IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

THINK AGAIN, INC., Debtor.	No. 04-24141 Chapter 11
WHOLE LIVING, INC., a Nevada corporation d/b/a The Brain Garden, Plaintiff, vs. DON TOLMAN, *et. al*, Defendants.	Adv. Pro. No. 05-2008

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

The debtor, a defendant in Civil Action No. 2:03-CV-0272 TS pending in the United States District Court, District of Utah, filed a Notice of Removal in this court on March 4, 2005, seeking to remove that action to this bankruptcy court where its bankruptcy case is pending. The plaintiff in that civil action, Whole Living, Inc., has now filed a Motion to Quash Debtor's Notice of Removal, asserting that removal is unavailable under 28 U.S.C. § 1452(a) and Fed. R. Bankr. P. 9027, which only permit removal "to the district court for the district where such civil action is pending . . . ." Because this court agrees with Whole Living's interpretation of the controlling statute and rule, the motion to quash will be granted.

Removal of actions related to bankruptcy cases is governed by 28 U.S.C. § 1452(a) which provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, **to the district court for the district where such civil action is pending**, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

Id. (emphasis added). Clearly, the plain language of this statute contemplates removal only to the federal district where the civil action is pending. Furthermore, this language is consistent with Fed. R. Bankr. P. 9027 which governs the procedure for removal under 28 U.S.C. § 1452(a). As set forth therein, "[a] notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending." Fed. R. Bankr. P. 9027(a)(1). Because the Utah civil action is not pending here in the Eastern District of Tennessee, removal to this court is inappropriate.

Presumably because the wording of the statute and rule is so clear, this court has only been able to locate two decisions on point with the case at hand. In *U-Haul Int'l, Inc. v. Gross Metal Products, Inc. (In re Gross Metal Products, Inc.)*, No. 97-30376DAS, 1997 WL 778756 (Bankr. E.D. Pa. Dec.

16, 1997), the debtor attempted to remove two actions to the bankruptcy court in Pennsylvania from federal district court in Arizona, after the district court had denied its change of venue request. *Id.* at *3. The bankruptcy court concluded that the removals were not properly effected within the scope of 28 U.S.C. § 1452(a) since "[t]he instant actions were pending not in this district, but in the [district of Arizona]." *Id.* at *1. The court observed that it knew "of no reported case in which a removal such as that at issue here, from a federal district court in one district directly to a bankruptcy court in another district, was attempted, let alone succeeded." *Id.* at *2.

> As illogical as it appears to remove a case to the very court in which it is already pending, it seems clear that a removal to a court in a different district is not permissible. This is because the statute seems to contemplate a removal of a state court action to a federal district/bankruptcy court, although removal of actions from a federal court not jurisdictionally associated with any district, *e.g.*, the Court of Federal Claims, appears also contemplated by F.R.B.P. 9027(a), which references a "state or federal Court."

Id. at *1.

The second case on point, also from the bankruptcy court for the Eastern District of Pennsylvania but by a different jurist, is even more instructive, albeit dicta in nature. In *Funquest Vacations, Inc v. Northwest Airlines, Inc. (In re Funquest Vacations, Inc.)*, No. 97-1196, 1998 Bankr. LEXIS 286 (Bankr. E.D. Penn. 1998), the debtor had removed a contract dispute pending in an Arizona state court to the bankruptcy court in Pennsylvania where its bankruptcy case was pending. The bankruptcy court entered an order remanding the case, after having concluded that removal was improper because removal was limited under 28 U.S.C. § 1452(a) to the Arizona federal district court. Thereafter, the debtor asked the Pennsylvania bankruptcy court to extend the time for filing a notice of removal in the Arizona federal district court based on excusable neglect. The defendant objected on the basis that the court was without

jurisdiction to enter the requested order. In ruling on the motion, the court made the following observation:

> Federal Rule of Bankruptcy Procedure 9027 establishes the procedure for removal of a claim or cause of action which is subject to removal under 28 U.S.C. § 1452. Removal to the district court in the district where the state case is pending is mandated by statute and implemented by rule. Notably, the statute confers jurisdiction on a court other than the court where the bankruptcy is pending (the "home bankruptcy court"). Seemingly, the procedure affects a somewhat illogical result given the purpose of removal in bankruptcy, i.e., to adjudicate all matters relating to the bankruptcy case in one forum. . . .
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> In the face of the clear statutory mandate, the proper procedure to follow if litigation in the home bankruptcy court is desired is to remove the proceeding to the district/bankruptcy court in which the litigation is pending (the "conduit court") and then move to transfer venue.

Id. at *3-*6 (footnotes and citations omitted)(citing, *inter alia*, *Nat'l Developers, Inc. v. CIBA-GEIGY Corp. (In re Nat'l Developers, Inc.)*, 803 F.2d 616, 620 (11th Cir. 1986)("While it may be true that allowing direct removal of state actions to the bankruptcy court conducting Chapter 11 proceedings would be a more efficient procedure than is the mechanism for removal outlined in 28 U.S.C. § 1478(a) [the predecessor to § 1452], we are obligated to enforce the procedures selected by the Congress.")). *See also* 10 *Collier on Bankruptcy* ¶ 9027.01 (15th ed. rev. 2005) ("Under section 1452(a), the claim or cause of action will be removed to the district court for the district in which the civil action (not necessarily the title 11 case) is pending. . . . Any party may move to change venue, a motion most frequently made when the court to which the suit was removed is not the court in which the bankruptcy case is pending.").

The cases cited by the debtor in its response in opposition to Whole Living's motion to quash are inapposite to the proceedings at hand. All deal with the issue of whether 28 U.S.C. § 1452(a) can be utilized to remove a federal district court action to the bankruptcy court in the same district, a matter upon which there is a split of authority. *See Sharp Elecs. Corp. v. Deutsche Fin. Servs. Corp.*, 222 B.R. 259,

260 (Bankr. D. Md. 1998)("Because the court concludes that this issue should be resolved by applying referral principles rather than removal principles, the court finds that a party may not remove a civil action between nondebtors from the United States District Court to the bankruptcy court for the same judicial district pursuant to 28 U.S.C. § 1452(a)."); *MATV-Cable Satellite, Inc. v. Phoenix Leasing, Inc.*, 159 B.R. 56, 60 (Bankr. S.D. Fla. 1993)(bankruptcy court concluded that district court action could be transferred to local bankruptcy court either by notice of removal or referral motion); *Gabel v. Engra, Inc. (In re Engra, Inc.)*, 86 B.R. 890, 896 (S.D. Tex. 1988)(bankruptcy court held that removal of federal district court action to bankruptcy court within the same district was procedurally proper and in reaching this conclusion, noted in dictum that under the wording of the removal statute, "a party must remove 'to the district court for the district where such civil action is pending'"). *See also EEOC v. Shelbyville Mixing Ctr., Inc. (In re Shelbyville Mixing Ctr., Inc.*), 288 B.R. 765, 767-68 (Bankr. E.D. Ky. 2002)(bankruptcy court vacated notice of removal filed by debtor in an attempt to remove lawsuit from federal district court to bankruptcy court in same district, observing that "28 U.S.C. § 1452 . . . does not provide a basis for removing a case to the bankruptcy court from a U.S. district court"). Thus, these cases provide no authority for the proposition urged by the debtor in its response, that this court may ignore the plain language of the statute and permit the lawsuit to remain in this court.

Lastly, in defense of its improper removal, the debtor asserts that Whole Living has improperly voiced its objection to the removal, that rather than a motion to quash, Whole Living was required to file a motion to remand. While the court is surprised at the debtor's effrontery in making this procedural argument, in light of its own blatant disregard of the plain and unambiguous wording of the removal statute, there is some support for this proposition, as the debtor notes. *See Princess Louise Co. v. Pacific*

Lighting Leasing Co. (In re Princess Louise Co.), 77 B.R. 766, 771 (Bankr. C.D. Cal. 1987)("The sole remedy of a party who contends that a claim or cause of action has been improperly removed to the bankruptcy court, or that the bankruptcy court lacks jurisdiction thereof, is to move to remand the claim or cause of action to the state court."). However, the issue before the court in *Princess Louise* was not the proper mechanism for challenging an improper removal, but whether all or only a portion of the state court proceeding had been removed to the bankruptcy court. *Id*. at 767. Thus, the statement is merely dictum. *Cf. In re Shelbyville Mixing Ctr., Inc.*, 288 B.R. at 767 (propriety of removal considered in context of objection to notice of removal, with result that court vacated removal); *Sharp Elecs. Corp. v. Deutsche Fin. Servs. Corp*., 222 B.R. at 264 (court granted motion to strike notice of removal and directed clerk of the court to return matter); *Cornell & Co., Inc., v. Southeastern Penn. Transp. Auth. (In re Cornell & Co., Inc.)*, 203 B.R. 585, 586-87 (Bankr. E.D. Penn.1997)(court apparently *sua sponte* struck notice of removal, concluding removal in violation of § 1452(a) to be void, and summarily returned the matter); *MATV-Cable Satellite, Inc. v. Phoenix Leasing, Inc*., 159 B.R. at 57 (motion to strike removal notice). To the extent that the *Princess Louise* decision can in any respect be viewed as prohibiting this court from considering the propriety of the removal in the context of a motion to quash, this court respectfully disagrees. The debtor has made no claim that it is being deprived of any substantive or procedural rights because of the type of motion brought by Whole Living. As such, this court is unpersuaded by the debtor's purely semantic argument.

Moreover, it should be noted that this court has the authority to determine a motion to remand. *See* 28 U.S.C. § 1452(b)("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."). *See also* 10 *Collier on Bankruptcy* ¶ 9027.09 ("The

hearing on the motion to remand will be heard by the bankruptcy judge . . . ."). And, because remand may be premised "on any equitable ground," *see* 28 U.S.C. § 1452(b), the court does not hesitate in concluding that an inherently improper removal satisfies this standard. Thus, even if Whole Living had filed a motion to remand rather than a motion to quash, the result would be the same. Removal to this court was improper and this proceeding should be returned to the federal district court in Utah. An order so holding will be entered contemporaneously with the filing of this memorandum opinion.

FILED: April 8, 2005

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE