APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-1817 and 04-3933

IFC INTERCONSULT, AG,

Appellant in 05-1817

v.

SAFEGUARD INTERNATIONAL PARTNERS, LLC;
SAFEGUARD INTERNATIONAL FUND, L.P.

and

IFC INTERCONSULT, AG

v.

SAFEGUARD INTERNATIONAL PARTNERS, LLC,

Appellant in 04-3933

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 04-mc-00107)
District Judge: Hon. Marvin Katz

Argued on November 14, 2005.

Before: ROTH, FUENTES and BECKER, Circuit Judges.

(Opinion filed: February 13, 2006)

ROTH, Circuit Judge.

These consolidated appeals involve the propriety of the District Court's confirmation of an arbitration award and, in connection with that award, also involve the questions whether the District Court had ancillary jurisdiction over a garnishment action to collect on the award and whether the District Court properly denied summary judgment on the garnishment action. For the reasons stated below, we will affirm the District Court's confirmation of the arbitration award, reverse the District Court's ruling that it lacked ancillary jurisdiction over the garnishment action, reverse the District Court's alternative ruling denying the garnishor summary judgment, and direct that summary judgment be entered in favor of the garnishor.

I. Factual and Jurisdictional Background

The parties to the arbitration are Safeguard International Partners, LLC (SIP) and IFC Interconsult, AG (IFC). SIP is the general partner of SIF Management, L.P., which manages a hedge fund, Safeguard International Fund, L.P. (the Fund).[1] In July 1996, SIP hired IFC to recruit investors for the Fund under an agreement (the Agreement) that stated that the parties would submit disputes under the contract to binding arbitration in Philadelphia, Pennsylvania, conducted by the American Arbitration Association. The Agreement did not specify what court would have jurisdiction over the arbitration.

SIP claims that IFC and related parties began to defraud it and, as a result, SIP refused to pay IFC all of the finder's fees. In August 2002, IFC responded by initiating arbitration against SIP under the Agreement. IFC wanted George H. Carter and Carter's company, CFC, related parties who were also owed fees, to be involved in the arbitration; SIP did not. In September 2002, SIP filed a complaint for declaratory judgment in the

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[1] The partnership agreements are all governed by Delaware law.

United States District Court for the Eastern District of Pennsylvania to determine who was eligible for arbitration under the Agreement. The District Court dismissed the complaint for lack of subject matter jurisdiction because there was not complete diversity of citizenship between the multiple parties. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); 28 U.S.C. § 1332.

In October 2002, SIP filed a similar declaratory judgment action in the Philadelphia Court of Common Pleas. In November, the Court of Common Pleas ruled that the arbitration could proceed but only between IFC and SIP and with certain restrictions. Various motions and appeals followed, but eventually the parties reached a settlement. The Court of Common Pleas on February 26, 2003, reflected this settlement in the following order:

> The Court, having been advised that the within case has been settled, the case shall be marked "discontinued" on the prothonotary's docket and removed from the applicable list and inventory of pending cases. If the instant proceedings involve an appeal from a compulsory arbitration award, any lien from the arbitration award is released. This case may be restored to the trial list only upon written order of the team/program leader. This relief shall be requested by formal motion.

Safeguard Int'l Partners, LLC v. IFC Interconsult, AG, No. 02-0904980, Order of Feb. 26, 2003.

The case then proceeded to arbitration. In June 2004, the arbitration panel entered an award in favor of IFC in the amount of nearly four million dollars. IFC filed a application in the District Court for the Eastern District of Pennsylvania to confirm the award. SIP moved for a one month extension to respond, which the District Court granted.

Rather than responding on the merits, however, SIP filed an application in the Court of Common Pleas to modify, correct and/or vacate the arbitration award under the Pennsylvania Uniform Arbitration Act, 42 PA.C.S.A. §§ 7314-15 and for sanctions against IFC.[2] SIP also filed a motion in the District Court to dismiss or stay IFC's confirmation petition under FED. R. CIV. P. 12(b)(6).[3]

Before the Court of Common Pleas addressed SIP's application to amend or vacate the arbitration award, the District Court ruled on IFC's application and SIP's motion in opposition. In the same order, the District Court granted IFC's application to confirm the arbitration award and denied SIP's motion. SIP then filed a motion to strike the judgment for lack of subject matter jurisdiction under FED. R. CIV. P. 60(b). The motion remonstrated that IFC had improperly alleged diversity jurisdiction when filing its petition to confirm the arbitration award in the District Court. The District Court denied the motion to strike the judgment because, although there is not complete diversity between the parties, there is federal subject matter jurisdiction based on the Federal Arbitration Act, 9 U.S.C. § 203. SIP then filed a motion for reconsideration. The District Court denied it and SIP appealed.

SIP presents two grounds to support its position that the arbitration award should not have been confirmed. First, SIP

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2 In the application to the Court of Common Pleas, SIP alleged that IFC violated the restrictions contained in the pre-arbitration order issued by that court. SIP additionally claimed that the arbitration panel lacked jurisdiction for some of its findings and erred as a matter of law because IFC had conceded SIP's defense that IFC took an unlawful secret profit, thereby voiding their Agreement.

3 We note that this motion might have been brought more properly under FED. R. CIV. P. 12(b)(1) as it challenged the District Court's subject matter jurisdiction, not the IFC's failure to state a claim on which relief could be granted.

argues that the District Court abused its discretion in declining to abstain from the exercise of jurisdiction over IFC's application to confirm the arbitration award. Second, SIP contends that the District Court denied it an opportunity to be heard on the merits of IFC's application to confirm the award.

While the appeal has been pending, SIP has refused to satisfy the judgment. For that reason, IFC initiated a garnishment action against the Fund under FED. R. CIV. P. 69. The Fund is scheduled to liquidate on March 31, 2006, after which IFC will not be able to look to its assets to satisfy the judgment. IFC's garnishment action is based on the Fund's contractual duty to indemnify SIP. The Agreement of Limited Partnership of the Fund provides that:

> The Fund shall indemnify and hold harmless each Indemnified Person [including SIP] from any and all reasonable costs and expenses and all damages and claims which may be incurred or asserted against him or it by reason of . . . [its] connection to or relationship with the [Fund]. . . .

Based on this language and on the Fund's interrogatory responses, IFC moved for summary judgment on the garnishment action against the Fund. The Fund argued that it was not liable to SIP because the indemnification clause of the Agreement did not cover placement fee arrangements and because the indemnification was only for actual loss, so that SIP's mere liability did not trigger the indemnification obligation. The District Court denied IFC summary judgment because it found that a genuine issue of material fact still remained regarding whether the Agreement provided for loss or liability indemnification.

In the same order that denied summary judgment, the District Court dismissed the action for lack of subject matter jurisdiction. The District Court found that it did not have original federal question jurisdiction over the garnishment and that ancillary jurisdiction was not possible because the garnishment action relied "not only on different facts than the award-confirmation suit, but also upon a new theory of liability—essentially, breach of contract between the Fund and SIP." IFC Interconsult, AG v. Safeguard Int'l Partners, LLC, No. 04-00107 (E.D.Pa. 2005), Memorandum and Order of February 10, 2005. IFC then appealed both the denial of summary judgment and the dismissal for lack of subject matter jurisdiction.

We have jurisdiction over SIP's appeal under 9 U.S.C. § 16 and 28 U.S.C. § 1291 and over IFC's appeal under 28 U.S.C. § 1291.

II. Discussion

This consolidated appeal presents four separate issues, each presented in turn below.

A. Did the District Court Abuse Its Discretion by not Abstaining under Colorado River from Hearing IFC's Motion to Confirm the Arbitration?

Federal district courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Federal district courts may abstain from hearing cases and controversies only under "exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." Id. at 813 (internal quotations omitted). "Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction," id. at 817 (internal quotations omitted), although there are certain categories of cases in which abstention is proper.

Colorado River categorized three situations in which the Supreme Court had previously found federal abstention proper: (1) cases that present federal constitutional issues that "might be mooted or presented in a different posture by a state court determination of pertinent state law," id. at 814; see R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941); (2) cases that present "difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case then at bar," Colorado River, 424 U.S. at 814; see Burford v. Sun Oil Co., 319 U.S. 315 (1943); La. Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); and (3) cases in which federal jurisdiction has been invoked for the purpose of restraining valid, good faith state criminal proceedings, Colorado River, 424 U.S. at 816; see Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, 420 U.S. 592 (1975) (extending Younger to quasi-criminal civil proceedings).

None of these situations is implicated in this case. Colorado River also recognized a fourth category of cases in which abstention might be proper out of respect for "considerations of [wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817 (internal quotations omitted). SIP argues that the District Court should have abstained based on these principles underlying this fourth category of abstention.

We review the District Court's decision not to abstain for abuse of discretion, although the underlying legal questions that determine whether the case falls within the range in which the District Court may exercise discretion are subject to plenary review. Riley v. Simmons, 45 F.3d 764, 770 (3d Cir. 1995); Grode v. Mut. Fire, Marine & Inland Ins. Co., 8 F.3d 953, 958 (3d Cir. 1993). As we stated in United Services Automobile Ass'n v. Muir:

> A district court has little or no discretion to abstain in a case that does not meet traditional abstention requirements. Within these constraints, determination whether the exceptional circumstances required for abstention exist is left to the district court, and will be set aside on review only if the district court has abused its discretion.

792 F.2d 356, 361 (3d Cir. 1986) (citation omitted).

The threshold requirement for a district court to even entertain abstention is a contemporaneous parallel judicial proceeding. For judicial proceedings to be parallel, there must be identities of parties, claims, and time. As we noted in Yang v. Tsui, "[P]arallel cases involve the same parties and 'substantially identical' claims, raising 'nearly identical allegations and issues.'" 416 F.3d 199, 205 (3d Cir. 2005) (quoting Timoney v. Upper Merion Twp., 66 Fed. Appx. 403, 405 (3d Cir. 2003)).

We have never required complete identity of parties for abstention. See Trent v. Dial Med. of Fla. Inc., 33 F.3d 217, 224 (3d Cir. 1994). However, even when there is a substantial identity of parties and claims, abstention is still appropriate only when there are "ongoing, not completed parallel state proceedings," or else we would be considering issues of *res judicata*. Bass v. Butler, 258 F.3d 176, 179 (3d Cir. 2001). In this case, the proceedings in the Court of Common Pleas involved the parties in this appeal, as well as additional parties, but there is no identity of time.

Even if we were to view all issues concerning the arbitration as necessarily related, there was no action pending in the Court of Common Pleas when IFC moved the District Court to confirm the arbitration award. The Court of Common Pleas effectively discontinued jurisdiction over its case in February 2003, more than a year before our case came before the District

Court for confirmation of the arbitration award. After a settlement was reached regarding the appeals from the Court of Common Pleas' declaratory judgment on eligibility for arbitration, the Court of Common Pleas discontinued the case and expressly noted that it could be reopened only by written order upon request by a formal motion. SIP never made such a motion, and the Court of Common Pleas issued no such written order. Even if we were to view SIP's Application to Modify or Vacate the Arbitration Award as constituting such a formal motion, we are unaware of any written order from the Court of Common Pleas that reopened the case. In any event, SIP filed the Application in the Court of Common Pleas only after IFC moved for confirmation of the arbitration award in the District Court. Therefore, we hold that the District Court was correct in declining to abstain from exercising its jurisdiction. This lack of identity in timing would capsize SIP's Colorado River raft, even if it were to succeed in getting launched.

SIP, however, remonstrates that the Court of Common Pleas "retained jurisdiction both to enforce its Order and to adjudicate any other issue relating to the arbitration because that Court was seized of jurisdiction to supervise the arbitration from October, 2002." As an initial matter, we note that the record contains no such indication from the Court of Common Pleas. SIP has failed to cite any language but its own that purports to show such on-going jurisdiction. Even if the language were from the Court of Common Pleas and not from SIP, there is a difference between a court's retaining active jurisdiction and merely possessing the contempt jurisdiction that inheres in courts to enforce past orders. We do not believe that a passive reservation of enforcement jurisdiction is adequate to trigger abstention, and we are wary about extending jurisdiction from an adjudication of eligibility for arbitration into jurisdiction over the arbitration itself.

For us to conclude that this case presents the prerequisite situation of parallel proceedings, much less determine that a Colorado River analysis counsels in favor of abstention so strongly that the District Court abused its discretion by refusing to yield jurisdiction, requires heroic assumptions in favor of SIP. We are not inclined to make these assumptions given the disfavor in which we hold abstention, and see no need to proceed to our traditional abstention analysis.[4] Therefore, we judge SIP's claim unseaworthy for a navigation of Colorado River's rapids, and affirm the District Court's denial of SIP's Rule 12(b)(6) motion.

B. Did the District Court Deny SIP an Opportunity to be Heard?

The District Court's Order of September 7, 2004, which confirmed the arbitration award, ably addressed SIP's argument about abstention but did not discuss the merits of confirmation beyond noting that "the arbitration was conducted within the rules established by the AAA and with no apparent objection by either party during the proceedings." Order of Sept. 7, 2004. The Order did, however, acknowledge SIP's arguments that the related parties "indirectly participated in the arbitration proceedings in violation of the Court of Common Pleas' November 1, 2002 Order" and that this involvement should void the arbitration award. Id.

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[4] The factors we consider in an abstention analysis are:

> [1] which court first assumed jurisdiction over a relevant res, if any; [2] whether the federal court is inconvenient; [3] whether abstention would aid in avoiding piecemeal litigation; [4] which court first obtained jurisdiction; [5] whether federal or state law applies; and [6] whether the state action is sufficient to protect the federal plaintiff's rights.

Rycoline Products, Inc. v. C & W Unlimited, 109 F.3d 883, 890 (3d Cir. 1997).

SIP argues on appeal that by confirming the arbitration award before affording SIP an opportunity to challenge the award on the merits, the District Court violated FED. R. CIV. P. 12(a)(4)(A), thereby denying SIP its Fifth Amendment Due Process right to be heard.

The Federal Rules of Civil Procedure apply to proceedings under the Federal Arbitration Act (FAA) to the extent that the FAA does not provide its own procedure. FED. R. CIV. P. 81(a)(3). SIP claims that the FAA does not provide its own procedure for challenging a court's exercise of jurisdiction, so that FED. R. CIV. P. 12 applies. FED. R. CIV. P. 12(a)(4)(A) provides that:

> (4) Unless a different time is fixed by court order, the service of a motion under this rule alters these periods of time as follows:
>
> > (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . .

FED. R. CIV. P. 12(a)(4)(A). SIP contends that FED. R. CIV. P. 12(a)(4)(A) was triggered because there was a pleading and a responsive motion that was denied.

SIP argues that IFC's application to the District Court for confirmation of the arbitration award was in the form of a pleading because the application featured numbered paragraphs like a pleading,[5] was entitled "petition," and allegedly lacked a supporting memorandum of law, a form of order, and a supporting affidavit, as required by LOCAL R. CIV. P. 7.1 of the

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[5] FED. R. CIV. P. 10(b) provides "All averments of claim or defense shall be made in numbered paragraphs, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances. . . ." FED. R. CIV. P. 10(b).

United States District Court of the Eastern District of Pennsylvania. Thus, SIP believes that Rule 12(a)(4)(A) is triggered because IFC filed a pleading and SIP's jurisdictional Rule 12(b)(6) motion in response was denied. Therefore, according to SIP, it should have received 10 days after the denial of its Rule 12(b)(6) jurisdictional motion to file a responsive pleading arguing against confirmation on the merits. SIP contends that, because it believed that it would have a later opportunity to challenge the arbitration award on the merits, it did not make its merits arguments in its Rule 12(b)(6) motion and that the District Court's flouting of the Federal Rules of Civil Procedure denied SIP its procedural due process rights.

We disagree. As an initial matter, IFC's application to the District Court for confirmation of the arbitration award was a motion, not a pleading. The FAA requires that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions. . ." 9 U.S.C. § 6. For SIP to believe that IFC had filed a pleading, it had also to believe that IFC was not following the procedural requirements of the FAA to proceed by motion; SIP made no such objection.

Circumstances indicate that SIP was well aware that IFC was required to proceed by motion under the FAA and in fact did so, as demonstrated by SIP's own request for an extension of the 14-day period for filing an opposition to a motion under Local Rule 7.1(c), which expressly applies to "any party opposing the motion."

We regard SIP's arguments about the application's form as pure pettifoggery. Numbered paragraphs do not a pleading make. Indeed, SIP's own motion papers were in a numbered format. The title of "petition" certainly does not vitiate the substance of the application, and we are satisfied from our consultation of the record that the application was in fact accompanied by a brief, a proposed order, and an appropriate affidavit. The opening words of the application, "Petitioner IFC Interconsult, AG moves the court for an order," make clear that it was a motion, not a pleading. Thus, SIP cannot claim to be justifiably confused by the form of IFC's application. Had SIP in fact interpreted the application as a pleading, it should have preserved its rights by seeking additional time to move, answer, or otherwise respond pursuant to FED. R. CIV. P. 12(a). It did not.

Because IFC proceeded by motion and not by pleading, SIP's argument fails on two points. First, because motion practice under the FAA was initiated, the relevant procedures are provided by FAA section 6, which requires that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions. . . ." 9 U.S.C. § 6. Since IFC made its application by motion, the Federal Rules of Civil Procedure do not apply to the responsive motion practice, Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 46 (2d Cir. 1994) (FED. R. CIV. P. 12(b) does not apply to motions to vacate arbitration awards); O.R. Sec., Inc. v. Prof. Planning Assocs., Inc., 857 F.2d 742, 748 (11th Cir. 1988) (the rules of notice pleading of FED. R. CIV. P. 8 are inapplicable to proceedings to vacate an arbitration award because relief must be sought in the form of a motion), and SIP proceeded at its peril when it failed to raise its arguments on the merits in its responsive motion. Second, even if the FAA did not provide the relevant procedures, FED. R. CIV. P. 12(a)(4)(A) could not have been triggered because a pleading is a prerequisite for the application of Rule 12(a)(4)(A), and there was no pleading, only IFC's motion, followed by SIP's motion.

We also note that SIP had several opportunities to present its arguments on the merits to the District Court but failed to invoke any of the statutory grounds for setting aside an arbitration award. SIP first filed a motion for extension for time to respond. However, when that motion was granted, SIP dashed into state court with a motion to vacate or modify the arbitration award, rather than argue on the merits in federal court. SIP then submitted its Rule 12(b)(6) motion for abstention, rather than argue on the merits. SIP declined to submit a cross-motion to vacate and made no attempt to argue the merits in its motion to strike the judgment and its motion for reconsideration, much less argue that it failed to raise arguments on the merits because it thought that it would have an opportunity to do so after its motion to dismiss. If SIP really expected that it would have an opportunity to respond on the merits, it is inexplicable why SIP failed to argue so after the District Court entered judgment. SIP proceeded at its own peril with its strategy of attempting to reverse-remove the case to state court rather than arguing the merits. SIP had ample opportunities to be heard and the District Court properly decided the merits of the confirmation action. Therefore, we will affirm the District Court's confirmation of the arbitration award.

C. Did the District Court Have Ancillary Jurisdiction Over the Garnishment Action?

IFC's appeal from the District Court's order dismissing the garnishment action against the Fund for lack of subject matter jurisdiction raises two theories of jurisdiction. First, IFC claims that the District Court had ancillary jurisdiction. Second, IFC claims that the District Court had supplemental jurisdiction under 28 U.S.C. § 1367(a). We undertake a plenary review of dismissals for lack of subject matter jurisdiction. Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 219 (3d Cir. 2005).

IFC argues that the District Court had subject matter jurisdiction both as a matter of ancillary jurisdiction and as a matter of supplemental jurisdiction. Ancillary jurisdiction is a common law doctrine that has largely been codified as "supplemental jurisdiction" in 28 U.S.C. § 1367.[6] Peacock v. Thomas, 516 U.S. 349, 354, n.5 (1996). We do not see the relevant inquiries for ancillary and supplemental jurisdiction as separate; if the District Court had ancillary jurisdiction, it also had supplemental jurisdiction under 28 U.S.C. § 1367.

The Supreme Court has explained that "a federal court may exercise ancillary jurisdiction '(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.'" Id. at 354 (quoting Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379-80 (1994)). Previously, we have held that a federal district court "has ancillary jurisdiction to adjudicate a garnishment action by a judgment creditor against a nonparty to the original lawsuit which may owe the judgment debtor an obligation to indemnify against the judgment." Skevofilax v. Quigley, 810 F.2d 378, 385 (3d Cir. 1987) (*en banc*). Skevofilax involved a garnishment action brought by judgment creditors who had won a federal judgment for malicious prosecution against three police officers. The officers were indemnified by the township that employed them, and the judgment creditors sought to satisfy the judgment by garnishing the township under FED. R. CIV. P. 69. The township objected that the federal district court lacked subject matter jurisdiction over the garnishment action because the parties were not diverse and the garnishment proceeding was based solely on contract and raised no federal issues. Sitting *en*

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6 Section 1367 authorizes supplemental jurisdiction:

> over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a).

banc, we held that under Rule 69, "the same relief is available in federal court for the satisfaction of a federal court judgment as would be available in state court," as "Rule 69 does not contemplate that the holders of federal judgments must resort to state tribunals for their enforcement." Id. at 384. The applicable state procedure in Skevofilax permitted a garnishment action based on an indemnification agreement. For that reason, we ruled that the District Court had jurisdiction.

There is no contention that, if Skevofilax is still "good" law, it governs this case and the District Court had ancillary jurisdiction over the garnishment action. The District Court held that it did not have subject matter jurisdiction because it believed that the Supreme Court's decision in Peacock, 516 U.S. 349, abrogated Skevofilax. The question before us, then, is whether Peacock overruled Skevofilax. We hold that it did not, and we are obligated to follow our precedent in Skevofilax insofar as Peacock does not apply.

1. Did Peacock Abrogate Skevofilax?

In Peacock, the Supreme Court addressed the question "whether federal courts possess ancillary jurisdiction over new actions in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment." 516 U.S. at 351. The plaintiff in Peacock had obtained a federal judgment against the defendant corporation for an ERISA violation. While the case was on appeal, the corporation's primary shareholder transferred most of the corporate assets to himself, which defeated the plaintiff's attempts to collect on the judgment from the corporation. The plaintiff then brought an action in federal court against the shareholder under a veil-piercing theory. Id. at 352. The plaintiff alleged subject matter jurisdiction, inter alia, as a matter of ancillary jurisdiction to the original ERISA suit. Id. at 354. The Supreme Court rejected the plaintiff's claim of ancillary jurisdiction because of the lack of a factual nexus with the original ERISA suit and because it involved "entirely new theories of liability." Id. at 358.

The Fund argues that Peacock overruled Skevofilax and, as evidence of that, points to Peacock's reference to Skevofilax as being on the wrong side of a circuit split. Id. at 352 n.2. Peacock noted that the Supreme Court had granted certiorari in the case to resolve a circuit split on the exercise of ancillary jurisdiction, id. at 352, and illustrated this split in footnote two, in which Skevofilax was listed along with three other cases as being on the wrong side of the split:

> Compare 39 F.3d 493 (CA4 1994) (case below), Argento v. Melrose Park, 838 F.2d 1483 (CA7 1988), Skevofilax v. Quigley, 810 F.2d 378(CA3) (en banc), cert. denied,481 U.S. 1029, 107 S.Ct. 1956, 95 L.Ed.2d 528 (1987), and Blackburn Truck Lines, Inc. v. Francis, 723 F.2d 730 (CA9 1984), with Sandlin v. Corporate Interiors Inc., 972 F.2d 1212 (CA10 1992), and Berry v. McLemore, 795 F.2d 452 (CA5 1986).

Id. at 352 n.2. The implication drawn by the Fund is that Peacock intended to abrogate Skevofilax. We are more sanguine about the continued viability of Skevofilax.

Footnote two is dictum. As the Supreme Court noted in the course of its discussion of ancillary jurisdiction in Kokkonen v. Guardian Life Insurance Co. of America, "[i]t is to the holdings of . . . cases, rather than their dicta, that we must attend." 511 U.S. 375, 379 (1994). Nonetheless, we pay due homage to the Supreme Court's well-considered dicta as pharoi that guide our rulings. Cf. Tate v. Showboat Marina Casino P'ship, 431 F.3d 580 (7th Cir. 2005) (Posner, J.) (arguing that "the holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome"). Footnote two, however, is hardly a well-considered dictum; it merely illustrates a circuit split about general questions of ancillary jurisdiction and is in no way dispositive of whether Peacock extends to garnishment actions.

Peacock itself made clear that it does not apply to Rule 69 actions. In the penultimate paragraph of the Peacock's majority opinion, the Supreme Court noted that:

> When a party has obtained a valid federal judgment, only extraordinary circumstances, if any, can justify ancillary jurisdiction over a subsequent suit like this. To protect and aid the collection of a federal judgment, the Federal Rules of Civil Procedure provide fast and effective mechanisms for execution.

Id. at 359. The Supreme Court then observed in a footnote that "Rule 69(a), for instance, permits judgment creditors to use *any* execution method consistent with the practice and procedure of the State in which the district court sits." Id. at 359 n.7 (emphasis added). Thus, the Supreme Court did not see a Rule 69 action as falling into the same category as the veil-piercing suit in Peacock. Peacock excepted Rule 69 actions from its reach.

Rule 69 provides that "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held. . . ." FED. R. CIV. P. 69. The Supreme Court referred to the full range of execution methods authorized under Rule 69, and for the Federal District Court for the Eastern District of Pennsylvania this includes garnishment. PA. R. CIV. P. 3101-3149. Thus, under Peacock itself, ancillary jurisdiction was proper over the Rule 69 garnishment action in this case.

Moreover, the Fund's reading of footnote two is contrary to the substance of the Peacock opinion. Factually, Peacock is a bird of a different feather than Skevofilax, and we do not believe that the Supreme Court intended Peacock to extend to the Skevofilax situation because garnishment is different from other types of liability. The key difference between Peacock and Skevofilax is that Peacock addressed whether ancillary jurisdiction was available to find primary liability, whereas Skevofilax dealt with ancillary jurisdiction to seek satisfaction of a judgment from a party that is alleged to be secondarily liable based on an indemnification agreement. Peacock emphasized the need for independent subject matter jurisdiction over *new* actions, id. at 359, which distinguishes it from a garnishment action. The Supreme Court itself recognized this distinction in Mackey v. Lanier Collection Agency & Service, where it noted that garnishment is usually understood as a procedural mechanism for the enforcement of judgments, rather than a "substantive law . . . [that] creates rights and liabilities where none existed before." 486 U.S. 825, 834 n.10 (1988).

Peacock was not a collection or enforcement action. The plaintiff did not seek a Rule 69 garnishment and there was no indemnity obligation available for garnishment. The plaintiff in Peacock did not seek to stand in the judgment debtor's shoes or to enforce an indemnification agreement. Instead, Peacock was an entirely new and unrelated action. There was no nexus of factual allegations between the veil-piercing claim in Peacock and the underlying ERISA claim, id. at 356; the plaintiff in Peacock was attempting to jurisdictionally bootstrap a new veil-piercing action onto his earlier ERISA suit. Veil-piercing does not make a party secondarily liable. Rather, it collapses corporate distinctions to make for joint primary liability. This contrasts with garnishment, in which there is a new party and a new theory of liability, but not a new direct claim. Moreover, garnishment actions are distinguishable from veil-piercing because they require a pre-existing contractual or statutory basis for garnishment, whereas veil-piercing is an equitable procedure, In re: Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005), that involves the creation of liability in spite of the contractual and statutory separateness of corporate entities.

The Supreme Court in Peacock observed that a court's ancillary jurisdiction is greater in judgment-enforcement actions than in independent suits based on a judgment, and was careful to note that it had "reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments." 516 U.S. at 356. The Supreme Court explicitly refrained from addressing collection actions in Peacock, see id. at 357, n.6, and noted that it had "never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person *not already liable* for that judgment." Id. at 357 (emphasis added). Thus, Peacock only addressed jurisdiction over actions that seek to impose liability "on a *person not otherwise liable* for the judgment." Id. at 351 (emphasis added). Indeed, Peacock itself largely recognized that jurisdiction is proper for Rule 69 actions to enforce a judgment like the instant one. See id. at 359, n.7. In light of the crucial factual distinction regarding primary and secondary liability, we believe that Peacock does nothing to disturb our holding in Skevofilax.

Indeed, were it otherwise, there could *never* be jurisdiction over any garnishment action, as it would always be based on a new, contractual theory of liability. Thus, "in almost all cases federal courts would be unable to enforce their judgments by resort to garnishment process." Skevofilax, 810 F.2d at 384. As we noted in Skevofilax:

> The untoward consequences of insistence upon a federal district court possessing an independent basis of subject matter jurisdiction over a garnishee would not be confined to the efforts at post-judgment enforcement. Under Rule 64 of the Federal Rules of Civil Procedure, prejudgment in rem and quasi in rem remedies are available "under the circumstances and in the manner

> provided by the law of the state in which the district court is held[.]"

Id. at 384 (citing FED. R. CIV. P. 64) (alterations original).

"Ancillary enforcement jurisdiction is, at its core, a creature of necessity." Peacock, 516 U.S. at 359. If federal courts were deprived of ancillary jurisdiction to enforce their judgments, it would make federal courts dependent on state courts to enforce federal judgments, thereby jeopardizing the effectiveness of federal decrees. Skevofilax, 810 F.2d at 385. Moreover, "[i]t would impose on the state courts the role of serving as an auxiliary or adjunct to the district court by cleaning up the loose ends of a district court lawsuit," thereby impairing the interests of the state. Id. "Prudential factors", such as "convenience, judicial economy . . . fairness to litigants and . . . interests of federalism" counsel strongly against the Fund's reading of Skevofilax. Id. at 389 (Becker, J., concurring) (quoting Ambromovage v. United Mine Workers of Am., 726 F.2d 972, 990 & n.53 (3d Cir. 1984)). We are not inclined to render federal courts toothless. Doing so would be contrary to all prudential factors.

Our reading of Peacock comports with the jurisprudence of the Seventh Circuit, which has considered the issue on no less than three occasions. Footnote two of Peacock directs the reader to compare six circuit court decisions. 516 U.S. at 352 n.2. Three of the six cases, including Peacock itself, dealt with whether there was ancillary jurisdiction over veil piercing actions subsequent to an initial finding of corporate liability. See Thomas v. Peacock, 39 F.3d 493 (4th Cir. 1994); Sandlin v. Corp. Interior, Inc., 972 F.2d 1212 (10th Cir. 1992); Blackburn Truck Lines, Inc. v. Francis, 723 F.2d 730 (9th Cir. 1984). Of the remaining three cases, one is Skevofilax and one is Argento

v. Melrose Park, 838 F.2d 1483 (7th Cir. 1988).[7] Argento involved a garnishment action on an indemnification contract to collect the damages awarded in a civil rights action under 42 U.S.C. §§ 1983 and 1985. The legal issue in Argento was indistinguishable from Skevofilax. Since the Supreme Court's decision in Peacock, the Seventh Circuit has stated in no less than three cases that Peacock did not overrule Argento. See Yang v. City of Chi., 137 F.3d 522 (7th Cir. 1998) (district court had jurisdiction over garnishment proceeding based on indemnification clause); Wilson v. City of Chi., 120 F.3d 681 (7th Cir. 1997) (holding Peacock does not apply where "the plaintiff is proceeding in his original action [under Rule 69] rather than by means of a new suit."); Matos v. Nellis, Inc., 101 F.3d 1193 (7th Cir. 1996). Accord Condaire, Inc. v. Allied Piping, Inc., 286 F.3d 353 (6th Cir. 2002) (holding that federal court may exercise jurisdiction over a garnishment action that raises different issues than were litigated in the original suit). Cf. U.S.I. Prop. Corp. v. M.D. Constr. Co., 230 F.3d 489, 497

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7 The final case is Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986), which involved two separate garnishment actions against different defendants, who were both alleged to be liable to the judgment debtor. The Fifth Circuit concluded that there was no ancillary jurisdiction because Fifth Circuit precedent has always treated garnishments as independent actions, unconnected to the underlying suit establishing liability. Id. at 455. Nonetheless, the Fifth Circuit held that there was federal jurisdiction over one of the garnishment actions based on diversity jurisdiction.

We find the results of the Fifth Circuit's decision troubling, as it would largely restrict the ability of federal courts to enforce their judgments to the diversity of citizenship of garnishee and garnishor (although we can conceive of the rare situation in which garnishment could lead to federal question jurisdiction). The possibility that some garnishees will be haled before a federal court while other garnishees on the same judgment will end up before a state court is a poor use of judicial resources and creates too many opportunities for jurisdictional mischief.

n.6 (1st Cir. 2000) (noting Skevofilax and stating "[w]e do not decide whether such indemnification proceedings fall within enforcement jurisdiction."); Dulce v. Dulce, 233 F.3d 143 (2d Cir. 2000) (district court had jurisdiction to order judgment debtor's executor to probate judgment debtor's will); Thomas, Head & Greisen Employees Trust v. Buster, 95 F.3d 1449 (9th Cir. 1996) (district court had jurisdiction to void fraudulent transfer). We concur with the Seventh Circuit that Peacock applies to the non-collection scenarios, like veil-piercing, but not to the garnishment scenarios of Argento and Skevofilax.

The Fund also claims that Peacock governs this case because a new basis for liability is alleged. We disagree. Although garnishment actions are new actions in the sense that there is a new party and a new theory for that party's liability, they are not new actions in the sense of a new direct claim. The District Court characterized the instant case as having a different theory of liability based on breach of contract. More aptly phrased, the garnishment is based not on a breach of contract theory, but on the *existence* of a contract. Although garnishment involves a new theory of liability, there is an essential difference between an action to enforce a judgment via garnishment and an action to establish liability in the first place. A typical action requires that the plaintiff establish that the defendant is liable to him. A garnishment action, in contrast, is predicated on a pre-existing judgment finding that the judgment debtor is liable to the garnishor and then requires a showing that the garnishee is liable to the judgment debtor, not to the garnishor.

The Fund objects that Peacock should govern because the garnishment was a separate action rather than part of the original suit. While the Fund is correct that the Seventh Circuit appeared to find this distinction important in Wilson, 120 F.3d at 684, we find that the better reading of Wilson is the one the Seventh Circuit has adopted in later cases, namely that Rule 69 actions are to be treated as part of the original suit. Thus, in Yang, the Seventh Circuit noted that:

> there is no question here that [plaintiff]'s Rule 69 petition is not a new suit. As in Wilson and Argento, the only new issue raised in [plaintiff]'s second suit is whether [defendant was acting within the scope of his employment so as to trigger the indemnification clause].

137 F.3d at 526. Thus, the Seventh Circuit line of cases does not support the treatment of garnishment actions differently, based on whether they are brought separately or as a part of the original suit that established primary liability.

To the extent that the Fund urges us to find the fact that a Rule 69 action was filed separately from the original suit as divesting jurisdiction, we reject the proposition as unduly formalistic. A Rule 69 action can be filed as part of the original suit or as a separate suit. A Rule 69 action, by its very nature, piggybacks on an action establishing liability and has a derivative status. Moreover, the Rule 69 action can be initiated under the original suit years after the original complaint was filed. We fail to see a meaningful distinction between Rule 69 actions brought under an original suit and those brought separately, and we are loathe to burden judgment creditors with an atavism that smacks of the archaic distinctions of pleadings at common law.

The Fund's final argument is that ancillary jurisdiction over a garnishment action is not appropriate where the garnishee disputes its liability. We do not believe that disputed liability is sufficient to divest federal jurisdiction from an action when it would otherwise be appropriate, even if the dispute involved questions of fact. Under Skevofilax, the dispute over the scope of the indemnification agreement is irrelevant to jurisdiction; contesting garnishment cannot itself defeat federal enforcement jurisdiction. See 810 F.2d at 385. Cf. Matos, 101 F.3d at 1196.

("Whether a debt existed, and if so whether [the garnishee] repaid, are in the end factual questions that the district court must resolve.")

The Fund argues that Peacock's observation that the Supreme Court had previously "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including . . . garnishment" cannot be read as an indication that there is ancillary jurisdiction over all garnishment actions. Instead, the Fund asserts that ancillary jurisdiction over garnishment actions is only appropriate when there are no contested issues of fact regarding the garnishment. Thus, in the Fund's reading, there might be ancillary jurisdiction over a run of the mill garnishment of a bank account to pay a child support order but not for a contested indemnification like in the present case.

As support for this reading, the Fund points to Hudson v. Coleman, 347 F.3d 138, 146 (6th Cir. 2003), in which the Sixth Circuit held that there was no ancillary federal jurisdiction over a garnishment action based on an indemnification agreement because "legitimate, unresolved disputes concerning whether conduct occurs without scope of [the agreement] deprives a federal court of ancillary jurisdiction in a garnishment action pursuant to Peacock." In Hudson, the Sixth Circuit opined:

> The Supreme Court's acknowledgment of the fact that garnishment sometimes falls within ancillary jurisdiction is obviously not imprimatur for all garnishment actions arising from previous factually similar underlying federal claims to proceed in federal court. The type of garnishment proceeding referred to in Peacock does not contemplate making the garnishee personally liable on the judgment based on some independent legal theory as Hudson seeks to do in this

> case. Instead, the typical garnishment proceeding referenced in Peacock contemplates the garnishee's paying the judgment creditor/garnishing party directly for funds, such as a salary, owed by the garnishee to the defendant in the underlying action.

Id. at 144.

We are unpersuaded by our brethren's analysis.[8] The Sixth Circuit's jurisprudence on ancillary jurisdiction appears

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[8] We would think that any consideration of the scope of the Supreme Court's blessing of ancillary enforcement jurisdiction over garnishment in Peacock would begin with an analysis of the case cited by the Supreme Court as an example of when ancillary jurisdiction was proper over a garnishment action, Mackey, 486 U.S. 825. The Sixth Circuit did not even mention Mackey in Hudson, perhaps because the issue was "obvious." Unfortunately, Mackey does not support the proposition for which the Supreme Court cited it in Peacock. The Supreme Court cited it as an example of its past approval of "the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including . . . garnishment." 516 U.S. at 356.

Ancillary federal enforcement jurisdiction was never involved in Mackey, however. Mackey came up on a grant of *certiorari* to the Georgia Supreme Court; federal courts were never involved until the Supreme Court heard the case and the issue it granted *certiorari* on was whether ERISA, a federal statute, preempted Georgia's garnishment statute. Had the Sixth Circuit referred to Mackey, however, they would have noted a well-considered dictum (easily counter-balancing the rather cursory dictum in footnote two of Peacock) that garnishment is usually understood as a procedural mechanism for the enforcement of judgments, rather than a "substantive law . . . [that] creates rights and liabilities where none existed before." 486 U.S. at 834, n.10. To this extent, the fact that garnishment always involves a new theory of liability is irrelevant to the question of ancillary jurisdiction. The liability in garnishment is always a derivative, secondary liability to the garnishor, never direct, primary liability. This distinction removes garnishment actions from the analysis set forth in Peacock.

unsettled, Condaire, Inc. v. Allied Piping, Inc., 286 F.3d 353 (6th Cir. 2002) (holding that federal court may exercise jurisdiction over a garnishment action that raises different issues than were litigated in the original suit), and the example given by the Sixth Circuit is a distinction without a difference. The difference between "to owe" and "to be liable" is purely semantic. Garnishment always involves a separate theory of liability from the original action. The garnishment of a salary still involves a theory of contract liability based on an employment contract and is thus indistinguishable from garnishment based on an indemnification contract (which could itself be part of an employment contract). In any event, our disagreement with Hudson is immaterial because, as discussed below regarding the District Court's denial of IFC's summary judgment motion, the remaining questions concerning the Fund's liability are questions of law. The fact that the Fund's liability is disputed does not defeat federal jurisdiction.

Although we believe it clear that ancillary enforcement jurisdiction is proper in this case under its actual facts, we note that there would undoubtedly have been subject matter jurisdiction over the garnishment in this case had SIP made a cross-claim against the Fund under FED. R. CIV. P. 13(g). "[M]any of the same factors that would justify jurisdiction of the indemnification claim if it had been . . . asserted as a cross-claim under Rule 13(g) continue to justify jurisdiction over the Rule 69 claim." Skevofilax, 810 F.2d at 389 (Becker, J., concurring). In neither the instant case nor Skevofilax was a timely cross-claim filed under Rule 13(g). A plurality section of Skevofilax treated the judgment debtors' support of the judgment creditors' garnishment motion as a cross-claim, but we do not think it takes away from the essential point. Namely, if there would have been jurisdiction over a cross-claim, there must also be jurisdiction over a derivative claim made by a party standing in the shoes of the party that could have made the cross-claim.

There are numerous strategic reasons why a cross-claim might not be asserted in any particular action,[9] but we do not believe that federal jurisdiction can ever depend on a particular defendant's strategic maneuvers. Either there is a sufficient "common nucleus of operative fact" for jurisdiction to hear related claims or there is not. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). If a sufficient "common nucleus of operative facts" for jurisdiction could exist over a cross-claim, so too could it exist over a garnishment action. There was a "common nucleus of operative facts" between the arbitration confirmation and the garnishment in this case because the original arbitration matter which the District Court confirmed dealt with IFC's contract with SIP to recruit investors *for the Fund*, which SIP managed via SIF Management, L.P. When SIP refused to pay the placement fees to IFC, it did so on the grounds that it was protecting the Fund from the alleged fraud.

SIP's calculated decision not to implead the Fund should not be adequate to defeat IFC's garnishment action. The possibility of ancillary jurisdiction via a cross-claim indicates that there should also be ancillary jurisdiction for a garnishment action that lets the garnishor stand in the shoes of the potential cross-claimant.

To summarize, we do not believe that Peacock extends to cases involving garnishment actions based on indemnification agreements. Therefore, we hold that Skevofilax is still "good law" and are bound by this precedent to find that there is ancillary jurisdiction to impose an obligation to pay an existing judgment on a party that is alleged in good faith to be

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[9] SIP and the Fund are juridically separate entities and are represented by separate counsel, but there is an inference of complicity between the Fund and SIP, which is the general partner in SIF Management, L.P., which is the general partner of the Fund, in order to escape the judgment, for the Fund is set to liquidate on March 31, 2006.

secondarily liable for that judgment. We conclude that our holding here does not ruffle Peacock's feathers.

D. Did the District Court Err in Refusing to Grant Summary Judgment for the Garnishment?

In the same order, the District Court both denied IFC's motion for summary judgment on the garnishment and dismissed the garnishment action for lack of subject matter jurisdiction. If the District Court lacked subject matter jurisdiction, it should not have ruled on summary judgment, as there would not be a proper "case or controversy" that it could adjudicate.

While we remain chary of hypothetical jurisdiction, see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-102 (1998), in light of our ruling that the District Court erred in finding that it did not have subject matter jurisdiction, we are willing to look upon the District Court's ruling as being a ruling in the alternative. We recognize that the District Court was faced with a difficult question regarding the relationship of Peacock and Skevofilax, and that, viewed in light of our ruling, the District Court's combined ruling served the interests of judicial economy. Therefore, we will deem the District Court's consideration of summary judgment to have been proper in spite of its finding that it did not have subject matter jurisdiction over the case.

We undertake a plenary review of grants of summary judgment. Gottshall v. Consol. Rail Corp., 56 F.3d 530, 533 (3d Cir. 1995). Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the non-moving party. Gottshall, 56 F.3d at 533.

The genuine issue of material fact found by the District Court was the scope of the indemnification agreement, namely whether it was loss or liability indemnification and whether it covered the placement fee agreement. Indemnity agreements are interpreted in accordance with general principles of contract law and, under Delaware law, "the interpretation and construction of insurance contracts presents a clear question of law subject to de novo review." E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 686 A.2d 152, 156 (Del. 1996); Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195 (Del. 1992) ("The proper construction of any contract, including an insurance contract, is purely a question of law."). Therefore, the District Court erred in denying IFC's summary judgment motion on the grounds that genuine issues of material *fact* remained. Accordingly, we will reverse the District Court's denial of IFC's motion for summary judgment.

Typically, we would now remand this case to the District Court to allow it the first crack at determining questions of law related to summary judgment, which could then be appealed to us. This is not a typical case, however, for two reasons. First, the Fund is set to liquidate on March 31, 2006. If we were to remand and the District Court granted summary judgment, IFC's ability to collect on its judgment from the Fund would be severely prejudiced. IFC has been diligent in protecting its rights and had the District Court properly found jurisdiction over the garnishment action, the March 31, 2006, deadline might not loom so large.

Second, although there is a corporate separateness between SIP and the Fund, we note that SIP exercises significant control over the Fund in its capacity as general partner of SIP Management, L.P., which is the general partner of the Fund. The main legal defense posed by the Fund is that it is not yet liable. Were SIP to pay, the Fund could not claim that its indemnification obligation has not yet vested. In the context of the pending liquidation of the Fund, the party capable of satisfying the judgment, there is a strong overtone of strategic behavior by related parties. We are loathe to let a federal judgment be evaded by strategic behavior. See City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001) ("a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.") Therefore, rather than remand, we are exercising the full measure of our jurisdiction under 28 U.S.C. § 1291 and undertaking our own plenary review of the questions of law.

There are still four questions of law that must be resolved. First, whether the indemnification agreement was for loss or liability indemnification; second, whether the indemnification agreement applied to the placement fee arrangement; third, whether SIP was acting within the ambit of the "on behalf of" clause regarding the placement fees; and fourth, whether there is merit to the Fund's claim of set-off.

1. Was the Indemnification for Loss or Liability?

The agreement between SIP and the Fund is governed by Delaware law. It is readily apparent that it is an agreement for liability, not just loss indemnification. The indemnification agreement states that:

> The Fund shall indemnify and *hold harmless* each Indemnified Person [including SIP] from any and all reasonable costs and expenses and *all damages and claims* which may be *incurred or asserted* against him or it by reason of any action taken or omitted to be taken on behalf of the [Fund] or in furtherance of its interest, or by reason of such Indemnified Person's connection to or relationship with the [Fund], unless such cost, expense, damage or claim results from the failure of such Indemnified Person to [act in good faith in the best

> interests of the Fund and not commit gross negligence or wilful misconduct].

(emphasis added). The agreement provides indemnification not merely for "damages incurred," but also for "claims asserted." Under Delaware law, this assuredly includes judgments awarded. Seitz v. A-Del. Constr. Co., 1987 Del. Super. LEXIS 1279, *7 (Del. Super. Ct., Aug. 13, 1987) ("When the contract of indemnity binds the indemnitor to save harmless the indemnitee, it is a contract indemnity against liability."); Tidewater Coal Exch., Inc. v. Am. Surety Co., 143 A. 34 (Del. Super. Ct. 1928); see also, Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 202 n.6 (3d Cir. 1995) ("hold harmless" defined as an agreement in which one party relieves another of "liability"); Sorensen v. Overland Corp., 142 F.Supp. 354 (D. Del. 1956).

2. Did the Indemnification Agreement Exclude Placement Fees?

Under Delaware law,

> if a writing is plain and clear on its face, i.e., its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent. However, if the words of the agreement can only be known through an appreciation of the context and circumstances in which they were used a court is not free to disregard extrinsic evidence of what the parties intended. In that situation the language used by the parties is subject to different meanings and is, thus, ambiguous, or more precisely, not reflective of the parties shared intent. But the language of an agreement, like that of a statute, is not rendered ambiguous simply because the parties in litigation differ concerning its meaning.

City Investing Co. Liquidating Trust v. Cont'l Cas. Co., 624 A.2d 1191, 1198 (Del. 1993) (internal citations and quotations omitted).

In this case the agreement is plain on its face. There is no ambiguity regarding the words "*any* action take or omitted to be taken on behalf of the [Fund]". This is broad, unambiguous language that evinces no intention to carve out a particular transaction. Therefore, we do not consider the affidavit of an SIP member, submitted by SIP in opposition to the garnishment, which purports that the indemnity provision was not intended to apply to placement fee obligations. As the indemnification agreement is clear on its face, we hold that it does cover the placement fee arrangement, if it was undertaken on behalf of the Fund.

3. Was SIP Acting on Behalf of the Fund When It Refused to Pay IFC?

The Fund argues that although the placement fee arrangement was made on its behalf, the failure to pay IFC for its services was not done on its behalf. We believe that this draws too fine of a line and that, as a matter of law, SIP was acting on the Fund's behalf in contracting with IFC and in its actions that constituted a breach of that contract. It is unquestioned that SIP had the authority to enter into the placement fee arrangement and to monitor the contract. SIP's refusal to pay IFC was because SIP claimed that IFC was defrauding it. SIP has vigorously maintained this position throughout this litigation. When SIP refused to pay, it was acting in accordance with its management duties to protect the Fund from fraud and believed in good faith, as far as we can tell, that withholding payment was excused by IFC's prior breach. Only now, when it appears that the Fund might be on the hook, does the Fund disown SIP's actions. We are unimpressed. The failure to pay IFC its placement fees was done on behalf of the Fund and is covered by the indemnification agreement.

4. May the Fund Raise SIP's Set-Off Claim as a Defense to the Garnishment?

Finally, the Fund argues that IFC breached its agency agreement with SIP by diverting the Fund's assets and that the Fund's ability to raise SIP's claim of a set-off precludes summary judgment on the garnishment action. We disagree. First, this was SIP's defense in arbitration, which was rejected by the arbitrators. This is not a direct appeal of the arbitrators' ruling, so if the Fund were in privity with SIP, the arbitrators' ruling, confirmed by the District Court in its Order of September 7, 2004, would preclude litigation of this issue under *res judicata*. Transamerica Occidental Life Ins. Co. v. Aviation Office of America, Inc., 292 F.3d 384, 393 (3d Cir. 2002). Second, the Fund, as garnishee, may not raise the judgment debtor's defenses as against the judgment creditor. FED. R. CIV. P. 69 states that "[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held. . . ." Although the interpretation of the indemnification Agreement is governed by Delaware law, the case was before the United States District Court for the Eastern District of Pennsylvania. We look therefore to Pennsylvania law regarding enforcement of the judgment. Under Pennsylvania law, a garnishee "may not assert any defense on behalf of the defendant against the plaintiff or otherwise attack the validity of the attachment." PA. R. CIV. P. 3145(b)(2). Therefore, the Fund may not raise SIP's set-off claim as a defense.

Because no genuine issues of material fact remain and all issues of law have been decided in favor of IFC, we hereby order summary judgment in favor of IFC in its garnishment action.

Conclusion

For the reasons given above, we will affirm the District Court's confirmation of the arbitration award in favor of IFC as against SIP, reverse the District Court's denial of summary judgment on IFC's Rule 69 garnishment action, and direct that summary judgment be entered in favor of IFC as against the Fund on the garnishment action.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. MISC.A.04-00107

In the Matter of the Arbitration between

IFC INTERCONSULT, AG,

Petitioner/Plaintiff.

v.

SAFEGUARD INTERNATIONAL PARTNERS, LLC

Respondent

and

SAFEGUARD INTERNATIONAL FUND, L.P.,

Respondent/Garnishee

MEMORANDUM & ORDER

Katz, S.J. February 10, 2005

Plaintiff/Petitioner IFC Interconsult, AG ("IFC") brings its Motion for Summary Judgment against

Respondent/Garnishee Safeguard International Fund, L.P. ("the Fund") to enforce an arbitration award rendered in its favor by this court against Respondent Safeguard International Partners, LLC ("SIP"). IFC argues that the Fund is liable for the judgment that SIP has failed to satisfy. For the reasons set forth below, IFC's Motion for Summary Judgment is denied. In addition, the garnishment action against Respondent/Garnishee Safeguard International Fund, L.P. is dismissed for lack of subject matter jurisdiction.

A. Background

In 1996, IFC contracted with SIP to obtain investors for the Fund. SIP is the general partner of the general partner (SIF Management, L.P.) of the Fund. In exchange for IFC obtaining investors for the Fund, SIP was to pay IFC placement fees. Prior to SIP contracting with IFC to obtain investors for placement fees, SIP had entered into a partnership agreement with the Fund which included an indemnity clause.[1] Although IFC knew of the Fund's existence at the time it contracted with SIP to obtain investors, it did not negotiate as a term of the contract that the Fund would guarantee SIP's obligations. IFC contracted solely with SIP.

After a dispute arose as to investments obtained by IFC, SIP refused to pay IFC further placement fees. IFC brought suit and on September 7, 2004, this court entered judgment confirming an approximately $3.9 million arbitration award in favor of IFC against SIP. To this point, SIP has failed to bond

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[1] The clause provides in part that "the Partnership shall indemnify and hold harmless each Indemnified Person from any and all reasonable costs and expenses and any and all damages and claims which may be incurred or asserted against him or it by reason of any action taken or omitted to be taken on behalf of the Partnership or in furtherance of its interest, or by reason of such Indemnified Person's connection to or relationship with the Partnership." Plaintiff's Motion for Summary Judgment, ¶ 6.

or satisfy the judgment. On November 8, 2004, IFC served the Fund as garnishee with a writ of execution upon the judgment against SIP. IFC argues that as SIP's judgment creditor, it stands in SIP's shoes and may enforce the indemnity clause contained in the partnership agreement between SIP and the Fund in order to collect on its judgment.

B. Subject Matter Jurisdiction

1. This court does not have original jurisdiction over the present garnishment proceeding under the Federal Arbitration Act

This court exercised proper jurisdiction over the first phase of litigation, which resulted in a confirmation of IFC's arbitration award against SIP, under Article 2 of the Federal Arbitration Act ("the FAA"). The FAA provides for enforcement of foreign arbitral agreements and awards such as those at issue between IFC and SIP by incorporating the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). Under the FAA, federal district courts have original jurisdiction over actions reached by the Convention. 9 U.S.C. § 203. Article 2 provides for two types of claims in federal district court: (1) an action to compel arbitration pursuant to an arbitration agreement falling under the convention, 9 U.S.C. § 206; and (2) an action to confirm an arbitral award as against any other party to an arbitration made pursuant to an agreement falling under the convention, 9 U.S.C. § 207.

IFC argues that the FAA provides for original subject matter jurisdiction in the current action. But the current action is to enforce a judgment, not to compel arbitration or to confirm an arbitral award. IFC has already prevailed in both of those circumstances. In addition, the FAA's original federal jurisdiction does not extend to actions against parties which were not parties to the initial arbitration agreement. The Fund was not a party to the arbitration between IFC and SIP and as a result, we cannot extend original subject matter jurisdiction over this garnishment proceeding.[2]

2. This court lacks ancillary jurisdiction over the present garnishment proceeding

IFC argues in the alternative that this court retains ancillary jurisdiction over the present garnishment proceeding under 28 U.S.C. § 1367, which provides for supplemental jurisdiction "over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constitution." IFC cites Skevofilax v. Quigley for the proposition that a "district court has ancillary jurisdiction to adjudicate a garnishment action by a judgment creditor against a nonparty to the original lawsuit which may owe the judgment

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[2] As the Fund itself points out, a district court's subject matter jurisdiction over a judgment-enforcement proceeding may be based on diversity jurisdiction. Response of Safeguard International Fund, L.P., to Motion for Summary Judgment, 7, n. 6. It would appear, though, that IFC cannot establish diversity jurisdiction in this action. The district court must "deny jurisdiction in an action by an alien against citizens of another state and another alien." Field v. Volkswagenwerk AG, 626 F.2d 293, 296 (3d Cir. 1980). IFC is corporation organized and existing under the laws of Switzerland, thus establishing itself as an alien plaintiff for diversity purposes.

However, the citizenship of limited liability companies such as SIP and limited partnerships such as the Fund "is deemed to be that of the persons composing such association." Pippett v. Waterford Dev., LLC, 166 F.Supp.2d 233, 236 (E.D.Pa. 2001). If any alien is a partner of the Fund, diversity is destroyed between IFC and the Fund. One of the partners of the Fund is Heinz C. Schimmelbusch, an Austrian citizen and not a permanent U.S. citizen. Thus diversity jurisdiction cannot be established. In any event, IFC does not allege diversity jurisdiction as grounds in this current proceeding and thus we need not reach this question.

debtor an obligation to indemnify against the judgment, or any other form of property." Skevofilax, 810 F.2d 378, 387 (3d Cir. 1987).

IFC distinguishes the current controversy from Peacock v. Thomas, 516 U.S. 349 (1996), relying instead on the earlier issued Skevofilax, while the Fund asserts that the more recent Peacock trumps Skevofilfax. In Skevofilax, the Third Circuit held that the district court had ancillary jurisdiction to adjudicate a garnishment action against a New Jersey township in order for plaintiffs to collect on a judgment rendered against police officers found liable for use of excessive force, where the township had agreed to indemnify the officers against liability. In Peacock, the Supreme Court abrogated Skevofilax, Peacock, 516 U.S. at 351, n.2, and held that the district court did not possess ancillary jurisdiction over a new employee action to collect on an ERISA class action judgment rendered against a former employer through the employer's officer.

Peacock affirms the two instances in which ancillary jurisdiction may be exercised: "(1) to permit disposition by a single court of factually interdependent claims; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Peacock, 516 U.S. at 354 (quoting Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379-80 (1994)). In the first instance, the Supreme Court found that any factually interdependent questions were served once judgment was entered in the original ERISA suit. Similarly, when IFC's arbitration award was confirmed in the original district court suit, "the ability to resolve simultaneously factually intertwined issues vanished." Id. at 355. Regardless, as in Peacock, there is an insufficient factual dependence between the claims raised in IFC's prior and resolved effort to confirm its arbitration award and the current effort to enforce it through the Fund. The facts of the confirmation claim involved whether the participation in the arbitration process of a third party prohibited by a state court judge violated the process itself. The facts of the garnishment claim involve whether the Fund (a non-party to the arbitration) is required to indemnify SIP and satisfy IFC's judgment. IFC insists that the current case is "based on the same facts as the underlying arbitration award." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, 7, n. 4. But in fact the claims "have little or no factual or logical interdependence, and, under these circumstances, no greater efficiencies would be created by the exercise of federal jurisdiction over them." Id. at 356 (citing Kokkonen, 511 U.S. at 380).

As for the second instance, the Supreme Court in Peacock did approve the exercise of ancillary jurisdiction over "a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." Id. at 356 (citations omitted). Indeed, IFC cites vehemently to this portion of the decision, despite IFC's general reluctance to consider its own garnishment action as similar to that in Peacock. However, Peacock warns that the Supreme Court has "never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." Id. at 357. The Court explicitly cautioned against the exercise of jurisdiction over proceedings that are entirely new and original, such as the employee's effort to pierce the corporate veil to reach his former employer's officers in order to collect on his ERISA class action judgment. Id. at 358.

IFC argues that this garnishment action is not an entirely new and original proceeding and "simply invokes the district court's 'inherent power to enforce its judgments.'" Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, 7, n. 4 (quoting Peacock, 516 U.S. at 356).

For this reason it maintains that the action falls under Skevofilax, not Peacock. In fact, the question of the indemnifying clause does raise a new and original proceeding, one premised on legal theory distinct from that underlying the action to confirm the arbitral award—namely, whether the Fund has essentially committed a breach of contract in failing to indemnify SIP under the terms of the clause.

In Skevofilax, there was no dispute over the applicability of the clause.[3] The contractual language clearly stated that the township was responsible for any judgments against its employees incurred in the course of duty.[4] In the

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[3] The collective bargaining agreement between the township and the police officers provided that in the "event of a judgment against a member of the bargaining unit arising out or incidental to the performance of his duty, the Employer agrees to pay for said judgment or arrange for the payment of said judgment." Skevofilax, 810 F.2d at 379.

[4] In a very similar case cited by the Fund, the Sixth Circuit came out the other way. In Hudson v. Coleman, 347 F.3d 138 (6th Cir. 2003), two police officers were found liable in a civil rights action. The plaintiff sought to enforce the judgment through their employer, the City of Flint, Michigan. She claimed that the police officers' union contract obliged the city to indemnify the officers and thus the district court should extend ancillary jurisdiction. However, the Sixth Circuit found that the indemnification clause in question required the city to indemnify the officers only for acts within the scope of their employment and authority, and the initial suit did not establish that the officers' behavior fell within that scope. As a result, the appeals court determined the enforcement action to be a new and original one and declined to extend the requested ancillary jurisdiction.

Our current case echoes Hudson closely in that interpretative issues remain as to whether the Fund is required to indemnify SIP before SIP has incurred actual losses. This court chooses not to follow Yang v. City of Chicago, 137 F.3d 522 (7th Cir. 1998). While Yang also involved a plaintiff seeking enforcement of a civil rights judgment against police officers through the officers' city employer, the Seventh Circuit felt that current case, the Fund has raised the argument that the language of its indemnification clause covers SIP's actual losses only, not its liability. As a result, the Fund states that it may ultimately need to reimburse SIP for the amount of the judgment *after* SIP pays the judgment itself, but it need not do so beforehand. Regardless of the strength of this contract-interpretation argument, it does raise a genuine issue of material fact that precludes summary judgment. *See* United States v. Diebold, Inc., 369 U.S. 654 (1962); Fed.R.Civ.Pro. 56(c). This issue in turn raises an entirely new and original legal proceeding, over which this court cannot rightfully extend ancillary subject matter jurisdiction.

IFC cites to Home Corp. v. deLone, 1997 WL 214849 (E.D.Pa. April 23, 1997) as more recent evidence that Peacock does not control this case. Attorney deLone was initially sanctioned in a case he counseled against a defendant Kurtz. The sanctions remained unpaid. He later served as counsel in another unrelated case against defendant Home Corp., and won that case. Kurtz sought to collect on the sanctions fees he was owed by deLone from the first case by enforcing judgment against Home Corp., which owed attorneys' fees to deLone from the second case. The district court agreed that ancillary judgment was appropriate.

Home Corp., however, is distinguishable from the current case for the same reason as Skevofilax is distinguishable from both Peacock and the current case. There was no new and

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since an officer had pulled a gun, he was acting in the scope of his employment, and thus there was no separate issue to be determined as to whether city's indemnification policy applied. In our current case the interpretative issue is not so easily subsumed. In addition, Yang concerned a municipality's general statutory duty to indemnify officers for liabilities incurred within their scope of employment. We are concerned with whether SIP has a right to loss indemnification or only liability indemnification under its private contract with the Fund.

original factual issue or theory of liability involved in Kurtz's reaching the fees owed to him through Home Corp. There was no contractual question or indemnification clause interpretation at play as there is in our current case to render ancillary jurisdiction inappropriate.

C. Conclusion

IFC seeks to grasp onto ancillary jurisdiction by repeatedly referring to the current claim as a mere effort to collect a judgment and not to establish liability on the part of the Fund. But because of the question of whether the indemnifying clause is activated by the current circumstances, such liability does need to be established as a separate case from confirming the arbitral award. Peacock explains this distinction in a particularly applicable manner:

> This [judgment-enforcement] action is founded not only upon different facts than the [initial] ERISA suit, but also upon entirely new theories of liability. In this suit, [the plaintiff] alleged civil conspiracy and fraudulent transfer of [his former employer's] assets, but, as we have noted, no substantive ERISA violation. The alleged wrongdoing in this case occurred after the ERISA judgment was entered, and Thomas' claims—civil conspiracy, fraudulent conveyance, and "veil piercing"—all involved new theories of liability not asserted in the ERISA suit. Other than the existence of the ERISA judgment itself, this suit has little connection to the ERISA case. This is a new action based on theories of relief that did not exist and could not have existed, at the time the court entered judgment in the ERISA case.

Similarly, IFC's judgment enforcement action relies not only on different facts than the award-confirmation suit, but also upon a new theory of liability—essentially, breach of contract between the Fund and SIP. The alleged wrongdoing in the current case occurred after the award-confirmation judgment was entered, and this effort to reach the Fund based is based on a contract theory of relief did not exist and could not have existed at the time this court entered judgment in the award-confirmation case.

A genuine issue of material fact remains as to whether the indemnification clause at issue applies to loss or liability coverage, rendering summary judgment inappropriate. The question of the indemnification clause raises a new theory of liability related to breach of contract, rendering ancillary judgment inappropriate. Therefore we need not reach the further questions of whether in fact the indemnity clause covers SIP's liability to IFC and not just its actual losses, whether the judgment debt is too contingent and uncertain to be attached in garnishment or whether IFC's garnishment claim is barred by the applicable statute of limitations.

This case is closed for administrative purposes. An appropriate order follows.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, S.J.

ORDER

AND NOW, this 10th day of February, 2005, upon consideration of Petitioner/Plaintiff's Motion for Summary Judgment, and the response, reply and sur-reply thereto, it is hereby **ORDERED** that the Motion is **DENIED**. It is further ordered that the garnishment action against Respondent/Garnishee Safeguard International Fund, L.P. is

DISMISSED for lack of subject matter jurisdiction. This case is closed for administrative purposes.

BY THE COURT:

/s/ Marvin Katz

MARVIN KATZ, S.J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Misc. Action No. 04-00107

In the Matter of the Arbitration between

IFC INTERCONSULT, AG,

Petitioner

and

SAFEGUARD INTERNATIONAL PARTNERS, LLC,

Respondent.

MEMORANDUM

Katz, S.J. September 7, 2004

IFC Interconsult AG ("IFC") and Safeguard International Partners, LLC ("Safeguard") entered into a written agreement dated July 25, 1996 (as amended, the "Agreement") whereby IFC agreed to act as placement agent for a proposed investment limited partnership, the Safeguard International Fund, L.P. ("Fund"). Safeguard agreed to act as General Partner in the Fund. Pursuant to the Agreement, IFC would seek limited partner capital commitment subscriptions for the Fund from investors identified in the Agreement's exhibits. In return for its services, IFC was contractually entitled under the Agreement to compensation in the form of placement and bonus fees as well as certain future rights.

Although IFC raised several hundred million dollars in subscriptions for the Fund, it did not receive any compensation from Safeguard. In January 2002, IFC notified Safeguard that it had assigned forty percent of its right to payment under the Agreement to Carter Financial Corporation ("CFC"), a Delaware corporation solely owned by George Carter. Safeguard refused to consent to the assignment. The Agreement provided that "in the event of any dispute arising under this Agreement, [the parties] will submit the dispute to binding arbitration in the City of Philadelphia, Pennsylvania under the rules of the American Arbitration Association." On August 19, 2002, IFC filed a demand for arbitration before the American Arbitration Association ("AAA") seeking to recover commissions and fees due under the Agreement from Safeguard. IFC listed George Carter and CFC as additional claimants on the demand and named Safeguard and the Fund as respondents.

Shortly after the demand for arbitration was filed, Safeguard and the Fund filed a federal action seeking a declaratory judgment on the arbitrability of this fee dispute, but their complaint was dismissed on jurisdictional grounds. On October 3, 2002, Safeguard and the Fund filed a complaint in the Court of Common Pleas for Philadelphia County also seeking a declaratory judgment. Safeguard and the Fund argued that George Carter, the Fund, and CFC were not parties to the Agreement and therefore could not participate in the arbitration proceedings. The Honorable Gene D. Cohen, presiding over case, held a hearing on Safeguard's petition for a preliminary injunction to stay the arbitration proceedings pending resolution of claims in the state court. On November 1, 2002, Judge Cohen issued an Order that stated in relevant part:

> Upon consideration of the Petition for Preliminary Injunction . . . the Court finds that Safeguard International Fund, LP, Carter Financial Corporation, and George H. Carter are not proper parties to the arbitration agreement between Safeguard International Partners, LLC, and Interconsult, AG. It is therefore ORDERED and DECREED that the said Petition is granted and all arbitration proceedings involving Safeguard International Fund, LP, George H. Carter and Carter Financial Corporation are STAYED. It is further ordered that Safeguard International Partners, LLC and IFC Interconsult, AG, shall proceed as agreed by filing in Philadelphia for arbitration. . . .

Order dated November 1, 2002, Court of Common Pleas for Philadelphia County Commerce Program (Case No. 04980).

On January 16, 2003, IFC filed an amended demand for arbitration naming only Safeguard as the respondent, in accordance with Judge Cohen's ruling. After consultation with and comment by the parties, the AAA appointed Stephen W. Armstrong, Esq., Bennett G. Picker, Esq. and Theodore R. Mann, Esq. ("the Panel") to serve as arbitrators. In the course of the arbitration, Safeguard admitted that it did not pay the fees set forth in the Agreement, but argued that IFC was no longer entitled to those fees because Safeguard had terminated its agency with IFC for cause due to IFC's alleged fraud.[1]FN1 After nearly a week of arguments during which both parties appeared in Philadelphia, Pennsylvania as per the terms of the Agreement, the review of approximately 300 exhibits marked for identification, extensive pre-hearing and post-hearing briefing, and after considering all the evidence, the Panel made

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[1] Details of these allegations are not relevant here, but in short, Safeguard alleged that IFC committed fraud by profiting in a sale of its interests in the Fund to the Basel Landschaftlicke Pensionkasse through a transaction involving an off-shore shell corporation.

its final award ("Award") on June 7, 2004. The Panel directed that "[w]ithin thirty (30) days from the date that the Association transmits this Final Award to the parties, the Respondent shall pay the Claimant the total sum of THREE MILLION, NINE HUNDRED FOURTEEN THOUSAND, FOUR HUNDRED TWO DOLLARS AND SEVENTY TWO CENTS ($3,914,402.72) to satisfy this Final Award."

On June 9, 2004, IFC filed a Petition to Confirm Arbitration Award in the U.S. District Court for the Eastern District of Pennsylvania. This court has jurisdiction pursuant to Title 28 U.S.Code Section 1332. In response, Safeguard filed a Motion to Dismiss Petition to Confirm Arbitration Award pursuant to Federal Rule of Civil Procedure 12(b)(6). In this Motion, Safeguard asserts that CFC and George Carter indirectly participated in the arbitration proceedings in violation of Judge Cohen's November 1, 2002 Order.[2] Safeguard also filed an Application to Modify, Correct and/or Vacate the Arbitration Award in the Court of Common Pleas for Philadelphia County. In this application, which Safeguard filed on July 8, 2004, Safeguard claims that the Award is invalid because of Carter and CFC's involvement in the arbitration and also argues that this federal action is an improper attempt by IFC to usurp jurisdiction from the state court. On July 15, 2004, IFC filed a petition for a temporary restraining order and preliminary injunction with this federal court, seeking to enjoin Safeguard from proceeding with its application to vacate the Award in state court while this federal action to enforce the Award was pending. This court denied the request for a TRO.

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[2] Safeguard states that CFC and George Carter's illicit participation is evidenced by the fact that Carter actually paid IFC's arbitration costs, IFC's president did not attend all the arbitration hearings, and George Carter pleaded his personal losses to the Panel. See Memo. in Support of Safeguard's Rule 12(b)(6) Motion at 5-6.

The issue now before the court is whether it should abstain from deciding the Petition to Confirm Arbitration Award filed by IFC given the pending state court action with jurisdiction over the arbitration. Because the court finds that, as a legal question, the pending state action is not parallel and does not take precedence over the federal action, it will not abstain from resolving the pending Petition to Confirm and Motion to Dismiss. Safeguard argues that because the Court of Common Pleas had issued a pre-arbitration order interpreting the Agreement, any issues regarding the validity or enforcement of the arbitration award should be also resolved in Common Pleas Court. See Mem. in Support of Rule 12(b)(6) Motion at 9. As support, Safeguard cites the abstention doctrine as outlined by the Supreme Court in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). See Mem. in Support at 11. In Colorado River, the Court stated that in certain circumstances, principles of "judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" warrant federal abstention from pending state court matters. The factors identified by the Colorado River Court for deciding the "appropriateness of dismissal in the event of an exercise of concurrent jurisdiction" include (1) which court first assumed jurisdiction over property; (2) "the inconvenience of the federal forum;" (3) "the order in which jurisdiction was obtained by the concurrent forums;" (4) and the "desirability of avoiding piecemeal litigation." Colorado River, 424 U.S. at 818 (internal citations omitted).

Applying the factors identified in Colorado River, this court finds that federal abstention is not appropriate. First, there is no state court jurisdiction over any property relating to the arbitration between IFC and Safeguard. Second, although Safeguard argues that the federal forum is inconvenient because CFC and George Carter cannot be joined as they would destroy diversity, the joinder of these two parties is not necessary to resolve whether or not to confirm whether the Award in favor of IFC and against Safeguard should be confirmed. Therefore the federal forum is no less convenient for either IFC or Safeguard than the Philadelphia Court of Common Pleas. Third, Safeguard filed its case in the Court of Common Pleas in October 2002, however, Judge Cohen ordered that the state court prothonotary mark that case "discontinued" on February 26, 2003, well before IFC filed this action in federal court. It is also unclear whether Safeguard has properly reopened the Common Pleas case by filing its Application to Modify on July 8, 2004 because Judge Cohen's February 26, 2003 Order stated that a party must request a restoration of the case to the trial list by a formal motion, which Safeguard has not filed. See IFC's Reply Brief at 4-5. See also Bass v. Butler, 258 F.3d 176, 179 (3d Cir. 2001) (ruling that federal court should not abstain where state court case had "run the course," since abstention doctrine "provides for federal deference to ongoing, not completed, parallel state proceedings."). Even if the reopened Common Pleas case is deemed "concurrent," it concerned a declaratory judgment concerning which parties could participate in the arbitration pursuant to the terms of the Agreement. As such, it is not parallel to the action filed in federal court, which concerns whether the arbitration award should be confirmed. As for the final Colorado River factor, this court recognizes the desirability of resolving the matter in one forum, but finds any risk of fractured proceedings outweighed by the importance of the federal court properly exercising its jurisdiction. The prior discontinued state court case is insufficient to invoke the unusual practice of federal court abstention. See Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 25-26 (1983) (noting that the task in abstention cases is "not to find some substantial reason for the exercise of federal jurisdiction by the district court [but] to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the surrender of that jurisdiction.").

In its argument in favor of federal abstention, Safeguard analogizes its position to that of the defendant in Vulcan Chemical Technologies, Inc. v. Barker, 297 F.3d 332 (4th Cir. 2002). In that case, Barker sued Vulcan in California state court, but Vulcan successfully petitioned that court to compel Barker to submit to arbitration instead. Following an arbitration award in favor of Barker, Vulcan filed a federal action in Virginia seeking to vacate the award. Id. at 335. Shortly after the federal suit was filed, the same California state court upheld the award and denied another motion by Vulcan to vacate the award. Two weeks later, however, the federal district court ruled in favor of Vulcan and vacated the award. The Court of Appeals for the Fourth Circuit held that the district court should have abstained pursuant to Colorado River since the federal forum was inconvenient, the district court decision created piecemeal, conflicting litigation, and the state court had an ongoing parallel proceeding dealing with the same issues that had been filed before the federal action and had already reached a conclusion. Id. at 340-42. In addition, the Court of Appeals noted that Vulcan and Barker's contract had stated that the parties would submit to arbitration administered by the California court system, making resolution of the claim in federal court in the Western District of Virginia not only inconvenient but inappropriate. Id. at 339-40. Vulcan is distinguishable from this case because the Court of Common Pleas has neither confirmed nor vacated the Award yet, the Common Pleas case was discontinued over a year before this federal case was initiated, and the Agreement did not name any particular court, but rather stated that the parties would submit to arbitration in Philadelphia, where this federal court is located.

The court declines to abstain from exercising its jurisdiction in this case and finds that the arbitration was conducted within the rules established by the AAA and with no apparent objection by either party during the proceedings and therefore the Award is confirmed.

BY THE COURT:

/s/ Marvin Katz

MARVIN KATZ, S.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-1817 and 04-3933

IFC INTERCONSULT, AG,

Appellant in 1817

v.

SAFEGUARD INTERNATIONAL PARTNERS, LLC;
SAFEGUARD INTERNATIONAL FUND, L.P.

and

IFC INTERCONSULT, AG

v.

SAFEGUARD INTERNATIONAL PARTNERS, LLC,

Appellant in 3933.

MEMORANDUM & ORDER

Before: SCIRICA, Chief Judge, SLOVITER, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER and VAN ANTWERPEN, Circuit Judges

ORDER

The petition for rehearing en banc filed by the Appellee Safeguard International Fund in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: March 20, 2006

CH/cc: Kenneth I. Levin, Esq.
Dennis R. Suplee, Esq.
Nancy Winkelman, Esq.
Bruce W. Bellingham, Esq.
James D. Zirin, Esq.
Paul R. Rosen, Esq.