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MICHAEL L. WILLIAMS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **IN RE:**<br><br>**COMMERCIAL FINANCIAL SERVICES, INC., and**<br><br>**CF/SPC NGU, INC.,**<br><br>**Debtors.** | **Case No. 98-05162-R**<br>**Chapter 11**<br><br>**Case No. 98-05166-R**<br>**Chapter 11**<br>**Jointly Administered with**<br>**Case No. 98-05162-R** |
| **COMMERCIAL FINANCIAL SERVICES, INC., Debtor, and BRADLEY D. SHARP, Trustee of the CFS Liquidating Trust,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**MIKE C. TEMPLE,**<br><br>**Defendant.** | **Adv. Proc. No. 02-0110-M** |

**REPORT AND RECOMMENDATION REGARDING DEFENDANT'S MOTION TO WITHDRAW REFERENCE**

THIS MATTER comes before the court pursuant to the Defendant's Motion to Withdraw Reference and to Stay Adversary Proceeding with Brief ("Motion to Withdraw"), filed March 14, 2003, by Mike C. Temple, Defendant herein ("Defendant" or "Temple"). The Court has also reviewed the Objection to Defendant's Motion to Withdraw Reference and Stay of Adversary Proceeding (the "Objection"), filed March 28, 2003, by Commercial Financial Services, Inc. and Bradley D. Sharp, Trustee of the CFS Liquidating Trust, Plaintiffs herein ("Plaintiffs"), and the Reply Brief (the "Reply") filed by the Defendant on April 17, 2003. Defendant requests that the

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reference of this adversary proceeding be withdrawn, and that all further proceedings be held in the United States District Court for the Northern District of Oklahoma (the "District Court"). The question is whether Temple has waived his right to jury trial either by failing to timely request a withdrawal of the reference or by his inclusion of a claim of set off in his answer. This Court believes that the failure of Temple to comply with the rules of the District Court and binding precedent of the United States Court of Appeals for the Tenth Circuit constitutes a waiver of any right to a jury trial which Temple may have held. On that basis, this Court recommends that the Motion to Withdraw be denied. There appears to be no reason to reach the issue of set off.

**Jurisdiction**

The Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1334(b),[1] and venue is proper pursuant to 28 U.S.C.A. § 1409. Reference to the Court of this matter is proper pursuant to 28 U.S.C.A. § 157(a). This is a core proceeding as contemplated by 28 U.S.C.A. § 157(b)(2)(H). This report and recommendation is submitted pursuant to Rule B-6(6), District Court Rules for Bankruptcy Practice and Procedure.[2]

**Background**

Plaintiffs filed this adversary complaint on May 29, 2002, seeking to avoid certain transfers made by Commercial Financial Services, Inc. ("CFS") to Defendant after his termination as Chief Financial Officer of CFS in the summer of 1998. In the complaint, Plaintiffs allege that CFS paid Temple $3,250,000.00 in severance pay, funds for indemnification from liability for acts as a CFS

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[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq*. (West 2003).

[2] *See In the Matter of Rules of Court, Miscellaneous No. M-128,* dated April 11, 1985 (hereinafter "Rule B-____").

employee, and COBRA payments for 12 months, and that said payment constitutes a fraudulent transfer under § 548 of the Bankruptcy Code. Summons was issued on May 29, 2002. On April 17, 2002, Defendant filed a pleading demanding a jury trial and that the complaint be dismissed for exceeding the statute of limitations imposed by § 546.[3] On the same day, this adversary proceeding was transferred to the undersigned judge. One week later, Plaintiffs filed an amended complaint alleging that the transfers to Defendant are also avoidable under § 544(b), which incorporates, in this instance, the Oklahoma Uniform Fraudulent Transfer Act.[4] The Court ruled that the filing of the amended complaint rendered the Defendant's request for dismissal moot.[5] In an answer filed on August 7, 2002, Temple asserted that he was entitled to set off any amounts which he may be found to owe Plaintiffs against obligations owed to him by CFS.

On March 13, 2003, Defendant renewed the statute of limitations defense by filing a pleading entitled Motion to Dismiss or Alternative Motion for Summary Judgment on Statute of Limitations with Brief. Defendant asserts that dismissal or summary judgment is proper because the two year statute of limitation in § 546 bars this adversary proceeding and that the agreement between the parties, which tolled the statute of limitations, is invalid. The next day, Defendant filed the Motion to Withdraw. Defendant demands that the reference be withdrawn to accommodate his Seventh Amendment right to a jury trial. Plaintiffs, on the other hand, contend that Defendant has forfeited any right to a jury trial and that the Motion to Withdraw is otherwise untimely.

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[3] *See Docket No. 4.*

[4] OKLA. STAT. ANN. tit 24, § 112 *et seq.* (West 1987).

[5] *See Docket No. 9.*

## Discussion

The procedure for reference of matters to the bankruptcy court is set forth in 28 U.S.C. § 157, which provides:

> **(a)** Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> **(b)(1)** Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.[6]

The District Court has referred to the bankruptcy courts in this district all bankruptcy cases and proceedings to the full extent permitted by § 157(a).[7]

The District Court may withdraw any proceeding referred to the Bankruptcy Court on its own motion or upon the timely motion of any party for "cause."[8] On the other hand, the District Court must withdraw the reference when a party, upon timely motion, shows that resolution of a proceeding "requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."[9] Defendant does not assert that resolution of this adversary proceeding requires consideration of laws regulating interstate commerce; therefore the request to withdraw the reference must be predicated upon a showing of cause.[10]

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[6] 28 U.S.C.A. § 157(a) and (b)(1), (3) (West 2003).

[7] *See In the Matter of Rules of Court, Misc. No. 128*, dated July 24, 1984 ("Order of Referral of Bankruptcy Cases").

[8] 28 U.S.C.A. § 157(d) (West 2003).

[9] *Id.*

[10] *See NDEP Corp. v. Handl-It, Inc. (In re NDEP)*, 203 B.R. 905, 907 (D. Del. 1996).

The cause asserted by Defendant is his Seventh Amendment right to a jury trial. The United States Supreme Court has held that a defendant in a fraudulent conveyance action, who has not submitted to the equitable jurisdiction of the bankruptcy court by filing a claim against the debtor's estate, is entitled to a jury trial.[11] In the case at bar, Plaintiffs allege that CFS fraudulently transferred $3,250,000.00 to Defendant. Defendant has neither filed a claim against the estate nor has he consented to a jury trial before this Court. He has, however, filed an answer alleging the right of setoff.

The Plaintiffs argue that Defendant waived his right to a jury trial by failing to timely file the Motion to Withdraw. Motions for withdrawal of the reference are governed by 28 U.S.C. § 157(d) and Rule B-6. Section 157(d) provides:

> **(d)** The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.[12]

Rule B-6 provides in relevant part:

> A particular proceeding commenced in or removed to the Bankruptcy Court shall be transferred to the District Court for hearing and trial by a District Judge only in accordance with the procedure below.
>
> (1) A party seeking such transfer shall file a motion therefor in the Bankruptcy Court certifying one or more of the following grounds:
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> * * *

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[11] *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58-59 (1989); *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990).

[12] 28 U.S.C.A. § 157(d) (West 2003).

(E) The proceeding is under 11 U.S.C. § 303 and a jury trial is demanded.

(F) Cause exists, within the contemplation of 28 U.S.C. § 157(d), for the withdrawal of the particular proceeding to this District Court (a specification of such alleged cause must be stated).

* * *

(3) If movant is an original defendant, intervenor, or added party, the motion shall be filed within twenty (20) days after movant has entered appearance or been served with summons or notice.[13]

Defendant was summoned on May 29, 2002. Defendant filed the Motion to Withdraw over nine months later on March 14, 2003, well outside of the time frame established by Rule B-6. In the opinion of this Court, an untimely request for withdrawal of the reference should be summarily denied. It is not within this Court's purview to make exceptions to the filing deadlines contained in the local rules of the District Court. Any such exceptions are reserved to the sound discretion of the District Court which promulgated the rules.[14]

Even if Rule B-6 were somehow inapplicable in this case, Defendant's filing of the Motion to Withdraw remains untimely. As one court has noted,

> The threshold question in evaluating a motion to withdraw the reference under § 157(d) is whether plaintiffs' motion filed five months after debtor Mahlmann filed his bankruptcy petition was made in a timely manner. *In re Stavriotis*, 111 B.R. 154, 157 (N.D. Ill.1990). If the motion is not made in a timely manner, the parties' rights under § 157(d) are deemed waived. *Id.* The statute provides little guidance as to

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[13] Rule B-6 (emphasis added).

[14] In his response brief filed on April 17, 2003, Temple "requests that this Court waive the twenty day period provided in Local Rule B–6(3)." *Reply* at 9. Temple misunderstands the present role of this Court. This Court merely reviews the matter and makes a report and recommendation to the District Court. The final decision, whether it be on withdrawal of reference or waiver of the timeliness requirements under Rule B–6, is left to the District Court. This Court will not presume to tell the District Court which of its rules to enforce and/or which of its rules to waive.

> what constitutes "timely." Courts, however, have generally defined timely as "as soon as possible after the moving party is aware of grounds for withdrawal of reference" or as "at the first reasonable opportunity after the moving party is aware of grounds for withdrawal of reference." *In re Sevko, Inc.*, 143 B.R. 114 (N.D. Ill.1992). The two statements of the standard are considered identical, any difference being purely a matter of semantics. *Id.* The reason for the timeliness requirement is to prevent parties from forum shopping, stalling, or otherwise engaging in obstructionist tactics. *In Matter of Lissner Corp.*, 115 B.R. 604, 608-612 (N.D. Ill.1990); *In re Giorgio*, 50 B.R. 327, 328-329 (D. Rhode Island 1985); *See also, In re White Motor Corp.*, 42 B.R. 693 (N.D. Ohio 1984).[15]

More than nine months have passed between the time Defendant was summoned by this Court and the time Defendant sought withdrawal of the reference. It is beyond the ken of this Court to understand how the Motion to Withdraw could be considered timely.

This Court also believes that Defendant has waived his right to a jury trial as a result of his failure to combine the request with a timely motion to withdraw the reference. The United States Court of Appeals for the Tenth Circuit has held that "to avoid waiver, parties seeking a jury trial must combine their request for a jury trial with a request for transfer to the district court."[16] Defendant filed a demand for jury trial on April 17, 2002, and again in his amended answer on August 19, 2002. The Defendant, however, waited until March 14, 2003, to file his Motion to Withdraw. The Court is bound by decisions of the Tenth Circuit and believes that a seven month period between filings fails to constitute combining a demand for a jury trial with a request to withdraw the reference under *Latimer*. A plain reading of *Latimer* requires that such requests be

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[15] *In re Mahlmann*, 149 B.R. 866, 869 (N.D. Ill. 1993); *see also Snider v. Commercial Financial Services, Inc. (In re Commercial Financial Services, Inc.)*, 252 B.R. 516, 520 (Bankr. N.D. Okla. 2000) (motion to withdraw filed fourteen months after filing of amended complaint deemed untimely under Rule B-6 and 28 U.S.C. § 157(d)(2)).

[16] *Stainer v. Latimer (In re Latimer)*, 918 F.2d 136, 137 (10th Cir. 1990), *cert. denied*, 502 U.S. 863 (1991).

filed simultaneously or in a combined motion to avoid waiving rights to a jury trial, and other courts have so held.[17]

Temple spends considerable time in the Reply arguing that *Latimer* is not applicable to the present case, and that, in any event, its pronouncements on the issue of waiver of the right to a jury trial are mere *dicta*. As Temple puts it:

> The entire discussion by the Tenth Circuit addressing the failure to file a withdrawal of the reference is dicta because it is clearly premised upon the opening phrase, "Even if the defendants had made a proper request." 918 F.2d at 137.[18]

The position taken by Temple is, in a word, incredible. In the same paragraph quoted by Temple, the Tenth Circuit went on to state that "[w]e hold that to avoid waiver, parties seeking a jury trial must combine their request for a jury trial with a request for transfer to the district court."[19] In the present case, Temple failed to comply with the holding in *Latimer*. He neglected to combine his request for a jury trial with his motion to withdraw the reference. In the eyes of this Court, *Latimer* is controlling and the conclusion which it mandates is inescapable: Temple has waived his right to a jury trial. Obviously, the opinion of this Court is only a recommendation; the District Court is free to rule as it sees fit.

The Plaintiffs also argue that Defendant waived the right to a jury trial by asserting a setoff against CFS in his amended answer. Defendant staunchly disagrees. Courts are split on the issue,

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[17] *See Anstine v. United States Fidelity and Guarantee Co. (In re Sand Hills Beef Corp.)*, 199 B.R. 740, 742 (D. Colo. 1996) ("Both Judge Clark and I, however, are bound by the clear mandate of the Tenth Circuit in requiring that, 'to avoid waiver, parties seeking a jury trial must *combine* their request for a jury trial with a request for transfer the district court.'" (emphasis in original) (citation omitted)).

[18] *Reply* at 10.

[19] *Latimer, supra,* 918 F.2d at 137.

and the parties have ably briefed the same. The District Court need reach the issue of set off only if it determines that: (1) waiver of the timeliness requirements of Rule B–6 is appropriate; (2) the Motion to Withdraw is timely under the case law discussed above; and (3) *Latimer* is not applicable to the case at bar. This Court does not reach the issue of set off at the present time because it believes that Temple has waived any right to a jury trial as a result of his failure to timely request a withdrawal of the reference. Should the District Court disagree, and desire further input from this Court on the issue of set off, this Court will be happy to submit a supplemental Report and Recommendation.

**Conclusion**

The Court recommends that the Motion to Withdraw Reference filed by Mike C. Temple, Defendant herein, be denied.

Dated this 25th day of April, 2003.

BY THE COURT:

TERRENCE L. MICHAEL
UNITED STATES BANKRUPTCY JUDGE

## CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2003, I mailed by first-class United States mail a true and correct copy of the foregoing Report and Recommendation Regarding Defendant's Motion to Withdraw Reference to the parties listed below:

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