

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	CHAPTER 11
	)	
THE ALIERA COMPANIES INC.	)	CASE NO. 21-11548-JTD
d/b/a Alieria Healthcare, Inc.,	)	
	)	<b>Related to Docs. # 17 and 38</b>
Alleged Debtor.	)	<b>Obj. Deadline: January 6, 2022, at 4:00 P.M. (EST)</b>
	)	<b>H'rg Date: January 13, 2022, at 11:00 A.M. (EST)</b>

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**REPLY TO PETITIONING CREDITORS' OBJECTION TO  
THE ALIERA COMPANIES INC.'S MOTION TO TRANSFER VENUE  
PURSUANT TO 28 U.S.C. § 1412 AND FED. R. BANKR. P. 1014**

COMES NOW The Alieria Companies Inc. d/b/a Alieria Healthcare, Inc. (the “**Alleged Debtor**” or “**Alieria**”), by and through their undersigned counsel, and submits this reply (the “**Reply**”) to the *Petitioning Creditors’ Objection to the Alieria Companies Inc.’s Motion to Transfer Venue Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014* [Dkt. No. 38] (the “**PC Objection**”) filed by the petitioning creditors in the above-captioned case (the “**Petitioning Creditors**”), objecting to the relief sought in the *Motion to Transfer Venue Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014* [Dkt. No. 18] (the “**Alieria Venue Motion**”) which seeks entry of an order transferring venue of the above-captioned case to the United States Bankruptcy Court for the Northern District of Georgia (the “**Georgia Court**”).<sup>1</sup> In support of the Reply, Alieria respectfully state as follows:

**INTRODUCTION**

1. The facts and legal arguments relevant to the Alieria Venue Motion and the related *Petitioning Creditors’ Motion to Transfer Venue of the Later-Filed Voluntary Bankruptcy Cases*

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Alieria Objection and the Alieria Venue Motion.

of *The Alieria Companies Inc. and Its Four Affiliates* [Dkt. No. 18] (the “**PC Venue Motion**”) and Alieria’s objection thereto [Dkt. No. 40] (the “**Alieria Objection**”) have been extensively laid out in prior pleadings and will not be repeated here. Accordingly, this Reply focuses only on specific errors and misleading arguments set forth in the PC Objection.

### **REPLY TO OBJECTION**

2. First, as has been the hallmark of the Petitioning Creditors’ pleadings in this matter, the PC Objection is rife with unsupported allegations, unprofessional personal attacks and thinly-veiled smears. Alieria trusts that the Court will ignore same.

3. Second, contrary to the Petitioning Creditors contention, Alieria properly served the Alieria Venue Motion. The Petitioning Creditors are incorrect as to the applicable Rules. Bankruptcy Rule 1014(b) (which relates to a venue transfer motion when petitions are filed respecting the same debtor in multiple courts) simply provides that notice of such motion and the hearing on same shall be provided to the U.S. Trustee, entities entitled to notice under Bankruptcy Rule 2002(a) and any other entities that the Court may direct. However, because Bankruptcy Rule 1007(a)(2) does not require the filing of a list of creditors by Alieria at this point in the process, all of the Bankruptcy Rule 2002(a) parties that exist at this point (namely, the Petitioning Creditors, the U.S. Trustee and parties who have appeared in the case to date), have been served. Accordingly, Alieria has complied with the requirements of Bankruptcy Rule 1014(b).<sup>2</sup>

4. Third, whether or not the Alieria case is “inextricably intertwined” with the Sharity bankruptcy case pending in this Court is irrelevant to the venue issue. The Sharity bankruptcy

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<sup>2</sup> Further, as a practical matter, because the Petitioning Creditors served their venue transfer motion on all of Alieria’s creditors in the Georgia case (as they were required to do under Bankruptcy Rule 1014(b), since the creditors in the Georgia case would be affected by such motion), all of Alieria’s creditors have now been made aware that venue is an issue in this matter.

case has progressed to a post-confirmation phase – a plan has been confirmed and become effective, and the liquidating trust called for under such plan has been established. As such, Sharity’s bankruptcy “estate” no longer exists and the Court’s post-confirmation jurisdiction is narrowly circumscribed. *See In re Resorts Int’l, Inc.*, 372 F.3d 154 (3d Cir. 2004) (jurisdiction of the non-Article III bankruptcy courts is limited after confirmation of a plan). In the *Resorts Int’l* case, the Third Circuit was asked to consider whether the bankruptcy court would have “related to” jurisdiction under 28 U.S.C. §§ 157(a) and 1334 to adjudicate post-confirmation malpractice claims brought by a Litigation Trustee under a confirmed plan. *Id.* The Third Circuit began its analysis by noting the limits on bankruptcy jurisdiction following confirmation of a plan.

Though courts have varied the standard they apply post-confirmation, the essential inquiry appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter. . . . At the post-confirmation stage, the claim must affect an integral aspect of the bankruptcy process – there must be a close nexus to the bankruptcy plan or proceeding. . . .

Whether a matter has a close nexus to a bankruptcy plan or proceeding is particularly relevant to situations involving continuing trusts, like litigation trusts, where the plan has been confirmed, but former creditors are relegated to the trust res for payment on account of their claims. To a certain extent, litigation trusts by their nature maintain a connection to the bankruptcy even after the plan has been confirmed. The question is how close a connection warrants post-confirmation bankruptcy jurisdiction. Matters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus. Under those circumstances, bankruptcy court jurisdiction would not raise the specter of "unending jurisdiction" over continuing trusts.

*Id.* at 166-67. The Third Circuit continued by reviewing certain reported decisions where courts determined whether post-confirmation bankruptcy jurisdiction existed based on the facts before them. With respect to cases where a post-confirmation trust was seeking to recover for the creditor-beneficiaries based on what were essentially state law causes of action assigned to the trust, the Third Circuit cited with approval several cases which found jurisdiction to be lacking.

[T]his kind of close nexus to the bankruptcy plan or proceeding was absent in *Falise*, 241 B.R. 48. *Falise* involved a dispute between tobacco manufacturers and a trust created as a result of the bankruptcy of an asbestos products producer. *Id.* at 51. The trust sought to recover from the tobacco companies for their role in contributing to asbestos-related illnesses. *Id.* Noting that the resolution of the dispute would require more than merely interpreting the plan's terms, the court held that bankruptcy court jurisdiction does not extend to a “major suit” brought by the trust against non-parties to the bankruptcy or to any closely related proceeding. *Id.* at 52, 55. In *Falise*, the resolution of the dispute would have had no impact on any integral aspect of the bankruptcy plan or proceeding. Accordingly, it was appropriate to find no bankruptcy jurisdiction over that collateral matter.

*In re Haws*, 158 B.R. 965, similarly illustrates when a proceeding lacks a sufficiently close nexus to the bankruptcy plan or proceeding to uphold post-confirmation jurisdiction. There, the action was brought by a trustee for a liquidating trust against a partner of the debtor for breach of fiduciary duty. *Id.* at 967-68. In holding the matter to be outside bankruptcy court jurisdiction, the court noted the plaintiff had failed to demonstrate how any damages recovered from the defendant were “necessary to effectuate the terms of the” plan. *Id.* at 971. The court recognized that “nowhere in the lawsuit is the bankruptcy court being asked to construe or interpret the confirmed plan or to see that federal bankruptcy laws are complied with in the face of violations.” *Id.* It concluded: “The only nexus to this bankruptcy case is that the plaintiff in this matter is a liquidating trustee representing a group of creditors appointed pursuant to the confirmed plan of reorganization.” *Id.*

*Id.* at 168. The Third Circuit then proceeded to examine the facts present in the case sub judice and held that the bankruptcy court lacked jurisdiction over the malpractice claims at issue.

The malpractice action could result in an increase in the Litigation Trust's finite assets. But the potential to increase assets of the Litigation Trust and its beneficiaries does not necessarily create a close nexus sufficient to confer “related to” bankruptcy court jurisdiction post-confirmation. The Trust beneficiaries here no longer have the same connection to the bankruptcy proceeding as when they were creditors of the estate. For reasons they believed financially prudent, they traded their creditor status as claimants to gain rights to the Litigation Trust's assets. Thus, their connection to the bankruptcy plan or proceeding is more attenuated. Furthermore, if the mere possibility of a gain or loss of trust assets sufficed to confer bankruptcy court jurisdiction, any lawsuit involving a continuing trust would fall under the “related to” grant. Such a result would widen the scope of bankruptcy court jurisdiction beyond what Congress intended for non-Article III bankruptcy courts. Accordingly, resolution of these malpractice claims will not affect the interpretation, implementation, consummation, execution, or administration of the Plan.

*Id.* at 170-71. And even if it is ultimately determined that this Court has jurisdiction to hear the recent adversary proceeding filed by the Sharity liquidating trust against Alieria and its debtor subsidiaries, that proceeding is in its extreme infancy – no answer has been filed and the adversary proceeding is now stayed by Alieria’s bankruptcy cases. Therefore, this factor should have no weight in the decision.

5. Fourth, there is no evidence of a “significant learning curve.” The Petitioning Creditors claim this Court and the U.S. Trustee have “been briefed” as to the nature of the claims asserted in the Sharity case. But so what? Is it impossible to “brief” the Georgia Court of the nature of the claims? Further, this Court has not decided the merits of any such claims as of yet, given that the bar date in the Sharity case passed less than two weeks ago, and no claim reconciliation process has even begun in the Sharity case (and indeed, as noted above, the Court may not even have jurisdiction over claims brought by the Sharity liquidating trust against Alieria and its affiliates).

6. Fifth, it is undeniable that the expense to the Alieria bankruptcy estate would be greater in Delaware than Georgia. Alieria would need to retain local counsel in Delaware, and would need to pay for travel of counsel and witnesses if in-person hearings are needed in the case. Those expenses would not be present in Georgia. Moreover, most if not all former officers, directors, employees and other witnesses which Alieria would need in connection with evidentiary hearings reside within 100 miles of the U.S. Courthouse in Atlanta, thus they could be compelled by subpoena to attend hearings conducted in Atlanta. *See* Fed. R. Civ. P. 45(c)(1) (incorporated by Bankruptcy Rule 9016). In contrast, these witnesses could not be compelled to appear at any such hearing conducted in Delaware. Alieria acknowledges that Georgia witnesses could be compelled to attend depositions in Georgia, and thereafter the deposition transcripts might be

admissible under Fed. R. Civ. P. 32(a)(4) (incorporated by Bankruptcy Rule 7032) at Delaware evidentiary hearings based in the “unavailability” of the witnesses; however, due to the way depositions are generally conducted, with numerous protective objections and no immediate court oversight, that would be more cumbersome, more expensive and much less preferable than having live testimony where the court can observe the witnesses’ demeanor in real time.

7. Sixth, while one can quibble as to the exact number of creditors of Alieria are located in Georgia as opposed to other states, the fact remains that *no creditors of Alieria reside in Delaware.*

8. Seventh, despite the Petitioning Creditors’ argument, “[a] debtor’s choice of forum is entitled to great weight if venue is proper.” *In re Rests. Acquisition I, LLC*, No. 15-12406, 2016 Bankr. LEXIS 684, at \*7 (Bankr. D. Del. Mar. 4, 2016). *See also In re Suntech Power Holdings Co.*, 520 B.R. 399, 420 (Bankr. S.D.N.Y. 2014) (“Where the case is initially brought in a proper venue, the debtor’s choice of forum is entitled to great weight.”); *Rehoboth Hospitality*, 2011 Bankr. LEXIS 3992, at \*10 (“[g]enerally, there is a presumption in favor of maintaining the debtor’s choice of forum.”); *In re Uslar*, 131 B.R. 22, 23 (Bankr. E.D. Pa. 1991) (“unless the balance is strongly in favor of transferring venue, the debtor’s choice of forum should rarely be disturbed”). Clearly, Alieria, the debtor, has chosen its forum, both initially in filing the ABC in Georgia, and then in commencing the cases in the Georgia Court. As such, this factor weighs heavily in favor of the Alieria Venue Motion. *See In re Ceasars Entertainment Operating Company, Inc.*, 2015 Bankr. LEXIS 314 at \*18, 2015 WL 495259, Case No. 15-10047 (Bankr. D. Del. Feb. 2, 2015) (“[i]f the Court finds that the Debtor’s choice of forum is entitled to deference, as a practical matter the Petitioning Creditors bear a burden to overcome that deference. . . .”).

9. Finally, it must be noted that the Petitioning Creditors' entire Objection appears to be premised on their assertion that the Petitioning Creditors (along with the Sharity Liquidating Trust) are either the only, or at least the most important, creditor class in the Alieria case, and that the interests of other creditors should be ignored. They may or may not be (such claims have yet to be determined), but in any event, that is not how the bankruptcy system works. The Petitioning Creditors represent a subset of alleged creditors of Alieria that may very well have a conflict with Alieria's trade or other non-Sharity creditors, and it is entirely likely that an unsecured creditors committee in the Alieria case, made up of a cross-section of Alieria's creditors, will contest, or at least closely scrutinize, the Petitioning Creditors' and Sharity's claims. Again, that is part of the normal bankruptcy process, and will occur whether the case proceeds in Delaware or Georgia.

### **CONCLUSION**

WHEREFORE, having replied to the PC Objection, Alieria respectfully requests that this Court enter an order (i) transferring venue of the above-captioned case to the Georgia Court, and (ii) granting such other and further relief as may be just, equitable and proper.

This 10th day of January, 2022.

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**CERTIFICATE OF SERVICE**

I, Rachel B. Mersky, hereby certify that on January 10, 2022, I served or caused to be served a correct copy of the foregoing *Reply to Petitioning Creditors' Objection to the Alieria Companies Inc. 's Motion to Transfer Venue Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014* by the Court's CM/ECF system on all counsel of record registered in this case through CM/ECF and by separate e-mail upon the following:

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January 10, 2022

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