' damages, which should be measured as the amount by which the improper amendments to the Indentures reduced the value of the notes. See, e.g., *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 618 F. Supp. 2d 280, 291-92 (S.D.N.Y. 2009) (purpose of damages is "to put the non-breaching party in the same economic position it would have been in had the breaching party performed its contractual obligations"); *LNC Invs., Inc. v. First Fidelity Bank*, 1997 WL 528283, at *34-35 (S.D.N.Y. Aug. 27, 1997) (collecting cases and concluding that, under the TIA, plaintiffs are entitled to recover losses similar to those in securities fraud actions). The Court would have been required to calculate damages by some method had Capmark never filed for bankruptcy.

In short, confirmation of the Capmark plan is simply not necessary in order for this Court to enter a final judgment in this case. Nor will the bankruptcy proceedings "necessarily address" (Mtn. at 36) the same issues raised by Plaintiffs in this lawsuit. First of all, no fraudulent transfer action has been filed, and Defendant cannot describe even the contours of such a hypothetical

suit. Moreover, even if Defendant’s hypothetical fraudulent transfer action *is* eventually filed in Issuer’s bankruptcy, litigation over the propriety of the liens would address the Issuer’s conduct, and not the scope of Defendant’s duties and liability as trustee. For all of these reasons, this litigation is not “uniquely affected” by the proceedings in Delaware and should be deemed non-core.

III. Transfer To The Bankruptcy Court Would Not Promote The Interests Of Justice Or The Convenience Of The Parties

Defendant argues that the bankruptcy transfer statute (28 U.S.C. § 1412)—rather than the general transfer statute (28 U.S.C. § 1404(a))—should govern transfer of this case, and that, in any event, the Court’s analysis would be identical under either statute. See Mtn. at 16-17. Defendant is wrong on both counts.

First, it is not at all clear that section 1412 applies here. This action is not a “case or proceeding under title 11” within the meaning of section 1412, because it is neither “under” nor “related to” a bankruptcy case. But even if the Court concludes that Plaintiffs’ claims are “related to” the Capmark bankruptcy, section 1404(a) would still apply because this is a non-core proceeding. See *Thomson McKinnon Sec., Inc. v. White (In re Thomson McKinnon Sec., Inc.)*, 126 B.R. 833, 834-35 (Bankr. S.D.N.Y. 1991).⁸

Second, the analysis under the two sections is similar, but not identical.⁹ Under section 1404(a), the party moving for transfer of venue must make a “clear and convincing” showing

⁸ The only reported case in this District that Defendant cites to suggest that non-core matters are governed by section 1412 is *Urban v. Hurley*, 261 B.R. 587 (S.D.N.Y. 2001). See Mtn. at 17. But that case involved a motion to transfer filed by a debtor, in an adversary proceeding in which the debtor was the plaintiff. *Id.* at 592-93. That section 1412 applied in a venue transfer motion filed by the debtor, relating to a lawsuit in which the debtor was the plaintiff, does not at all suggest that section 1412 applies in this pre-petition suit between non-debtor entities.

⁹ Plaintiffs agree that this lawsuit “might have been brought” in the District of Delaware, for the reasons stated by Defendant in its motion. See Mtn. at 14-16.

that transfer is proper. See *In re Collins & Aikman Corp. Sec. Litig.*, 438 F. Supp. 2d 392, 394-95 (S.D.N.Y. 2006). And the presumption that the District of Delaware is the “home court” for this dispute between non-debtor parties would not apply, because the case arises outside of the bankruptcy context.¹⁰ For the same reason, Capmark’s alleged preference that this matter be heard in the Delaware court is irrelevant.

On the other hand, if this Court chooses to analyze Defendant’s motion under section 1412, Defendant would have the burden of demonstrating by a preponderance of the evidence that transfer is proper. See, e.g., *In re Éclair Bakery Ltd.*, 255 B.R. 121, 141 (Bankr. S.D.N.Y. 2000). But Defendant’s invocation of a “home court” presumption would still be incorrect: Even assuming that this case falls within “related to” bankruptcy jurisdiction, a plaintiff’s valid choice of forum “cancels out” any presumption in favor of transfer based on a “home court” theory. *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 306 B.R. 746, 750 (S.D.N.Y. 2004) (citing *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1391 (2d Cir. 1990)). Thus, Defendant would still be required to establish that the relevant factors *favor* transfer, not merely that various factors “do[] not weigh against” or “do not argue against” transfer. Mtn. at 29.

Regardless of whether its motion is analyzed under section 1404 or 1412, Defendant has failed to meet its burden of demonstrating that transfer is warranted. Neither the interest of

¹⁰ None of the cases cited by Defendant that purportedly support a “home court” presumption under section 1404(a) in fact applies such a presumption. See *In re Northwest Airlines Corp.*, 384 B.R. at 61-62 (stating that, *if* a presumption did exist, it would be weakened by the fact of plan confirmation); *In re Collins & Aikman Corp. Sec. Litig.*, 438 F. Supp. 2d at 398-99 (listing existence of related bankruptcy proceedings as factor, rather than presumption, in venue determination); *Industri & Skipsbanken A/S v. Levy*, 183 B.R. 58, 63-65 (S.D.N.Y. 1995) (existence of bankruptcy proceeding described as factor “in favor” of transfer); *M.D. Sass Re/Enterprise Partners v. Cargill Fin. Servs. Corp.*, 1994 WL 97335, at *2 (S.D.N.Y. March 18, 1994) (stating in the alternative that interests of justice would be served by transfer under section 1404(a), without analysis or application of factors).

justice nor the convenience of the parties justifies transferring this matter to the forum of Defendant's choosing.

Courts have articulated the relevant factors to be considered in a motion to transfer in a variety of ways. Defendant relies (Mtn. at 21, 27) on the formulation from *In re Enron Corp.*, which identified six factors under "interest of justice," and five under "convenience of the parties." See 317 B.R. 629, 638-39 (Bankr. S.D.N.Y. 2004). As the Second Circuit has made clear, however, the propriety of a transfer turns on more than a scorecard. In a section 1404(a) analysis, the Second Circuit noted,

Some of the factors a district court is to consider are, *inter alia*: "(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties."

D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106-07 (2d Cir. 2006) (quoting *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002)). "[N]otions of convenience and fairness are considered on a case-by-case basis." *Id.* at 106. Under any formulation of the relevant factors, Defendant has failed to carry its burden.

A. Transfer Would Not Be In The Interest Of Justice

None of the "interest of justice" factors supports transferring this litigation from this Court.¹¹ First, transfer of this action to Delaware will not promote the interests of judicial economy, nor will it promote the efficient administration of the estate of the debtors that Plaintiffs did not name in this lawsuit. The bankruptcy court thus far has invested zero resources

¹¹ Plaintiffs assume that Defendant's claim that it could not receive a fair trial in this Court (Mtn. at 24-25) is merely a misstatement; in any event, Defendant provides no support for its claim, which should be rejected. See *In re Enron Corp.*, 317 B.R. at 644-45 (without specific evidence that trial would not be fair or that judgment would not be enforceable under the Full Faith and Credit Clause, "fair trial" argument does not support transfer).

in considering the issues involved in this action. *Cf. In re Dunmore Homes, Inc.*, 380 B.R. 663, 674 (Bankr. S.D.N.Y. 2008) (bankruptcy court's limited knowledge of matter supported hearing case in other forum); *In re Northwest Airlines Corp.*, 384 B.R. at 61 (bankruptcy court had no interest in retaining jurisdiction over case where it had heard none of the relevant issues). The bankruptcy court has not even set a bar date, and has not had to consider any challenge to the amendment to the Indentures. And the adversary complaint against Plaintiffs is nothing more than an attempt to shut down this litigation.

Second, this case will have little (if any) effect on the bankruptcy proceedings or the debtors themselves. Plaintiffs' claims involve *Defendant's* amendment of the May 2007 Indentures. Even assuming that Defendant is eventually entitled to indemnification from the Capmark entities (which neither Plaintiffs nor the Capmark entities concede), Defendant's recovery would be contingent upon Defendant filing a claim in the bankruptcy court. The effect of this action—if any—on Capmark's management would be entirely incidental.¹²

Moreover, Defendant's contention that this action courts unnecessary duplication is, as we have noted, exaggerated. In a hypothetical fraudulent transfer action, the bankruptcy court will *not* need to decide whether Defendant breached any duty owed toward noteholders. Conversely, this Court will not need to determine (or even consider) whether Capmark's new secured debt issuance constituted a fraudulent transfer to decide this case.

¹² The fact that Defendant seeks indemnification from entities now in bankruptcy does not mean that Plaintiffs' claims are meaningfully tied up in the Capmark bankruptcy. Defendant is able to provide complete relief to Plaintiffs, and therefore the Capmark entities are not necessary parties. See, e.g., *DeWitt v. Daley*, 336 B.R. 552 (S.D. Fla. 2006) (denying motion to dismiss and to stay litigation against employee of debtor corporations; named defendant could provide plaintiffs with relief, and claim of indemnification against debtor corporation warranted neither dismissal for failure to name indispensable party nor extension of stay to suit against employee named in individual capacity as defendant in Fair Labor Standards Act suit).

Defendant’s argument that both it and the Capmark entities risk inconsistent adjudications is also misdirected. As we have noted, there is always a risk of inconsistent adjudications whenever a defendant simultaneously resists liability and seeks to be indemnified. Transferring venue does not obviate that dilemma. And Rule 19, which Defendant invokes (Mtn. at 24 n.16), “does not protect a party from logically inconsistent results, only inconsistent obligations.” *Evergreen Marine Corp. v. Welgrow Int’l Inc.*, 942 F. Supp. 201, 206 (S.D.N.Y.1996) (quoted by *Cnty. Health Care Assoc. of N.Y. v. Mahon*, 106 F. Supp. 2d 523, 531 (S.D.N.Y. 2000)); *Bedel v. Thompson*, 103 F.R.D. 78, 80 (S.D. Ohio 1984) (“The ‘complete relief’ provision of Rule 19 relates to those persons already parties and does not concern any subsequent relief via contribution or indemnification for which the absent party might later be responsible.”).¹³

Finally, Defendant repeatedly insists that Plaintiffs brought this lawsuit in New York for solely “tactical” reasons. *E.g.*, Mtn. at 26. In fact, precisely the converse is true—New York was the only logical venue in which to bring this lawsuit. Defendant is a New York banking corporation, with its primary place of business in New York (Answer ¶ 39); New York law governs the Indentures (Ex. 1, Section 11.09); the bulk of Plaintiffs’ causes of action arise under New York law; and a plurality of Plaintiffs remaining in the case are based in New York.¹⁴ New

¹³ Defendant’s concern that, if Plaintiffs prevail in this action, they will “receiv[e] a different recovery” from other creditors in the Capmark bankruptcy (Mtn. at 25) is similarly meritless. In any case in which a cause of action exists for a group of plaintiffs, some may choose to sue and some may not. That those who choose to file suit may recover more than those who do not does not establish unfairness toward Defendant.

¹⁴ Plaintiffs with their principal place of business in New York include (terms defined in Second Amended Complaint): Gruss, Gruss Enhanced, Perry Partners, York Capital, York Select, York Credit, and Third Point. See Second Amended Cplt. ¶¶ 6, 7, 9, 24, 26, 27, 36.

York has a strong interest in deciding this dispute. Delaware, on the other hand, has no interest in the dispute.

B. Transfer Would Not Advance The Convenience Of The Parties

The convenience of the parties is, at most, neutral between venue in New York and Delaware, suggesting that maintaining venue in this Court is proper. The balance of convenience must be “strongly in favor of the moving party before a transfer of venue will be ordered under Section 1404(a).” Wright & Miller, 15 Fed. Prac. & Proc. § 3848 (3d ed. 2009). While Plaintiffs may file claims in the Capmark bankruptcy at a later date, that does not suggest that Plaintiffs consent to the bankruptcy court’s jurisdiction over a separate matter that implicates Capmark only tangentially, at most.

Nor was Plaintiffs’ naming of Deutsche Bank as the only defendant done, as Defendant suggests (Mtn. at 26 & n.18), for tactical reasons. The claims brought by Plaintiffs all involve Defendant’s failure, as Indenture Trustee, to honor its duties to the Noteholder Plaintiffs. The Capmark entities did not owe those same duties to Noteholders directly, and therefore could not have breached them, regardless of Capmark’s role in Defendant’s decision to amend the Notes in violation of the Indentures. The Capmark entities are not necessary parties to this suit, and Plaintiffs accordingly were not remiss in failing to name them as defendants. See *Am. Ins. Co. v. St. Jude Med., Inc.*, 597 F. Supp. 2d 973, 978 (D. Minn. 2009) (party who could later be sued for indemnification was not necessary party where it and defendant “presently share a strong interest” in the outcome of the litigation, because adjudication in favor of defendant would eliminate need for indemnification).

Next, Defendant is splitting hairs in suggesting that Delaware is somehow meaningfully more convenient to witnesses than the Southern District of New York. Even if, as Defendant

claims, Capmark witnesses may need to testify in this case as part of Defendant's defense, an additional 30 miles of travel—from Philadelphia to New York rather than Philadelphia to Wilmington, Delaware—does not constitute the sort of inconvenience to witnesses or parties that warrants a transfer. Compare, *e.g.*, *In re Northwest Airlines Corp.*, 384 B.R. at 61 (granting transfer from Southern District of New York to Los Angeles, where all or most of witnesses resided in Minnesota or Los Angeles); *Industri & Skipsbanken A/S v. Levy*, 183 B.R. 58, 64-65 (S.D.N.Y. 1995) (“The majority of the fact witnesses are not within the control of the parties but are available through subpoena in Texas.”); *Schechter v. Tauck Tours, Inc.*, 17 F. Supp. 2d 255 (S.D.N.Y. 1998) (transfer warranted where several potential witnesses resided in Hawaii, and accident at issue took place there). Nor does Defendant argue that any relevant witnesses would be unavailable in this District.

It must be added, finally, that all parties to this lawsuit are sophisticated financial entities, with sufficient resources to try this case in this Court; Defendant does not suggest that it would be prejudiced because of lack of means if the case were to remain in this Court. Nor does the location of relevant documents support transfer. As discussed above, all parties are already in possession of the vast majority—if not all—of the relevant documents. And to the extent any other relevant documents exist, they are likely in a form in which electronic production will be appropriate. This factor, then, is “at best neutral and thereby weighs in favor of retaining venue here.” *In re Enron Corp.*, 317 B.R. at 648.

In sum, Defendant's stated rationales in support of transfer present speculative and unsupported claims of future harm or are merely self-serving. The parties, the underlying documents, and Plaintiffs' claims all share a connection to New York, and Defendant has not met its burden of demonstrating that Plaintiffs' initial decision to bring suit in New York is

