



2. On December 7, 2004, ACI filed for Chapter 11 bankruptcy in the bankruptcy court.
3. On December 22, 2004, ACI filed bankruptcy Schedules A-J, which did not list a claim against either i2 or Mercer.
4. On March 17, 2006, ACI filed a disclosure statement, which also did not identify any claim against i2 or Mercer.
5. On May 8, 2006, ACI and the Official Committee of Unsecured Creditors filed a "Modified Joint Plan of Liquidation" (the "Plan"), once again failing to identify any claim against i2 or Mercer.
6. On May 19, 2006, the bankruptcy court approved the disclosure statement and confirmed the Plan by order. The effective date of the Plan was June 14, 2006.
7. The Plan provided for the liquidation of ACI by creating a litigation trust, the stated purpose of which was to "liquidate all of the assets of the Estate, including but not limited to prosecution of all claims of the Estate and claims contributed to the Litigation Trust pursuant to the plan." Plan, Art I, § 1.34. The Plan appointed Martin Fletcher, former counsel to the Unsecured Creditors Committee, as litigation trustee, and authorized him to exercise all of the powers of a Chapter 11 trustee, if one had been appointed.
8. The four main assets of the litigation trust included 1) the recovery of a tax refund; 2) any remaining tangible assets; 3) accounts receivable; and 4) funds resulting from the anticipated prosecution of avoidance actions, including actions to avoid and recover fraudulent transfers and preferences.
9. The Plan further contained a "retention of jurisdiction" clause over certain claims related to the bankruptcy proceedings.

10. Between November 23, 2006 and December 1, 2006, the litigation trustee filed 161 complaints in the bankruptcy court to void various alleged preferential transfers. On December 5, 2006, the litigation trustee filed six additional complaints for the turnover of property.

11. On December 6, 2006, the litigation trustee filed the instant adversary proceeding against i2 and Mercer. On March 9, 2007, the litigation trustee filed a first amended complaint.

12. The instant adversary proceeding is unique among the 168 adversary proceedings because it alone seeks to recover fraudulent conveyances and also asserts a variety of other state law causes of actions against the defendants.

13. The amended complaint contains the following allegations: In 2002, ACI began implementing a business plan requiring the deployment and installation of a new information technology platform. In March 2002, ACI met with i2 to discuss a contract for installation of this platform. i2 proposed certain "information technology architecture" and submitted the proposal to ACI. On July 18, 2002, Mercer provided an independent report to ACI and the Carlyle Group which approved the platform. On August 12, 2002, ACI entered into a written contract with i2. The information technology which i2 provided was insufficient to meet the needs of Air Cargo. It is alleged that i2 knew what information technology ACI needed to carry out its new business strategy, and that i2 and Mercer knew from the beginning that the platform provided by i2 was insufficient for those purposes.

14. ACI paid i2 an initial fee of \$3.2 million. Additional payments brought the total amount paid to \$5.7 million.

15. The amended complaint contains seven counts, for breach of contract against i2 (Count I), breach of contract against Mercer (Count II), intentional misrepresentation and fraud

against i2 (Count III), negligent misrepresentation against i2 and Mercer (Count IV), negligence and malpractice against i2 and Mercer (Count V), avoidance and recovery of fraudulent conveyances from ACI to i2, totaling "no less than \$5.7 million" (Count VI), and the avoidance and recovery of fraudulent conveyances from ACI to Mercer, totaling "no less than \$100,000" (Count VII).

16. On May 4, 2007, i2 filed a motion to dismiss, or in the alternative, to abstain, in which it alleged that the bankruptcy court lacked subject matter jurisdiction because the complaint did not concern "core" matters or matters "related to" the bankruptcy; that the District of Maryland is not the proper venue for the complaint; and that the causes of action are barred by judicial estoppel and res judicata.

17. On June 11, 2007 Mercer filed a motion to dismiss. Mercer argued that the litigation trustee's claims for breach of contract and negligence must be dismissed for lack of subject matter jurisdiction and failure to state a claim. Additionally, Mercer argued that the litigation trustee's fraudulent conveyance claim failed as a matter of law. Mercer further argued that all the claims against it should be dismissed under the doctrines of judicial estoppel and res judicata, because ACI failed to disclose any claims against Mercer in its schedules and disclosure statement.

18. On February 7, 2008, the bankruptcy court denied Mercer's and i2's motions to dismiss, finding that the bankruptcy court had post-confirmation subject matter jurisdiction and that the state law claims were viable. Both defendants appealed this decision, and on March 14, 2008, the bankruptcy court certified this interlocutory appeal.

## ANALYSIS

In determining whether to grant leave to file an interlocutory appeal of a bankruptcy court's decision, a district court adheres to the standards established by 28 U.S.C § 1292(b), the statute concerning interlocutory civil appeals taken to the courts of appeals. *In re Swann Ltd.*, 128 B.R. 138, 140-41 (D. Md. 1991). Under this framework, an interlocutory appeal will not be granted unless the bankruptcy court's order: (1) involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) for which an immediate appeal may materially advance the ultimate termination of the litigation. *See Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1<sup>st</sup> Cir. 2005); *KPMG Peat Marwick, L.L.P. v. Estate of Nelco, Ltd., Inc.*, 250 B.R. 74, 78-79 (E.D. Va. 2000). "If any one element is unsatisfied, leave to appeal cannot be granted." *KPMG*, 250 B.R. at 79. Moreover, "[a]n interlocutory appeal is not to be used simply to determine the correctness of a judgment." *In re Swann*, 128 B.R. at 141.

### *A. Difference of Opinion Concerning Controlling Law*

Assuming that determination of subject matter jurisdiction involves a controlling question of law, *see In re Travelstead*, 250 B.R. 862, 865-66 (D. Md. 2000), there must also be substantial ground for difference of opinion concerning that law. *KPMG*, 250 B.R. at 82. "[D]istrict courts [should] not deem [this] second element satisfied whenever parties disagree as to a Bankruptcy Court's interlocutory order, but rather only where substantial ground for disagreement exists as to the controlling issues of law that informed the order." *Id.* at 79. Furthermore, it is not dispositive to show a lack of unanimity of authorities in dealing with a complicated or confusing area of law. *See State ex rel. Howes v. W.R. Peele, Sr.*, 889 F. Supp.

849, 852 (E.D.N.C. 1995).

Here, the bankruptcy court correctly identified the Fourth Circuit's recent *Valley Historic Ltd. v. Bank of New York*, 486 F.3d 831, 837 (4th Cir. 2007) decision as the primary controlling law concerning "related to" jurisdiction under Title 11. As the bankruptcy court noted, *Valley Historic* adopted the Third Circuit's "close nexus" test, *see In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004), to determine whether a post-confirmation claim is sufficiently "related to" an underlying bankruptcy proceeding to provide the court with subject matter jurisdiction. *In re Air Cargo, Inc.*, 2008 WL 352619, at \*4-5. In a well-reasoned opinion, the bankruptcy court applied the "close nexus" test to the unique factual circumstances of this case, and concluded that the state law claims were sufficiently "related to" the underlying bankruptcy administration process to warrant subject matter jurisdiction.

Recognizing that the "close nexus" test must be applied on a case-by-case basis, and that the outcome often turns on a rather fact-intensive inquiry, the bankruptcy court distinguished its finding of subject matter jurisdiction from *Valley Historic* and *In re Resorts* on four grounds. First, unlike the situation here, the beneficiaries of the litigation trust in *Valley Historic* had already been substantially paid under the bankruptcy plan and did not stand to use any proceeds that could be obtained in the litigation. *Valley Historic*, 486 F.3d at 837. Second, because the bankruptcy Plan here called for a liquidation as opposed to reorganization, the specter of endless "related to" subject matter jurisdiction in a bankruptcy court was not present. Third, the bankruptcy court found that because the state law claims were factually related to the fraudulent conveyance claims, which undisputedly fell under the court's "arising under" subject matter

jurisdiction, jurisdiction was more likely to exist.<sup>1</sup> Finally, the bankruptcy court noted that the Trust's claims against i2 and Mercer arose prepetition, as opposed to postpetition, and therefore were more likely to maintain a sufficiently close nexus with the bankruptcy process and the original debtor. *See In re Railworks*, 325 B.R. 709, 723 (Bankr. D. Md. 2005). The bankruptcy court's thoughtful analysis thus applied Fourth Circuit law to the unique facts of this case. Although i2 and Mercer challenge the bankruptcy court's conclusion that the state law claims maintain a sufficiently "close nexus" to the bankruptcy administration process, this disagreement does not indicate that there are substantial grounds for difference of opinion concerning the applicable controlling law.

*B. Materially Advance Termination of the Litigation*

Even if i2 and Mercer had shown substantial grounds for a difference of opinion concerning the applicable controlling law, they must also demonstrate that an interlocutory appeal would materially advance termination of the lawsuit. The parties appear to agree that, regardless of this appeal, unless the Trust's fraudulent conveyance claims are barred by judicial estoppel or res judicata, at least those claims would remain viable in the bankruptcy court under its "arising under" subject matter jurisdiction. The Trust's fraudulent conveyance claim against i2 demands "no less than \$5.7 million" in damages, and its claim against Mercer "no less than \$100,000." As the bankruptcy court noted, the facts concerning these significant fraudulent conveyance claims are largely intertwined with the Trust's contract and tort claims.

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<sup>1</sup> i2 and Mercer are unable to point to any Fourth Circuit law precluding a bankruptcy court from considering this factor. Even if this consideration were improper, however, it alone would not demonstrate a substantial ground for difference of opinion concerning the controlling law.

Granting an interlocutory appeal on certain claims when others would nevertheless remain viable would present a “narrow exception to the longstanding rule against piecemeal appeals, [and] is limited to exceptional cases.” *Costar Group, Inc. v. LoopNet, Inc.*, 172 F. Supp. 2d 747, 750 (D. Md. 2001) (quoting *Beck v. Commc’n Workers of America*, 468 F. Supp. 93, 95-96 (D. Md. 1979)). The Fourth Circuit has noted “that piecemeal review of decisions that are but steps toward final judgments on the merits are to be avoided, because they can be effectively and more efficiently reviewed together in one appeal from the final judgments.” *James v. Jacobson*, 6 F.3d 233, 237 (4<sup>th</sup> Cir. 1993). The First Circuit denied an interlocutory appeal on an issue concerning one claim, because “the rest of the claims based on the same underlying facts [] proceeded in the district court,” and thus “appeal on the [] issue [would] not ‘materially advance the ultimate termination of the litigation.’” *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1<sup>st</sup> Cir. 2005).<sup>2</sup> Here, unless the Trust’s fraudulent conveyance claims were barred by judicial estoppel or res judicata, they would proceed in the bankruptcy court, irrespective of this appeal, and involve many of the same facts as the state law claims.

The bankruptcy court properly concluded that the fraudulent conveyance claims had not been shown, at this stage, to be barred by judicial estoppel. “Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation . . . and is designed to prevent a party from playing fast and loose with the courts and protect the essential integrity of the judicial process.” *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4<sup>th</sup>

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<sup>2</sup> i2 submitted a supplemental brief citing Fourth Circuit cases where interlocutory appeal was granted on individual claims in multiple claims proceedings. (i2 Supp. Brief at 1.) In the cases cited, however, the parties did not appear to contest whether leave to appeal should be granted. Courts may grant interlocutory appeal in their discretion, and therefore the cited cases do not advance the defendants’ argument.

Cir. 1998) (internal quotations omitted). A party asserting judicial estoppel is required to show the presence of four elements: “(1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact, rather than law or legal theory; (3) the prior position must have been accepted by the court in the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently.” *In re USinternetworking*, 310 B.R. 274, 281 (Bankr. D. Md. 2004) (quoting *Havird Oil Co., Inc. v. Marathon Oil Co., Inc.*, 149 F.3d 283, 292 (4<sup>th</sup> Cir. 1998)). The bankruptcy court correctly concluded that without an evidentiary record it was impossible to determine at the motion to dismiss stage whether ACI or the Trust were intentionally attempting to manipulate the judiciary.<sup>3</sup> Unlike *USinternetworking*, the claims here are not against a creditor, and therefore there would be no motive to exclude the claim from the Plan in order to secure the vote of the creditor. Moreover, again unlike *USinternetworking*, the debtor here was liquidating as opposed to reorganizing, and therefore would not have the same motivation to conceal the claims from creditors in order to prevent their recovery. Therefore, applying judicial estoppel to the Trust’s claims at this stage would be inappropriate.

As to res judicata,<sup>4</sup> “[s]ome courts have taken the view that if a plan does not expressly retain a claim that could have or should have been addressed at confirmation, the parties are barred by res judicata from later asserting those claims.” *In re Railworks*, 325 B.R. at 716. This

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<sup>3</sup> During the hearing counsel for the Trust, which now represents the interests of former creditors, specifically noted that it was unclear why ACI did not originally include its claims against i2 and Mercer in the Plan. Without more, the court cannot conclude that the Trust is now attempting to manipulate the legal process by bringing this suit.

<sup>4</sup> Neither i2 nor Mercer raised the issue of res judicata during the hearing; for the sake of completeness, however, the court will consider the merits of the argument.

strict approach, however, would seem to contradict 11 U.S.C. § 1123(b)(3), which “expressly permits a plan to provide for the retention of claims belonging to the estate by a representative of the estate appointed for that purpose.” *Id.* at 717. For that reason, a claim brought under a general jurisdiction retention clause is generally not deemed barred per se under the doctrine of res judicata. While it is not clear how specific a retention clause must be to avoid res judicata, *see id.*, the bankruptcy court correctly noted that the doctrine is generally applied only where the defendant was a previously named creditor, and hence party to the Plan. *In re Air Cargo, Inc.*, 2008 WL 352619, at \*9 (distinguishing *D&K Props. Crystal Lake v. Mutual Life Ins. Co. of NY*, 112 F.3d 257 (7<sup>th</sup> Cir. 1997)). Because i2 and Mercer were not named creditors, and therefore not parties to ACI’s bankruptcy Plan, res judicata does not appear to bar the claim.

If the fraudulent conveyance claims properly remain under the jurisdiction of the bankruptcy court, then a significant portion of the Trust’s lawsuit against i2 and Mercer would survive this potential appeal. In fact, many of the same facts that underlie the state law claims would be litigated under the fraudulent conveyance claims. Moreover, the damages sought by the Trust for the allegedly fraudulent conveyances comprise a significant portion of the total damages claimed in the lawsuit. Granting leave to appeal the bankruptcy court’s order would result in another potential round of brief-writing, to include discussion of potential statute of limitations and diversity jurisdiction issues. “Such delay is not in keeping with the requirement that an interlocutory appeal be accepted only if it will help terminate or shorten litigation and keep expenses down.” *In re Swann*, 128 B.R. at 142. Therefore, i2 and Mercer have not demonstrated that granting leave to appeal the bankruptcy court would materially advance the termination of this lawsuit.

**CONCLUSION**

Assuming that a determination of subject matter jurisdiction concerns controlling law, it does not appear that i2 and Mercer have demonstrated substantial grounds for difference of opinion concerning that law. The bankruptcy court properly identified controlling Fourth Circuit precedent and applied it to the specific facts of this case. Moreover, because the parties essentially concede that the fraudulent conveyance claims are properly under the bankruptcy court's jurisdiction, i2 and Mercer have failed to show that granting leave to appeal would materially advance termination of this litigation. For the foregoing reasons, the defendants' motion for leave to appeal the bankruptcy court's order will be denied.

A separate order follows.

June 11, 2008  
Date

/s/  
Catherine C. Blake  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

IN RE AIR CARGO, INC., *et al.*

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Civil Action No. CCB-08-587

**ORDER**

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. the defendants' motions for leave to appeal the bankruptcy court's order (docket entry no. 1 and docket entry no. 3) are **DENIED**; and
2. copies of this Order and the accompanying Memorandum shall be sent to Bankruptcy Judge James F. Schneider and counsel of record.

\_\_\_\_\_  
June 11, 2008

Date

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/s/

Catherine C. Blake  
United States District Judge