IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In Re:	**§**	
	§	
Scotia Development LLC, *et al.*,	**§**	**Civil Action: 08-259**
	§	
Debtor-In-Possession.	**§**	**Bankruptcy Case: 07-20027**
	§	

APPELLANTS' MOTION PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 8015 FOR REHEARING OF THIS COURT'S FEBRUARY 6, 2009 ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

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Appellants, by the undersigned counsel, respectfully move pursuant to Bankruptcy Rule 8015 for rehearing of this Court's February 6, 2009, order dismissing this appeal for lack of jurisdiction. Although Appellants disagree with the Court's conclusion that this appeal should have been brought in first instance in the United States Court of Appeals for the Fifth Circuit, this motion does not seek to relitigate that question.[1] Rather, Appellants respectfully request that the court vacate its order dismissing the appeal and instead order the matter transferred to the Fifth Circuit pursuant to 28 U.S.C. § 1631. As explained in detail below, Section 1631 requires a federal court that concludes it lacks jurisdiction over a matter to transfer that action to the court in which the matter should have been brought if it is in the "interest of justice" to do so. The overwhelming weight of authority holds this case must be transferred to the Fifth Circuit.

I. BACKGROUND

1. The facts giving rise to this action are well known to the Court and will be set forth only briefly here. On July 8, 2008, the United States Bankruptcy Court for the Southern District of Texas (Corpus Christi Division, Hon. Richard S. Schmidt presiding) entered an Order Denying The Indenture Trustee's Motion For A Superpriority Administrative Expense Claim Pursuant To Section 507(b). On July 9, 2008, Appellants filed notices of appeal of the 507(b) Order to this Court pursuant to 28 U.S.C. § 158(a)(1).

[1] Appellants do not concede the correctness of this Court's holding that it lacks jurisdiction over the merits of the 507(b); Appellants reserve the right to appeal that ruling to the Fifth Circuit in due course. Pursuant to Bankruptcy Rule 8015, the time for filing that notice of appeal "shall run from the entry of the order denying rehearing or the entry of a subsequent judgment."

2. Appellants separately appealed *confirmation* of the bankruptcy plan directly to the Fifth Circuit. The Fifth Circuit ordered expedited briefing, and oral argument was held on October 6, 2008 (Jones, C.J.; Owen & Southwick, JJ.). The case is pending for decision.

3. Appellants timely filed their opening brief in the 507(b) appeal to this Court on October 14, 2008. On November 14, 2008, Appellees filed their merits brief on the 507(b) appeal and separately filed a motion to dismiss the appeal. In their motion to dismiss, Appellees argued for the first time that "the appeal of the Confirmation Order is inextricably intertwined with the instant appeal of the 507(b) Order"; that this appeal should have been brought in the Fifth Circuit; and that this Court therefore lacked jurisdiction to decide the merits of the 507(b) appeal. Dkt. 20 at 16.[2] Appellants filed an opposition to the motion to dismiss, arguing that the Confirmation and 507(b) Orders were distinct and therefore properly appealed in separate actions to the Fifth Circuit and this Court, respectively.

4. On February 6, 2009, this Court granted Appellees' motion to dismiss. Dkt. 28, 29. The Court held that "the 507(b) Order is part of the Confirmation Order, which is currently on appeal to the Fifth Circuit Court of Appeals. Because the Fifth Circuit Court of Appeals has accepted appella[te] jurisdiction to review the Confirmation Order, this Court does not have subject matter jurisdiction over this appeal." Dkt. 28 at 2.

[2] Appellees' motion to dismiss also raised an equitable mootness challenge that is not relevant to this motion for rehearing. Appellees similarly raised an equitable mootness argument before the Fifth Circuit, which has yet to rule.

II. ARGUMENT

5. Appellants respectfully submit that, pursuant to 28 U.S.C. § 1631, this Court must vacate the order and final judgment dismissing this appeal and transfer the matter to the Fifth Circuit. Section 1631 provides, in pertinent part, as follows:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court *shall*, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631 (emphasis added). The relevant questions, therefore, are: (i) whether there is another court "in which the . . . appeal could have been brought"; and (ii) whether it is in the "interest of justice" to transfer the appeal. If these conditions are met, then, by the express terms of the statute, transfer is mandatory. *See Paul* v. *INS*, 348 F.3d 43, 47 (2d Cir. 2003) (reversing district court's failure to transfer case to court of appeals pursuant to Section 1631); *Kolek* v. *Engen*, 869 F.2d 1281, 1284 (9th Cir. 1988) (court of appeals may take jurisdiction under Section 1631 even in the absence of a formal motion to transfer "'because of the mandatory cast of section 1631's instructions'") (quoting *In re McCauley*, 814 F.2d 1350, 1351 (9th Cir. 1987)).

6. The express basis of this Court's order dismissing the 507(b) appeal was that, because "the 507(b) Order is an integral part of the Confirmation Order" (Dkt. 28 at 2), the 507(b) appeal should have been pursued in the Fifth Circuit rather than before this Court. This Court, therefore, "f[ound] that there is a want of jurisdiction," the first condition stated by the text of Section 1631.

7. Moreover, the second statutory condition is met: it is plainly in the "interest of justice" to transfer this case. It is well settled that, "[i]n harmony with the

intent of Congress, this section [§ 1631] has been broadly construed since its enactment." *Ross* v. *Colorado Outward Bound School, Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987). As the Fifth Circuit has explained, "'[t]he purpose of the FCIA [Federal Courts Improvement Act of 1982, which enacted § 1631,] was to *enhance* citizen access to justice.'" *Dornbusch* v. *C.I.R.*, 860 F.2d 611, 613 (5th Cir. 1988) (emphasis added) (quoting *Alexander* v. *C.I.R.*, 825 F.2d 409, 501 (D.C. Cir. 1987)) (additional internal quotation and citation omitted). Accordingly, "it is abundantly clear that Congress intended that 'a case mistakenly filed in the wrong court [should] be transferred as though it had been filed in the transferee court on the date in which it was filed in the transferor court.'" *Ibid.* (alteration in original); *see Paul*, 348 F.3d at 47 ("Congress intended [Section 1631] to *aid* litigants who were confused as to the proper forum for review.") (citing *Liriano* v. *United States*, 95 F.3d 119, 122 (2d Cir. 1996) (emphasis added); *see also* S. Rep. No. 275, 97th Cong. 1st Sess. 1 (1981); 128 Cong. Rec. 3572 (1982).

8. It is in the interest of justice to transfer this appeal, for three principal reasons. *First*, under this Court's view of the course of proceedings, the practical effect of denying a transfer would be to extinguish Appellants' rights to appeal the Bankruptcy Court's 507(b) Order. Under this Court's dismissal order, the time for filing a separate notice of appeal to the court of appeals or raising these matters in Appellants' opening brief in the confirmation appeal has, by definition, already passed.[3] As the Fifth Circuit and many other courts have repeatedly recognized, it is in the "interest of justice" to prevent parties from losing their right of judicial review. *See Scherbatskoy* v. *Halliburton Co.*, 125 F.3d 288, 292 (5th Cir. 1997) (transfer under Section 1631 would

[3] Appellants respectfully reiterate that they do not concede the correctness of the Court's jurisdictional holding. *See* n.1, *supra*.

serve interest of justice "because a new appeal . . . at this point would be barred as untimely"); *In re Exclusive Industries Corp.*, 751 F.2d 806, 809 & n.5 (5th Cir. 1985) ("[T]he interests of justice would be served by a transfer" under Section 1631 where "appellant might [otherwise] lose the right to appeal the bankruptcy judge's decision."); *Paul*, 348 F.3d at 47 ("Whether a new action filed by the litigant would be barred as untimely . . . militat[es] in favor of transfer."); *Phillips* v. *Seiter*, 173 F.3d 609, 610 (7th Cir. 1999) ("A compelling reason for transfer is that the plaintiff . . . will be time-barred if his case is dismissed . . . ."); *see also, e.g.*, *Merchants Fast Motor Lines, Inc.* v. *ICC*, 5 F.3d 911 (5th Cir. 1993) (same); *SEC* v. *Danning*, 759 F.2d 763, 767 (9th Cir. 1985) (same). Because dismissing this appeal outright on the jurisdictional rationale set out in the Court's latest order would—if not reversed by the Fifth Circuit—potentially deny Appellants the opportunity to seek review of the 507(b) Order, it is in the interest of justice to transfer this case to the Fifth Circuit.

9. *Second*, there is no credible evidence that Appellants "acted in bad faith by filing the instant appeal." *Scherbatskoy*, 125 F.3d at 292; *see also Paul*, 348 F.3d at 47 ("As there is no evidence in this case that [appellant] filed with the district court in bad faith, we hold that it was [reversible error] under § 1631 for the district court not to transfer the petition to this Court."). To the contrary, Appellants' understanding that this Court had jurisdiction to review the 507(b) Order has been plain for all to see since Day One. The Bankruptcy Court entered a separate order disposing of the 507(b) claim. Relying on Fifth Circuit case law holding that the *form* of an order is highly significant when assessing whether it is independently appealable, *see Harbor Ins. Co.* v. *Trammell Crow Co.*, 854 F.2d 94, 97 (5th Cir. 1988), Appellants filed timely notices of appeal to

this Court immediately after the Bankruptcy Court entered the 507(b) Order. Thus, there can be no suggestion that Appellants sought review in this Court only because they had somehow forfeited their right to review in the Fifth Circuit. *See Phillips*, 173 F.3d at 611 (denying transfer because petitions "were untimely when filed"). Any alleged mistake regarding this Court's jurisdiction plainly was made in good faith.

10. *Third*, the interest of justice would be hardly be served by denying transfer to a court of proper jurisdiction in response to such a belated motion to dismiss. As noted above, Appellants appealed the 507(b) Order to this Court on July 8, 2008. But Appellants did not file their motion to dismiss (or otherwise suggest that the merits of the 507(b) claim should have been pressed in the Fifth Circuit) until November 14, 2008—more than *four months later*. This delay is particularly noteworthy because it allowed Appellees to stay silent until the confirmation case had been fully briefed and argued to the Fifth Circuit. If there is any gamesmanship here, it is Appellees' apparent attempt to evade review of the 507(b) Order by claiming that the issue should have been raised in the Fifth Circuit only *after* the parallel proceedings in the court of appeals had been concluded. Regrettably, this case is no stranger to strategic ploys to avoid judicial review. *See* Fifth Circuit Oral Argument, Oct. 6, 2008, at 19:50 – 20:02 (Chief Judge Jones observing that Appellees "have done about as speedy a job of trying to undermine our appellate review as I've ever seen in nearly 25 years on the bench. So what's equitable about that situation?"), *available at* http://www.ca5.uscourts.gov/OralArgument Recordings.aspx?prid=280244. In any event, the abundant case law favoring Section 1631 transfers (as the strongly preferred alternative to dismissal) does not require that Appellees have acted in bad faith; it is enough that Appellants did not do so.

III. CONCLUSION

11. For the reasons stated above, this Court should vacate its order and final judgment dismissing the appeal and transfer this case to the Fifth Circuit pursuant to 28 U.S.C. § 1631.

Dated: February 17, 2009
Houston, Texas

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on February 16, 2009, I conferred with Steven M. Schwartz, counsel for the Appellees, regarding this Motion. Following that discussion, the parties were unable to reach an agreement concerning the Motion.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellants' Motion has been served on counsel listed below by CM/ECF and first class mail on this 17th day of February, 2009.

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