UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Roasters Corporation and Roasters Franchise Corporation,	)	Case No. 98-80704C-11D Case No. 98-81049C-11D (Jointly Administered)
	)	
Debtors.	)	
	)	
Mark Gillis, Trustee for Roasters Corporation and Roasters Franchise Corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00-9040
	)	
Pacific Roasters, LLC and David R. Thomason,	)	
	)	
Defendants.	)	

ENTERED
OCT 06 '00
U.S. Bankruptcy Court
Greensboro, NC
CPH

MEMORANDUM OPINION

This adversary proceeding came before the court on August 10, 2000, for hearing upon a motion by the defendants to dismiss this adversary proceeding. Sara A. Conti appeared on behalf of the defendants and Richard M. Hutson, II appeared on behalf of the plaintiff. Having considered the motion, the plaintiff's response, the briefs filed in support of and in opposition to the motion and the matters of record in this adversary proceeding, and having heard the arguments of counsel, the court finds and concludes as

follows:

FACTS

This is an action by the plaintiff/Trustee to collect a prepetition account receivable consisting of royalties and fees alleged to be due under certain franchise agreements and guaranties. Prior to the commencement of the underlying bankruptcy cases, defendant Pacific Roasters, LLC and Roasters Franchise Corporation entered into two franchise agreements for the operation of restaurants in Oregon. Simultaneously with the execution of the franchise agreements, defendant David R. Thomason executed guaranties in which he unconditionally guaranteed the payment of all royalties and fees due by the defendant Pacific Roasters, LLC. The royalties and fees alleged in the complaint arose while restaurants were being operated by defendant Pacific Roasters, LLC pursuant to the two franchise agreements.

Pacific Roasters, LLC is a limited liability company organized and existing under the laws of the State of Oregon with its principal office and place of business located in that state. David R. Thomason likewise is a citizen and resident of Oregon. Neither defendant has a place of business located in North Carolina and neither defendant has conducted business in North Carolina.

This adversary proceeding was instituted against the defendants on March 22, 2000. The defendants were served by mailing a copy of the summons and complaint by first class mail to their addresses in Oregon pursuant to Rule 7004(d) of the Federal Rules of Bankruptcy Procedure which provides that in an adversary proceeding in the bankruptcy court the summons and complaint may be served "anywhere in the United States."

In their motion to dismiss and supporting brief, defendants argue that this adversary proceeding should be dismissed because the court lacks subject matter jurisdiction and personal jurisdiction over defendants, because the parties are contractually obligated to arbitrate issues involved in this proceeding and on the grounds of forum non conveniens.

ANALYSIS

1. Subject Matter Jurisdiction.

This court has subject matter jurisdiction in this proceeding under 28 U.S.C. §§ 157 and 1334 and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. Section 1334 provides that the district courts shall have original but not exclusive jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Through the

enactment of 28 U.S.C. § 1334, Congress intended to grant broad and comprehensive jurisdiction to the district courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. See Celotex v. Edwards, 514 U.S. 300, 115 S. Ct. 1493, 131 L.Ed.2d 403 (1995). Under 28 U.S.C. § 157, the district courts may refer 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 to the bankruptcy court for the district. This authority has been exercised in the Middle District of North Carolina by means of the General Order of Reference which was entered on August 15, 1984. Although not a core matter, a proceeding by a bankruptcy trustee to collect a prepetition account receivable of the bankruptcy estate is within the jurisdiction granted under 28 U.S.C. § 1334 because it is "related to" the underlying bankruptcy case. See In re Apex Express Corp., 190 F.3d 624 (4th Cir. 1999); In re F&L Plumbing & Heating Co., Inc., 114 B.R. 370 (E.D.N.Y. 1990); In re Quality Care Medical Equipment Co., Inc., 92 B.R. 117 (E.D. Pa. 1988); In re Commercial Heating Treating of Dayton, Inc., 80 B.R. 880 (Bankr. S.D. Ohio 1987). Accordingly, defendants' challenge to subject matter jurisdiction is rejected.

2. Personal Jurisdiction.

In arguing that the court lacks personal jurisdiction, defendants contend that the exercise of jurisdiction over them in this adversary proceeding would violate the Fifth Amendment of the United States Constitution because they have insufficient contacts with the State of North Carolina. As reflected in the briefs filed by the parties, courts are split on the question of whether a defendant must have minimum contacts with the forum state in order for personal jurisdiction to be acquired through service pursuant to Bankruptcy Rule 7004(d). The better rule which has been adopted in the Fourth Circuit is that personal jurisdiction over a defendant served pursuant to Bankruptcy Rule 7004(d) does not depend upon whether the defendant has minimum contacts with the forum state. The controlling principles were stated by the Fourth Circuit Court of Appeals as follows:

> On the topic of whether the exercise of personal jurisdiction over Rapid is consistent with the Constitution and the laws of the United States, the question of whether Rapid had minimum contacts with West Virginia is irrelevant. This is so because when an action is in federal court on "related to" jurisdiction, the sovereign exercising authority is the United States, not the individual state where the federal court is sitting. [citations omitted] Rather, we need only ask whether Rapid has minimum contacts with the United States such that subjecting it

> to personal jurisdiction does not offend the Due Process Clause of the Fifth Amendment to the United States Constitution . . . Given that Rapid is a Delaware corporation with its principal place of business in New York, we have no doubt that this is the case.

In re Celotex Corp., 124 F.3d 619, 630 (4th Cir. 1997). In accord, In re Federal Fountain, Inc., 165 F.3d 600 (8th Cir. 1999); Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233 (7th Cir. 1990), cert. den. 489 U.S. 1089, 111 S. Ct. 968, 112 L.Ed.2d 1054 (1991); In re Colonial Realty Co., 163 B.R. 431 (Bankr. D. Conn. 1994); In re Am. Freight Sys., Inc., 153 B.R. 316 (D. Kan. 1993); In re J.T. Moran Fin. Corp., 124 B.R. 931 (S.D.N.Y. 1991).

In the present case, defendants are citizens and residents of the State of Oregon and have conducted extensive business in the United States, including the business operations giving rise to the prepetition royalties and fees sought by the plaintiff in this proceeding. It follows, therefore, that defendants have sufficient contacts with the United States such that defendants are subject to personal jurisdiction in this adversary proceeding pursuant to Bankruptcy Rule 7004(d).

3. Forum Non Conveniens and Venue.

Defendants likewise are not entitled to a dismissal based upon the doctrine of forum non conveniens or improper venue. The

doctrine of forum non conveniens is operative when an alternative forum has jurisdiction to hear a case, and when a trial in the forum selected by the plaintiff would cause oppressiveness and vexation to the defendant out of all proportion to plaintiff's convenience, or where the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems. Under such circumstances, the court may, in the exercise of its sound discretion, dismiss the case notwithstanding that jurisdiction and venue are established by the plaintiff. See American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981, 985, 127 L.Ed.2d 285 (1994).

An alternative forum with jurisdiction to hear the claim involved in this adversary proceeding is available since there is another forum in which the defendants are amenable to process, i.e., Florida or Oregon. However, a trial in this court would not cause oppressiveness and vexation to the defendants out of all proportion to plaintiff's convenience, nor are there considerations affecting this court's administrative and legal problems which render this forum inappropriate. It is true that defendants are residents of Oregon and hence faced with some inconvenience in this proceeding. However, defendants agreed in the underlying contractual documents to being sued in the State of Florida, which

is no less inconvenient than being sued in North Carolina. The relief sought in this action involves a determination of the amount of prepetition royalties and fees that are owed by the defendants under the agreements between the Debtors and the defendants. This determination will raise issues requiring resort to books and records of the Debtors that are located in North Carolina, as well as the testimony of the Trustee and other members of his firm who are familiar with such records. These witnesses are residents of North Carolina, as are the attorneys who have represented the Debtors throughout the underlying bankruptcy cases and throughout this and a large number of similar proceedings. The law involved in this matter, involving routine contract claims, does not involve complex or unsettled questions of Florida law. Considering these and the other circumstances present in this adversary proceeding, and having weighed the inconvenience to Movant against the convenience to Plaintiff if this proceeding remains in the Middle District of North Carolina, the court is satisfied that a trial in the Middle District of North Carolina would not cause oppressiveness and vexation to the defendant out of all proportion to plaintiff's convenience. Retaining this action in the Middle District of North Carolina also is consistent with the presumption in favor of a plaintiff's choice of forum.

The court also has considered the public interest factors which are relevant in deciding the motion to dismiss based upon the doctrine of forum non conveniens and has concluded that the public interest factors likewise do not support the motion to dismiss. This court is not so congested that it cannot handle this case without neglecting other cases. Unlike the situation in In re Rabex Amura of North Carolina, Inc., 198 B.R. 898 (Bankr. M.D.N.C. 1996), this proceeding does not involve the law of a foreign country or documents written in a foreign language. Instead, in this proceeding, because of prior involvement with other proceedings involving claims for royalties under the same franchise agreements involved in this proceeding, this court is familiar with the law related to the franchise agreements and the claims for royalties due under such agreements. Additionally, to the extent that the Movant is entitled to a jury trial, the District Court for the Middle District of North Carolina affords a readily available forum where a jury trial can be had without undue delay and without unduly burdening the court.

The court therefore has concluded that a consideration of the private factors and the public factors bearing upon the Motion to Dismiss under the doctrine of forum non conveniens both weigh heavily against the granting of the Motion and that the Motion,

therefore, should be denied.

Defendants likewise are not entitled to a dismissal based upon improper venue. Venue for this adversary proceeding properly lies in this court under the general rule of 28 U.S.C. § 1409(a). In re All American of Ashburn, Inc., 49 B.R. 926 (Bankr. N.D. Ga. 1985); In re Allegheny, Inc., 68 B.R. 183 (Bankr. W.D. Pa. 1986) (collection of accounts receivable); Matter of Commercial Heat Treating of Dayton, Inc., 80 B.R. 880 (Bankr. S.D. Ohio 1987) (collection of accounts receivable). Retaining jurisdiction in the Middle District of North Carolina also is consistent with the general rule that claims involving prepetition actions should be handled by the court which is familiar with the administration. See In re Allegheny, Inc., 74 B.R. 397 (Bankr. W.D. Pa. 1987); Matter of Commercial Heat Treating of Dayton, Inc., supra. The only exceptions to this general rule are actions to recover small sums of money and certain causes of action which arise postpetition, neither of which is applicable in the proceeding. See 28 U.S.C. §§ 1409(b) and (d).

4. Arbitration.

Although this court has personal and subject matter jurisdiction, and dismissal is not called for based upon forum non conveniens nor improper venue, the issue remains as to whether it

is appropriate for this court to consider the merits of this proceeding in light of defendants' demand for arbitration. For the following reasons, the court has concluded that the parties are contractually bound to arbitrate the controversy involved in this proceeding and that this court, therefore, should not consider the merits of the controversy. Instead, pursuant to 9 U.S.C. § 3, this action will be stayed pending the conclusion of the parties' arbitration.

It is undisputed that the franchise agreements involved in this proceeding contain an arbitration clause in which the parties agreed that all controversies, disputes or claims arising between the franchisor and the franchisee, including the guarantors, "shall be submitted for arbitration to the Ft. Lauderdale, Florida office of the American Arbitration Association on demand of either party." The arbitration clause in the franchise agreement further provides that the award and decision of the arbitrator shall be conclusive and binding upon all parties and that judgment upon the award may be entered in any court of competent jurisdiction. This arbitration clause is broad enough to encompass the controversy involved in this adversary proceeding and is binding upon the plaintiff, who stands in the shoes of the franchisor/Debtor, and the defendants. Such arbitration clause therefore is "valid,

irrevocable, and enforceable" pursuant to § 2 of the Federal Arbitration Act (9 U.S.C. § 2).

The enforceability of an arbitration clause in proceedings in the bankruptcy court varies, depending upon whether the proceeding is a core or a non-core matter. With respect to non-core matters, such as the matter now before this court, most courts have concluded that a bankruptcy court does not have discretion to deny enforcement of an arbitration clause. See Matter of National Gypsum, 118 F.3d 1056 (5th Cir. 1997); Shearson Lehman Hutton, Inc. v. Wagner, 944 F.2d 114 (2d Cir. 1991); Hayes & Co. v. Merrill Lynch Pearce Finner & Smith, Inc., 885 F.2d 1149 (3rd Cir. 1989); In re Pisgah Contractors, Inc., 215 B.R. 679 (W.D.N.C. 1995); In re Koras Data Systems, Inc., 122 B.R. 845 (Bankr. D.N.H. 1990). Pursuant to this line of authority, the court concludes that in the non-core matter now before the court, the arbitration clause in the franchise agreements is enforceable and that this court, therefore, may not consider the merits of this proceeding. However, the court rejects defendants' argument that this proceeding should be dismissed. Instead, pursuant to 9 U.S.C. § 3, the court will stay this proceeding pending the conclusion of the parties' arbitration. See Schwartz v. Coleman, 833 F.2d 310, 1987 WL 38184, at *2 (4th Cir. November 3, 1987); Old Republic Ins. Co. v. Meadows Indem.

Co., 870 F. Supp. 210, 211 (N.D. Ill. 1994); Klauder & Nunno Enters., Inc. v. Hereford Assocs., Inc., 723 F. Supp. 336, 340-41 (E.D. Pa. 1989).

CONCLUSION

Contemporaneously with the filing of this memorandum opinion an order will be entered overruling and denying defendants' motion to dismiss but staying further proceedings in this action pending conclusion of the arbitration of the controversy involved in this action.

This 6th day of October, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

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Roasters Franchise	)	Case No. 98-81049C-11D
Corporation,	)	(Jointly Administered)
	)	
Debtors.	)	
	)	
Mark Gillis, Trustee for	)	
Roasters Corporation and	)	
Roasters Franchise	)	
Corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00-9040
	)	
Pacific Roasters, LLC and	)	
David R. Thomason,	)	
	)	
Defendants.	)	
	)	

ENTERED
OCT 06 '00
U.S. Bankruptcy Court
Greensboro, NC
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ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' motion to dismiss is hereby overruled and denied; and

2. This adversary proceeding is hereby stayed pending the conclusion of the arbitration of the controversy involved in this adversary proceeding or the further order of this court.

This 6th day of October, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge