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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

AAL USA, INC.,	]	
	]	
	]	
Plaintiff,	]	
	]	
v.	]	**CASE NO. 2:16-cv-02090-KOB**
	]	
BLACK HALL, LLC, *et al.*,	]	
	]	
	]	
Defendants.	]	

AAL'S OPPOSITION TO MOTION TO ABSTAIN, STAY, OR DISMISS

Plaintiff AAL USA, Inc. ("AAL") opposes "Defendants' Motion to Abstain or Stay Proceeding or in the Alternative to Dismiss Counts IV, VIII-X, and XIV" (Doc. 7) and submits the following brief.

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I. INTRODUCTION

AAL filed this action after it discovered that that the Defendants[1] had stolen millions of dollars in assets – including more than a million dollars for a private jet transferred to a company owned by Daigle and Woolford, untold spending on personal expenses including at Joseph A. Bank, Men's Wearhouse, Victoria's Secret, Guitar Center, Target, Kroger, Petsmart, Amazon, etc., paying for personal and family travel to places like Couples Sans Souci resort, New Hampshire (Woolford's home state), Ireland, Iceland, and South Africa, hundreds of thousands of dollars used to purchase personal homes for Woolford, paying for the legal and other business expenses of companies owned by Daigle and Woolford (Corvis Arrow, Cold Harbor, Hindsight), paying for gambling and/or other expenses at horse tracks, and hundreds of thousands of dollars in unauthorized bonuses.

In their motion, a naked attempt by Defendants to forum shop their Motion to Dismiss or Transfer that the Jefferson County Circuit Court denied, Defendants argue that the Court should abstain, stay the case, or dismiss this case in part. Defendants have two central arguments, neither of which can succeed. First, they argue that this case centers around an Asset Purchase Agreement ("APA") between

[1] For purposes of this motion and brief, "Defendants" refers to Paul Daigle ("Daigle"), Keith Woolford ("Woolford"), Black Hall, LLC ("BHLLC"), Corvis Arrow, LLC ("Corvis Arrow"), and Hindsight Coffee ("Hindsight"), the movants.

AAL and Black Hall Aerospace ("BHA")[2] signed on September 29, 2016, even though the transaction never closed. BHA filed suit for specific performance of the APA in Madison County (the "Madison County case"). Therefore, Defendants contend, this case should be dismissed or stayed while BHA proceeds with its case in Madison County. There are several problems with this argument, but the central problem is this case nothing to do with the enforceability of the APA. It would exist regardless of the APA or its validity. This case is about the Defendants' actions siphoning off millions in assets from AAL and defrauding it.[3] Resolution of this case will not be dispositive of the Madison County case, and vice versa.

Second, Defendants argue that AAL filed this case to harass and inconvenience them. This allegation would be humorous except for the very real theft of millions of dollars. There is no truth to the allegation. Defendants have

[2] BHA is a company AAL formed to serve its FAA Part 145 aircraft repair facility. AAL was to receive BHA's shares after BHA obtained the Part 145. Daigle told AAL's owner Oleg Sirbu ("Oleg" or "Sirbu") he had instructed AAL's counsel to accomplish this and even sent an email to Oleg and third parties confirming BHA had become a subsidiary of AAL. BHA also confirmed its subsidiary status on social media such as LinkedIn and Facebook. But Daigle lied and never transferred the stock. Daigle, Woolford, and three others currently hold the stock.

[3] The only way that the enforceability of the APA might theoretically be at issue is if the Defendants argue that the APA is a defense for them, e.g., that the APA transferred the claims against them to BHA, but that does not mean that it is the heart of this case. Moreover, the APA could not transfer the claims against the Defendants to BHA because most or all of the claims against them are non-assignable claims -- e.g., conversion and fraud. Defendants' argument is actually repugnant; they ask the Court to find that a CEO and CFO can defraud their company, buy the assets of the company (at a discount because of their fraud and self-dealing) while covering up their wrongdoing, and then claim that when the company discovers their fraud, breaches of fiduciary duty, and faithless actions, the company cannot pursue those claims because the fraudsters somehow obtained the claims.

only themselves to blame for this litigation – they ensured it when they stole from AAL. AAL did not file this case to harass the Defendants, it filed in an attempt to obtain recompense and justice from previously trusted employees.

Beyond the flawed bases of Defendants' Motion, abstention, a stay, and/or dismissal are inappropriate. The Court should deny the motion to abstain because (1) Defendants have not shown a parallel state court proceeding; (2) the *Colorado River* factors are all neutral or counsel against abstention; and, (3) Defendants have not established the "exceptional circumstances" required to justify abstention in light of the Court's "unflagging obligation" to exercise jurisdiction when it properly possesses it. Similarly, the Court should deny Defendants' motion to stay because (1) their rationale for a stay is faulty; (2) the proposed stay is immoderate; and (3) they have not met their burden of showing circumstances justifying a stay. Finally, Defendants' motion to dismiss should be denied because AAL has met its pleading obligations in the Complaint[4] and properly alleged claims against the Defendants.

For those reasons, and those that follow, the Court should deny Defendants' motion to abstain, stay, or dismiss in its entirety.

II. BACKGROUND

Sirbu is the owner, president, and CEO of AAL. Sirbu's life is a modern day Horatio Alger story, the embodiment of the American dream. Sirbu was born in

[4] AAL refers to the First Amended Complaint as the Complaint.

Moldova. In 1999, he moved to the U.S. to study, earning his bachelor and master's degrees. Initially, Sirbu worked with the United States Holocaust Museum. Sirbu later took a job as government contractor with DynCorp International in 2007, and became a U.S. citizen in 2008. Working in an industry related to the Russian-made Mi17 helicopter, through DynCorp, he was introduced to AAL Group PLC ("Group"), which ultimately resulted in Sirbu going to work for Group in Dubai.

In February 2010, Group created AAL as a subsidiary. TMI Solutions, Ltd. held AAL's shares. Group formed AAL to support existing contracts involving aviation services with the U.S. government and its prime contractors. In October 2011, Daigle joined AAL. In 2013, AAL hired Woolford as finance manager. Woolford later became AAL's CFO.

When Sirbu became the sole owner of AAL in 2014, it was a small business with fewer than 20 employees and less than $1 million in revenue. Sirbu guided and tasked Daigle through the process of having AAL compete for contracts as both subcontractor and prime contractor. Due to Sirbu, AAL obtained significant contracts and his American dream soon became reality. Little did Sirbu know his dream would turn into a nightmare of deception and betrayal.

A. The Defendants begin to defraud AAL

Defendants have engaged in far-reaching fraud, breaches of fiduciary duty, usurpation of corporate opportunity and self-dealing, all at the expense of AAL.

The fraud has been going on for years. It began simply, with the Defendants living out of AAL, using its American Express credit card and BB&T debit card to purchase their day-to-day items and various luxuries with AAL's accounts to the tune of hundreds of thousands of dollars.

1. AAL's American Express card

Defendants and their co-conspirators brazenly used AAL's American Express card for personal use. The charges ranged from luxuries to groceries to gambling on horse racing. The following is a non-exhaustive list of the staggering personal use of AAL's credit card by Daigle, Woolford, and their inner circle of co-conspirators:

- Woolford used AAL's credit card to purchase airline tickets for he and his wife to fly to his home state of New Hampshire and for hotel charges while there. *See* Jan. 2014 AmEx Statement (Ex. 1).
- Woolford used AAL's credit card at Toys 'R' Us, Etsy.com, Wal Mart, and Amazon.com. *See* Feb. 2014 AmEx Statement (Ex. 2).
- Daigle used AAL's credit card for resort travel to Kissimmee, Florida. Woolford purchased airline tickets for he and his wife to Chicago and New Hampshire. *See* Apr. 2014 AmEx Statement (Ex. 3).
- Daigle bought plane tickets for he and his wife to travel to South Africa. *See* May 2014 AmEx Statement (Ex. 4).
- Woolford had charges at Joseph A. Bank and Couples Sans Souci resort. *See* Aug. 2014 AmEx Statement (Ex. 5).
- Daigle bought airline tickets for his wife to travel to Washington, D.C., and Woolford made purchases at Men's Wearhouse, Belk, and Victoria's Secret. *See* Oct. 2014 AmEx Statement (Ex. 6).
- Woolford made purchases at Kroger and Wal Mart. David Clarke ("Clarke," AAL's former "Executive Officer") had a charge at West Madison Veterinary Hospital. *See* Feb. 2015 AmEx Statement (Ex. 7).
- Daigle traveled to Key West with his family. Clarke and his daughter Brianna did, too. *See* June 2015 AmEx Statement (Ex. 8).

- Daigle made purchases at Dick's Sporting Goods and Alabama Outdoors. Clarke had a $923.18 charge at the Huntsville Guitar Center and a charge at Kohl's. *See* Aug. 2015 AmEx Statement (Ex. 9).
- Daigle had a $1,085 charge on Etsy.com, charges for airline tickets for family members, and charges at Party City, Spirit Halloween, and Party Time. Clarke had charges at Edible Arrangements, Wal Mart, and AV Seafood Market. Brett Harlow ("Harlow," BHA COO) had charges at Signature Flight Support HSV ("Signature"), and a variety of travel in the UK. *See* Oct. 2015 AmEx Statement (Ex. 10).
- Daigle had charges for "Hover Board Gear," the Tumi Leather store, various clothing stores in Dubai, and the World Rugby Shop ($1,450.34). *See* November 2015 AmEx Statement (Ex. 11).
- Daigle had over $12,678 in charges from Stubhub and Arizona resorts. Woolford charged over $800 at Joseph A. Bank. Clarke had charges at Dick's Sporting Goods and 910 Live (a concert venue). Harlow had a $2,500 charge at Churchill Downs, the famous horse track in Kentucky. *See* January 2016 AmEx Statement (Ex. 12).
- Daigle had a $1,500 charge at the World Rugby Shop. Woolford had charges for family travel and for flowers from FTD. Harlow had charges for an online clothing store and tickets to Rock the South. *See* February 2016 AmEx statement (Ex. 13).
- Woolford had travel services and Amazon charges. Ryan Penton ("Penton") made large purchases for Hindsight, even charging dues for the Coffee Association of America. Harlow had over $8,000 in charges at Churchill Downs. *See* Mar. 2016 AmEx statement (Ex. 14).
- Daigle charged travel to Ocean Key Resort & Spa in Key West. Woolford charged a stay at Gaylord Palms Resort. Clarke charged fees for the Cessna. *See* April 2016 AmEx statement (Ex. 15).
- Woolford had charges for a cruise line and charged private charter expenses. *See* August 2016 AmEx record (Ex. 16).
- Clarke paid for XM Sirius radio. Woolford had charges for private charter travel. *See* Sept. 2016 AmEx statement (Ex. 17).

2. AAL's BB&T debit card

Similarly, a review of AAL's checking account statements reveals a litany of personal charges by the Defendants and their co-conspirators using AAL's corporate account at BB&T. The following are only examples:

- AAL's debit card was used at Target, Amazon, Earth Fare, Skateworld, to purchase nearly 20 Tumi bags ($234/each), Bath & Body Works, Sephora ($3,600), and Kroger. *See* Dec. 2014 BB&T statement (Ex. 18).
- AAL's debit card was used at Amazon, Wal Mart, Pier 1, and Old Time Pottery Co. *See* Feb. 2015 BB&T statement (Ex. 19).
- AAL's debit card was used at Amazon.com, Kroger, Petsmart, The Aquarium Shop, and Target. *See* Oct. 2015 BB&T statement (Ex. 20).
- AAL's debit card was used at Burlington Coat Factory, Best Buy, Brewhouse Brands, PiperandLeaf.com (artisan tea apparently for Hindsight), and a restaurant supply store. *See* Mar. 2016 BB&T statement (Ex.21).
- AAL's debit card was used at Amazon, TouchBistro (a restraint point of sale system), and florists. *See* May 2016 BB&T statement (Ex. 22).
- AAL's debit card was used at Lowes, Target, Textron Aviation, Amazon.com, The Webstaurant, and The Elephant Sanctuary. *See* Aug. 2016 BB&T statement (Ex. 23).
- AAL's debit card was used at Run My Club, LLC, Your Band Café.co (coffee supplies apparently for Hindsight), Amazon.com, Netflix, and Hobby Lobby. *See* Sept. 2016 BB&T statement (Ex. 24).

3. Woolford uses AAL's money to buy Daigle's house

In 2015, unbeknownst to Sirbu and/or anyone else at AAL, Daigle and Woolford used AAL's money to finance Woolford's purchase of a house owned by Daigle. Daigle sold the house to Woolford, using a loan from AAL they then hid. *See* Settlement Statement, Note, and Mortgage (Ex. 25). Neither Daigle nor Woolford disclosed to Oleg this unauthorized use of AAL assets and self-dealing.

4. Corvis Arrow and the Jet

In January 2016, the Defendants created Corvis Arrow, whose sole member is Cold Harbor (both controlled by Daigle and Woolford). The Defendants used AAL's money to create Corvis Arrow and pay its legal and other expenses.

Defendants used over a million dollars of AAL's money to buy a Cessna 525 FAA Registration Number N294CW (the "Jet"):

The contract for the Jet was originally in AAL's name, but Defendants assigned the contract to Corvis Arrow. Woolford signed on behalf of AAL; Daigle signed for Corvis Arrow. *See* Closing Statement & Assignment (Exs. 26-27). Later, an Aircraft Bill of Sale was filed with the FAA along with a registration certificate signed by Woolford. *See* FAA registration (Ex. 28). Defendants used more than $1 million of AAL funds placed in escrow to close the Jet purchase.

Defendants used the Jet for their private trips and vacations and their own personal business interests, and AAL covered the costs associated with the operations, maintenance, and insurance. Despite the fact that Daigle and Woolford had purchased the Jet using AAL's money, Defendants charged AAL for use of the Jet. Defendants also issued a series of checks to Corvis Arrow from AAL's

accounts. *See* Checks (Ex. 29). Defendants even used AAL's money to pay Corvis Arrow's legal fees and to pay for Hall Albright Garrison & Associates ("HAGA," a CPA firm) to do Corvis Arrow's taxes. *See* MCG & HAGA invoices (Exs. 30 - 31).

5. Unauthorized bonuses

Defendants awarded themselves bonuses far in excess of those authorized. For example, Daigle in 2015 awarded himself an incredible unauthorized bonus of over $600,000. *See* Q4 2015 Quarterly Contribution and Wage Report (Ex. 32).

6. Woolford uses AAL money to buy a second house

In September 2016, Defendants again used AAL's money to buy another house, this time a $470,000 house for Woolford. They used AAL's funds and had official bank checks issued to pay cash for the house. *See* BB&T and ServisFirst Bank checks (Exs. 33 & 34). To hide their theft, they had the checks made out to the closing attorney handling the purchase. Woolford's house is pictured below:

7. Black Hall, LLC

Daigle formed BHLLC in 2013. *See* Formation Documents (Ex. 35). Eventually, it became wholly-owned by BHA, but Defendants used AAL resources to fund BHLLC. Daigle remains its registered agent. Defendants used AAL's money to pay BHLLC's employee Travis Cruise. *See* List of Employees (Ex. 36). Further, Defendants used AAL's money to pay for HAGA to do accounting work for BHLLC. *See* HAGA invoices (Ex. 37). Even in 2016, Defendants issued an unauthorized $35,687 check to BHLLC from AAL. *See* BHLLC Check (Ex. 38).

8. Hindsight Coffee

Hindsight is a coffee company owned by the Defendants. Unbeknownst to Sirbu, and without any authorization, Daigle and Woolford used AAL resources to fund the coffee company and its operations. Initially, Defendants used AAL's money to purchase the Hindsight truck and pay for its insurance and fuel:

Defendants also used AAL funds to employ two people for Hindsight - Daniel Stearns and Lacey Looser. *See* Employee List (Ex. 36). Defendants used AAL's funds to pay the legal fees and accounting fees for HAGA and ADP. *See* MCG and HAGA invoices (Exs. 39 & 40). Defendants also used AAL's funds to pay consulting and marketing fees for Hindsight. *See* Connell invoices (Ex. 41). Defendants used AAL's funds to purchase the supplies for Hindsight, from coffee to point of sale technology to artisanal tea, and for Hindsight to join its trade organization. *See* § II(A)(1), *supra*. In addition, Defendants issued an unauthorized $1,000 check to Hindsight. *See* Hindsight Check (Ex. 42).

9. Unauthorized transfers of cash to BHA

Defendants wrote a $2 million check to BHA on September 30, 2016. *See* Sept. 30 Check (Ex. 43). Defendants wrote another $1,263,339.03 check to BHA just days later, on October 3, 2016. *See* Oct. 3 Check (Ex. 44). An additional $1,137,000 was taken on October 7. None of these withdrawals were authorized – Daigle and Woolford just took $3.2 million out of AAL's accounts.

B. The APA

On September 23, Daigle represented to Sirbu that he had been contacted by Leidos and told that AAL had been denied base access. Leidos then sent a letter to AAL regarding OCONUS base access. Daigle forwarded the letter on September 24. *See* Sept. 24 email (Ex. 45). Daigle then presented a plan to Sirbu, representing

that a separation from AAL was required and that otherwise AAL would lose all of the work (which was a lie). Daigle misrepresented the cause and effect of the letter.

As early as September 26, Woolford was transferring money from AAL's accounts at BB&T to BHA's accounts. When questioned about this, he told his lawyers that he did not "want to deal with john[5] on this, but don't want to cause any more issues with oleg." *See* Sept. 26 email (Ex. 46).

Emails about the transfer of funds continued the next day. *See* Sept. 27 emails (Ex. 47). Also on September 27, unbeknownst to Oleg, Defendants' lawyer, Jon Levin,[6] sent a proposal letter for purchase of AAL's assets by BHA. *Id.* While the letter shows a copy going to AAL, no copy was ever sent to Oleg.

A valuation of AAL was not done. In fact, Woolford emailed Andy Watson and Levin, his attorneys, that the proposed sales price for AAL ($501,660.46) was a "quick down and dirty valuation of AAL using a 5 year average of EBITDA" that "really can't be used as a sales price." *See* Sept. 28 emails (Ex. 48). Daigle told Sirbu that it had been derived by AAL USA's accounting firm, which was not true. *See* HAGA Aff. (Ex. 49). Woolford has sworn that an "independent valuation" was

[5] John Eagan, BB&T.

[6] AAL has learned that during the time Levin was purportedly representing both BHA and AAL, in September and October 2016, Levin was in discussions with BHA about employment and, in fact, signed an agreement to work for BHA.

done by HAGA – HAGA says it did not and Woolford's statement was false when made.

On September 28, Levin, who was purportedly representing Oleg on behalf of AAL, emailed Woolford a draft of the APA, instructing him: "[d]o not send to Oleg, but let me know your questions/comments." *Id.*

On September 29, again unbeknownst to Oleg, Levin emailed Woolford a revised APA incorporating Woolford's changes, "as skinny as they get." *See* Sept. 29 emails (Ex. 50). Woolford emailed back one change, and the documents were sent to Oleg. Sirbu began to review the documents and asked questions about the proposal. While Oleg was going through the documents (which he had seen for the first time that day), Daigle emailed Leidos that he was the "sole owner" of BHA and the APA was "fully executed" - both lies. *Id.* Early in the morning Dubai time (where he was), Sirbu executed certain of the APA documents.

After September 29, Defendants' fraud began to come to light. Daigle stopped communicating with Sirbu, and Maynard, which had drafted the APA and associated documents, withdrew from representation. Realizing the APA was a massive fraudulent scheme, Sirbu refused to proceed with the closing or to sign various Assignment and Assumption Agreements and a Novation Agreement.

III. ARGUMENT

A. The Court should not abstain.

As a general rule, the pendency of a state court action does not bar proceedings in federal court concerning the same matter. *See Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1140 (11th Cir. 2013). In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), however, the Supreme Court carved out a narrow exception allowing federal courts to abstain when there is a parallel state-court action and reasons of judicial administration demand abstention. *See id.* at 818–20.

Nevertheless, courts applying the *Colorado River* doctrine must do so in light of their "unflagging obligation" to exercise jurisdiction when they properly possess it. *See Jackson-Platts*, 727 F.3d at 1140. A federal court should no more decline to adjudicate a case over which it has jurisdiction than it should adjudicate a case over which it lacks jurisdiction. *See Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821). Due to that unflagging obligation, the *Colorado River* analysis begins "with a heavy bias in favor of exercising jurisdiction." *TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1295 (11th Cir. 1998).

"[A]bstention as a general matter is rare, [and] Colorado River abstention is particularly rare." *Jackson-Platts*, 727 F.3d at 1140. Courts should abstain under *Colorado River* only in **exceptional circumstances** in which the clearest of

justifications supports abstention. *Id.* (citing *Colorado River*, 424 U.S. at 817-19). Application of the *Colorado River* doctrine "is an extraordinary step that should not be undertaken absent a danger of a serious waste of judicial resources." *Id.*

The threshold of the *Colorado River* analysis is whether there is a parallel state-court action. *See id.* (citing *Ambrosia Coal & Constr. Co. v. Pages Morales*, 368 F.3d 1320, 1330 (11th Cir. 2004)). If there is no parallel state-court action, a federal court may not abstain. *See Jackson-Platts*, 727 F.3d at 1140 (stating that "a federal court may abstain under the *Colorado River* doctrine only if there is a parallel state action"). If the party asking the court to abstain under *Colorado River* can establish the existence of a parallel state-court action, the court must then consider six factors to determine whether abstention is appropriate. *See id.*

Here, the *Colorado River* doctrine provides no basis for the Court to abstain. This proceeding and the Madison County case are not parallel proceedings because the parties, issues, and relief differ. Application of the six *Colorado River* factors fails to show the type of exceptional circumstances that would clearly justify abstention. Further, the Defendants have failed to show that the Court's proper exercise of its jurisdiction over this action creates the danger of a serious waste of judicial resources. In light of these facts and the heavy bias in favor of the Court fulfilling its obligation to exercise the jurisdiction Congress and the Constitution have given it, the Court should refuse to abstain.

1. The Defendants have failed to show a parallel state-court proceeding.

State and federal actions are parallel when they involve substantially the same parties, issues, and relief. *See Ambrosia Coal*, 368 F.3d at 1330. This action is not parallel to the Madison County case because there are meaningful differences as to the parties, issues, and relief sought.

First, the parties to this lawsuit are not substantially the same as the parties to the state-court action. A simple comparison makes this plain.

Parties to Madison County Case	**Parties to the NDAL Case**
Black Hall Aerospace, Inc.	AAL USA, Inc.
AAL USA, Inc.	Black Hall, LLC
Saul Kirsch	Corvis Arrow LLC
Oleg Sirbu	Cold Harbor Certifications, Inc.
	Hindsight Coffee, LLC
	Paul Daigle
	Keith Woolford
	IberiaBank Corporation
	IberiaBank
	ServisFirst Bank

The *only* party in both actions is AAL. The parties are not substantially the same. *See I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1551 (11th Cir. 1986).

Second, the issues the Court must decide to resolve AAL's claims in this case are not substantially the same issues the state court must decide to resolve the claims in that case. The premise of Defendants' argument on this point is that the APA is the dispositive issue in this case. It is not. The APA, even if valid, would not mean that AAL's claims in this action, the gravamen of which is claims for

conversion, were assigned to BHA. "[I]t has long been the law in Alabama that a chose in action for recovery of converted property is not assignable." *Rice v. Birmingham Coal & Coke Co.*, 608 So. 2d 713, 715 (Ala. 1992). As the Alabama Supreme Court held nearly 180 years ago:

> A right merely to recover the possession of a chattel by a suit, is a chose in action, as much so, as a bond or promissory note. In the latter case, the instrument is merely evidence of a right to recover a sum of money from another.…That a chose in action is not at common law assignable, or, in other words, that the right to sue for and recover the possession, cannot be transferred to another, is an ancient doctrine of the common law—(Coke's Litt. 214, A.; 2Black. Com. 397.)

Goodwyn v. Lloyd, 8 Port. 237, 239-40 (Ala. 1838). The validity of the APA, therefore, is not determinative of AAL's claims in this suit.

Further, "[i]t seems to be well settled, as a general proposition under the common law, that a right of action arising from tort is nonassignable, and this rule has been applied to actions for fraud and deceit, 'where the wrong is regarded as one to the person.'" *All States Life Ins. Co. v. Jaudon*, 154 So. 798, 800 (Ala. 1934); *see also Lowe v. Fulford*, 442 So. 2d 29, 32 (Ala. 1983) ("It is also well settled that, in the absence of statutory provision, rights of action for torts purely personal…are not assignable."); *Neuberger v. Felis*, 82 So. 172, 175 (Ala. 1919) ("fraud…is neither assignable nor enforceable by the assignee.").[7]

[7] *See also In re Pazdzierz*, 718 F.3d 582, 586–87 (6th Cir. 2013) ("Claims of fraud are personal and not assignable under Michigan law."); *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 675 (10th Cir. 2007) (fraud claim not assignable); *Mafia Collection v. Demaio*, No. 63631, 2015 WL 3936836, at *2 (Nev. June 24, 2015) ("Claims for breach of fiduciary duty are akin to fraud

Further, claims for misappropriation, fraud, and the like are not assignable as part of an asset purchase agreement from a seller corporation to a buyer corporation when there is no merger of the two corporations, the two corporations have not become amalgamated, and the original corporation continues to exist. *Baker v. Allen*, 197 N.E. 521 (Mass. 1935) is informative. There, minority shareholders of the Boston-Montana Mines Company ("BMMC") brought a derivative suit against the directors of BMMC for damages for breach of fiduciary duty. *Id.* at 522. They accused BMMC's directors of causing it damage by, e.g., culpable neglect, wasting corporate assets, illegal and ultra vires issues of capital stock, permitting excessive salaries to the defendants, and payment of money under the pretense of paying expenses. *Id.* The defendants argued that after considering the financial condition of BMMC, they had sold "all and singular the real, personal and mixed property" of BMMC to the National Boston Montana Mines Company ("NBMMC"). *Id.* at 523. It was determined by a special master that the defendants' factual allegations about the transfer from BMMC to NBMMC were correct. *Id.*

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claims…and rights of action based on fraud are not assignable because they are personal to the party who was defrauded."); *Joseph v. S & J Operating Co.*, 2012 WL 1535172, at *4 (D. Kan. May 1, 2012), *aff'd in part, appeal dismissed in part sub nom. Kowalsky v. S & J Operating Co.*, 539 F. App'x 908 (10th Cir. 2013) (tort claims not assignable); *In re Pittard*, 358 B.R. 457, 460 (Bankr. N.D. Ga. 2006) ("assignments of rights of actions for injuries arising from fraud to the assignor are not assignable."); *Claire Murray, Inc. v. Reed*, 139 N.H. 437, 440, 656 A.2d 822, 824 (1995) (fraud and breach of fiduciary duty claims not assignable); *Jones v. Hicks*, 100 N.W.2d 243, 245 (1960) ("The general rule is well established…that a right of action for fraud is personal and not assignable.").

The trial court dismissed the plaintiffs' suit, and the plaintiffs appealed. *Id.* The Baker court reversed the trial court, finding such claims were not assignable:

> The allegations of the present bill contain charges of fraudulent conduct as well as of other breaches of the fiduciary duty of the defendant directors. There are specific averments to the effect that the defendants have permitted one of their number to receive large sums of money unlawfully in the guise of expenses, and to handle and use moneys of the corporation as his own, and that they have issued shares of capital stock in the corporation without any consideration or with improper consideration. These are averments of fraudulent conduct. Whatever may be said about the assignability of charges of failure to perform other fiduciary duties of the defendants as directors, those just enumerated cannot rightly be regarded as falling under any other category than fraud. They do not constitute damage to specific property. They are simply rights to litigate for a fraud practiced on the corporation. They are not assignable….there has been no merger of the corporation and the new corporation; they have not become amalgamated; the corporation has not been extinguished but continues to exist. The cause of action set forth in the bill is in dominating features for damages inflicted on the corporation by fraud of the defendants as directors.

Id. at 524-25. This result makes sense. To allow AAL's claims for fraud and misappropriation against Defendants to transfer from AAL to BHA would allow and encourage fraudsters to commit fraud, then extinguish claims against themselves personally by selling the assets of the company to a friendly buyer (or as here, themselves) before getting caught.[8]

Because AAL's claims are not, as the Defendants contend, "entirely dependent on a determination of the validity of the Agreement," *see* Doc. 8, p. 22,

[8] According to Defendants' theory, they could also eliminate criminal exposure for their thefts from AAL by simply buying AAL's assets. That is not the law, civilly or criminally.

and because AAL's claims against the Defendants were not assignable to BHA, the validity and enforceability of the APA is not dispositive of this case and the issues in this case are not substantially the same as the issues in the Madison County case.

Third, the relief AAL seeks in this case is meaningfully different from the relief the parties seek in the state-court action. In its Madison County counterclaim, AAL seeks – **from BHA:**

- damages for BHA's fraud and suppression;
- damages for BHA's conversion of AAL's assets (mostly after the APA);
- damages and specific performance for BHA's breach of contract;
- a constructive trust on the assets and revenues of BHA and related corporate entities;
- a judgment that the APA is voidable;
- damages for BHA's tortious interference and conspiracy;
- damages for BHA's unjust enrichment;
- relief for BHA's violation of Federal and common law trademark law;
- damages and other relief for BHA's cybersquatting;
- damages, disgorgement of profits, and other relief for BHA's violations of the Computer Fraud and Abuse Act ("CFAA"), Defend Trade Secrets Act ("DTSA"), and the Alabama Trade Secrets Act ("ATSA"); and,
- an accounting of assets transferred to BHA from August 2016 to present.

See generally Countercl. All relief is sought from BHA.

In this case, AAL seeks – **from Daigle, Woolford, and their co-conspirators ("Conspirators"):**

- damages for the Conspirators' fraud and suppression;
- damages for Conspirators' conversion of AAL's assets while working at AAL (and afterward);

- damages for the Conspirators' and ServisFirst's breach of contract;
- relief for Conspirators' violations of the CFAA, DTSA, and ATSA;
- an accounting of and constructive trust over the assets of Daigle and Woolford;
- an order requiring Daigle and Woolford to transfer BHA's shares and Part 145 to AAL;
- damages for the Conspirators' breaches of fiduciary duty;
- damages for the Conspirators' tortious interference and conspiracy;
- damages for the Conspirators' unjust enrichment;
- a return of the compensation paid to Daigle and Woolford;
- damages for ServisFirst's negligence and/or wantonness; and,
- damages for ServisFirst's violation of the UCC.

See generally Compl. AAL seeks relief from the Conspirators and ServisFirst.

Seeking the same categories of damages is not the same as seeking the same damages. The damages sought in this action are different *and* against different parties than those sought in Madison County. AAL also seeks certain relief here it does not seek in Madison County, e.g., repayment of the compensation paid to Daigle and Woolford under the faithless servant doctrine, damages for ServisFirst's negligence, wantonness, and violation of the UCC, and damages for the Conspirators' breaches of fiduciary duty.

The Madison County case and this case have different parties, with different claims, for different relief. The two are not parallel proceedings and the Court need go no further and instead should deny Defendants' motion on these grounds alone.

2. The *Colorado River* factors do not support abstention.

If (and only if) a district court determines that there is a parallel state-court proceeding, it must then apply a six-factor analysis to determine whether exceptional circumstances clearly justify abstention. Those factors are:

> (1) the order in which the courts assumed jurisdiction over property; (2) the relative inconvenience of the fora; (3) the order in which jurisdiction was obtained and the relative progress of the two actions; (4) the desire to avoid piecemeal litigation; (5) whether federal law provides the rule of decision; and (6) whether the state court will adequately protect the rights of all parties.

TransSouth Fin., 149 F.3d at 1294–95. Courts must apply those factors in a pragmatic and flexible manner—not mechanically. *See Ambrosia Coal*, 368 F.3d at 1332. "No single factor is dispositive . . . ." *Jackson-Platts*, 727 F.3d at 1140. But, the weighing of the factors must take into account the "heavy bias favoring the federal courts' obligation to exercise the jurisdiction that Congress has given them." *Id.* (citing *Metro. Life v. Lockette*, 155 F.3d 1339, 1341 (11th Cir. 1998); *Am. Bankers. Ins. Co. of Fla. v. First State Ins. Co.*, 891 F.2d 882, 884–85 (11th Cir. 1990)). Application of those factors here shows that abstention is improper.

a. Neither this Court nor the state courts have taken jurisdiction over property.

The first factor looks at whether one court has assumed jurisdiction over property before the other. *See Jackson-Platts*, 727 F.3d at 1140-41. Neither court has taken jurisdiction over property, so this factor does not and cannot favor abstention.

b. This Court and the state court are equally convenient fora.

The second factor concerns the relative convenience of the federal forum. *See Jackson-Platts*, 727 F.3d at 1141. As with the first factor, this factor does not favor abstention because this Court is equally convenient to the Madison County Circuit Court. In fact, Madison County is in the Northern District of Alabama. ServisFirst and IberiaBank are present in Birmingham. AAL's counsel is located in Birmingham. Some of Defendants' counsel is in Birmingham. It is also easier for AAL's owner to fly into Birmingham.

In similar circumstances, courts in the Eleventh Circuit have found that this factor weighs against abstention. *See Jackson-Platts*, 727 F.3d at 1141 ("The federal forum neighbors Polk County, Florida, where the state forum is located. Hence, the federal forum and the state forum are equally convenient; this factor thus cuts against abstention."); *Weekes-Walker v. Macon Cty. Greyhound Park*, 2015 WL 5736182, at *9 (M.D. Ala. Sept. 30, 2015) (distance between Macon County and federal forum left federal forum not inconvenient); *SE Prop. Holdings, LLC v. Parks*, 2014 WL 3687226, at *4 (S.D. Ala. July 24, 2014) (S.D. Ala. equally convenient to Circuit Court in Baldwin County).[9]

This factor shows that Defendants are merely taking another cut at their previously-denied motion to dismiss or transfer venue. Defendants argue that they

[9] Defendants cite *Ambrosia Coal*, 368 F.3d at 1332, but that case supports AAL's position. Here, the evidence and witnesses are in the federal forum as that factor is applied.

would be inconvenienced by litigating in this Court, but AAL would be inconvenienced and caused to incur greater expense by having to litigate its claims in Madison County, as the Defendants know. The Circuit Court heard Defendants' arguments on this point and rejected them. *See* Order (Ex. 51). Defendants are either forum shopping or seeking to inconvenience AAL, or both.[10]

c. The relative progress of the two proceedings fails to support abstention.

The third factor concerns the relative progress of the two cases. *See Am. Bankers*, 891 F.2d at 885. "This factor 'should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Am. Bankers*, 891 F.2d at 885 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983)).[11]

Defendants argue that the Court should abstain because the Madison County case was filed first and discovery has begun there, and they attempt to impute a bad motive to AAL. Mot. at 24. The activity in the Madison County case does not mean this factor favors abstention and is ironic given that BHA has obtained a

[10] Defendants argue that parties, witnesses, and evidence are in Huntsville. Mot. at 26. But the location of evidence is a non-factor given that the evidence in this case is almost entirely electronic, and two of the parties (the Bank Defendants) are in Jefferson County. Similarly, the location of witnesses is a red herring because the witnesses can be deposed at their counsel's offices, presumably in Huntsville, unless the parties agree differently.

[11] Defendants cite *Daniel v. Cullman Cty. Court Referral, LLC*, No. 5:15-CV-00101-AKK, 2015 WL 3604210, at *3 (N.D. Ala. June 8, 2015), but that case is easily distinguishable. There, the federal case had been stayed and was not developed at all, unlike the state court action. *Id.* In contrast, this case is more developed than the Madison County case, not less.

partial stay of discovery in Madison County, preventing the depositions of Daigle and Woolford and various corporate entities because of an alleged criminal investigation into their actions. In fact, at the time of this filing, there has not been a single deposition taken in Madison County and BHA has not produced a single document or answered a single interrogatory. It has objected to every single discovery effort, objecting to 20 subpoenas issued by AAL.

The cases are at the same stage – discovery has only just begun and the Defendants, in fact, would have had discovery responses due in this case a month ago had they not removed it. There has been substantial motion practice in both cases, and in this action AAL has filed a complaint and an amended complaint, has served discovery, and has moved for and obtained two injunctions, along with another agreement put on the record. Particularly given the partial discovery stay in Madison County, this factor does not favor abstention. It disfavors it. *See Am. Bankers*, 891 F.2d at 885 ("The fact that Arlen has answered in the New York action while First State had not answered in this federal action counts little in measuring progress in litigation. This factor, therefore, does not weigh in favor of dismissal."); *Jackson-Platts*, 727 F.3d at 1142 (stating that when proceedings are at equal stages, the factor does not favor abstention).

Defendants argue that this litigation is retaliatory and vexatious, but their claim is not supported by a shred of evidence.[12] Defendants baldly assert that the "only reason this action was filed was to further AAL's campaign to destroy Black Hall and its officers." Mot. at 24. Actually, the case was filed because AAL learned that the Defendants and their co-conspirators had stolen millions of dollars in assets from AAL by buying themselves a jet, living out of the company, buying themselves houses, cars, and vacations, and giving themselves hundreds of thousands of dollars in unauthorized bonuses, among other bad acts.

The case is not retaliatory merely because it was filed shortly after BHA filed against AAL seeking specific performance under the APA. Indeed, the fact it was filed within hours shows it was already in the making. AAL filed suit after carefully gathering evidence that Defendants had absconded with assets worth millions of dollars, and it would have filed suit regardless of whether BHA had filed suit in an attempt to seek performance under the APA. This suit was also filed after weeks of preparation and (unexpectedly) on the same day that BHA filed an amended complaint in Madison County. Defendants cannot reasonably contend that AAL somehow put together its complaint (which is 29 pages long and includes a number of exhibits) in the minutes after BHA filed an amended complaint.

[12] Defendants cite *Moses H. Cone*, 460 U.S. at 17 n.20, but the Court there did not "rely on such reasoning."

The specificity of the complaint and the supporting documents also demonstrates that the action was not "vexatious" or "retaliatory." A vexatious suit is one "instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued." BLACK'S LAW DICTIONARY (10th ed. 2014). The details and exhibits filed with the suit reflect documented evidence of the thefts alleged. Hardly harassing; and similar to a burglar asserting that his victim is harassing him by bringing charges.

Defendants argue that a forum selection clause in the APA should govern, but BHA is not a party here and this suit is not about the APA. It is about the Defendants' conversion, breaches of fiduciary duty, faithless behavior, and fraud.[13] These claims would exist had an APA never existed.

Finally, Defendants' arguments concerning "forum shopping" are ironic because that is precisely what they have done. Defendants filed a motion to dismiss or transfer this case in the Circuit Court. After briefing and a hearing, their motion was denied. *See* Mot. to Dismiss, Renewed Mot. to Dismiss, & Order Denying Mot. to Dismiss (Exs. 52-53, 51). Defendants later removed the case on the eve of a preliminary injunction hearing and repackaged their arguments as arguments to abstain, stay, or dismiss. *See id.*

[13] *Allied Mach. Serv., Inc. v. Caterpillar Inc.*, 841 F. Supp. 406 (S.D. Fla. 1993) is inapposite. There, the plaintiff filed suit in state court, dismissed its case, and re-filed in federal court. AAL has done no such thing. It is more applicable to the Defendants than to AAL.

d. There is little risk of piecemeal litigation.

The fourth factor to be considered is the risk of piecemeal litigation. "Run of the mill piecemeal litigation will not do." *Jackson-Platts*, 727 F.3d at 1142 (quoting *Ambrosia Coal*, 368 F.3d at 1333). The Eleventh Circuit explained:

> *Colorado River*'s factor concerning the avoidance of piecemeal litigation does not favor abstention unless the circumstances enveloping those cases will likely lead to piecemeal litigation that is **abnormally excessive or deleterious**. In *Colorado River*, for example, the Federal Government sued "some 1,000 water users," … The single most important factor …was that the federal statute upon which the lawsuit revolved evinced a clear federal policy of avoiding the piecemeal adjudication of water rights in a river system….this case neither turns on a federal statute designed with the intent of avoiding piecemeal litigation nor involves claims against 1,000 parties….Although the dual proceedings in this instance will likely result in some unremarkable repetition of efforts and possibly some piece-by-piece decision-making, **there is no indication that piecemeal litigation poses any greater waste or danger here than it does in the vast majority federal cases with concurrent state counterparts**. As we have emphasized, **federal courts are almost invariably obligated to exercise otherwise valid jurisdiction over such cases.**

Ambrosia Coal, 368 F.3d at 1333 (internal citations omitted) (emphases added). Here, there is nothing approaching "abnormally excessive or deleterious."[14]

[14] The authority Defendants cite proves no different. In *Brown v. Blue Cross & Blue Shield of Florida, Inc.*, 2011 WL 11532078, at *9 (S.D. Fla. Aug. 8, 2011), *aff'd*, 456 F. App'x 854 (11th Cir. 2012), unlike here, the "heart" of the case was the same – unpaid blood clotting factor treatments. In contrast, the Madison County action is about the enforceability of the APA while this case is focused on the conversion and other bad acts of the Defendants while employed by AAL. Defendants contend that the resolution of the APA will resolve certain claims in this Court, but that just is not so. *See* § III(A)(1), *supra*. This case is about distinct issues and different damages from the Madison County case, and a verdict in either would not be determinative for either side in the other case.

Defendants have not provided a warrant or any evidence to support a finding that abnormal, excessive, or deleterious piecemeal litigation would occur absent dismissal. Consequently, the fourth factor does not support abstention. *See Carden v. Town of Harpersville*, 2016 WL 4493059, at *12 (N.D. Ala. Aug. 26, 2016) ("while some piecemeal litigation is inevitable, any threat of abnormally excessive or deleterious piecemeal litigation is overstated by Defendants. This factor is neutral."); *Crimson Yachts v. M/Y Betty Lyn II*, 2010 WL 2683341, at *5 (S.D. Ala. July 1, 2010) (citing *Ambrosia Coal*); *Pigott v. Sanibel Dev., LLC*, 508 F. Supp. 2d 1028, 1032 (S.D. Ala. 2007) ("some duplication of effort and potentially piece-by-piece decision-making" not sufficient to find this factor favored abstention).

e. Federal law provides the rule of decision as to some of AAL's claims in this proceeding.

The fifth factor is whether state or federal law applies. *Ambrosia Coal*, 368 F.3d at 1334. To the extent state-law governs claims, this factor favors abstention "only where the applicable state law is particularly complex or best left for state courts to resolve." *Jackson-Platts*, 727 F.3d at 1143. Here, there are no "complex questions of state law," so this factor does not favor abstention. Further, this forum is the superior forum to adjudicate AAL's federal claims. *See, e.g., Pigott*, 508 F. Supp. 2d at 1033 ("Unquestionably, this Court is better positioned to resolve these questions of purely federal law than an Alabama state court would be."); *see also Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673

F.3d 84, 103 (2d Cir. 2012) (quoting *Moses H. Cone*, 460 U.S. at 26) ("the presence of federal-law issues must always be a major consideration weighing against surrender.").

f. Both this Court and the state court are equally adequate to adjudicate the state-law issues.

Defendants argue that the Madison County Court can protect the interests of all parties. Absent a finding that this Court cannot do the same, this factor does not favor abstention. *See Ambrosia Coal*, 368 F.3d at 1334 ("This factor will only weigh in favor or against abstention when one of the fora is inadequate to protect a party's rights."); *Am. Bankers*, 891 F.2d at 886 ("That American's rights are protected in state court does not deprive it of its right to the federal forum."). Further, this factor weighs against abstention because AAL asserts federal claims.

g. Conclusion

It is an abuse of discretion for a court to abstain under the *Colorado River* doctrine in the absence of "exceptional circumstances." *Jackson-Platts*, 727 F.3d at 1140. "'Only the clearest of justifications' merits abstention." *Id.* (quoting *Colorado River*, 424 U.S. at 819). Defendants cannot meet this standard, and the Court should deny Defendants' motion to abstain.

B. <u>The Court should not stay the case.</u>

Defendants next argue that the Court should stay this case pending the outcome of the Madison County case. *See* Doc. 8, pp. 28-29. Defendants argument

is that the cases "involve the same central issue, witnesses and facts, [and] the claims in both cases are nearly identical." *Id.* at 29. Defendants also argue that there is a risk of duplicative discovery and trials, inconsistent decisions, and waste of resources. *Id.* The Court should deny the Defendants' request for a stay because, among other reasons: (1) this case concerns issues distinct from those being litigated in Madison County and do not "involve the same central issue"; (2) BHA has already obtained a stay of much of the discovery directed to BHA in the Madison County case (it would love to avoid all discovery); (3) AAL should not be denied a speedy and fair resolution of its claims against the Defendants, with no foreseeable end in sight in the Madison County case; and (4) Defendants simply have not met their burden of establishing that a stay is justified.[15]

[15] The authority cited by Defendants does not prove that the Court should stay this case. *Hess v. Volkswagen Grp. of Am., Inc.*, 2016 WL 3483166, at *1-2 (N.D. Ala. June 27, 2016) involved a stay pending transfer to an MDL and came after plaintiff's counsel engaged in what this Court said "smack[ed] of gamesmanship" and "'gotcha' games." AAL has not engaged in gamesmanship or gotcha games but instead wants to proceed with its case against these Defendants for their conversion, self-dealing, and other breaches of duty to AAL. *Peterson v. Avantair, Inc.*, 2013 WL 4506414, at *1 (M.D. Fla. Aug. 23, 2013) involved a single case against a company that went bankrupt and the individual defendants moving for a stay, with the exact same allegations against both. In contrast, AAL alleges these Defendants converted assets, breached their fiduciary duties, etc. before the APA (the focus of the Madison County action) was ever discussed. *Gulfmark Offshore, Inc. v. Bender Shipbuilding & Repair Co.*, 2009 WL 2413664, at *1 (S.D. Ala. Aug. 3, 2009) similarly dealt with claims against a company that went into bankruptcy and closely-related claims against closely-related defendants; here, the parties in this case are distinct from the parties in the Madison County case (AAL is the only party in both cases) and the claims in this case center on the wrongdoing of these Defendants while they worked for AAL while the claims in Madison County center on the enforceability of the APA.

First, as has already been discussed, this case is not about the APA and does not turn on the enforceability of the APA. Rather, AAL brings this action to address the bad acts of Daigle and Woolford while employees at AAL as CEO and CFO. This is not a case about the APA.

Second, Defendants' claims about dual-track discovery ignore the reality of the state of discovery. In fact, BHA moved for and obtained a stay of much of the pending discovery in the Madison County case. It also objected to every single written discovery request.[16]

Third, AAL should not be indefinitely denied relief during the pendency of the Madison County case. The Eleventh Circuit explained, "[w]e have repeatedly held that a stay order which is 'immoderate' and involves a 'protracted and indefinite period' of delay is impermissible." *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1172 (11th Cir. 2007); *see also Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 (11th Cir. 2000) ("As the Supreme Court has explained, '[a] stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description.'"). The Madison County case is in its infancy; it has not

[16] Further, the focus of the discovery in this case will be different than the focus in the Madison County case. AAL does not intend to focus its efforts on the APA or its enforceability; nor has the discovery it served previously in this case (in the Circuit Court) reflect such.

been set for trial, nor is it knowable when it will be concluded. The stay proposed by Defendants is immoderate, and the Court should reject it.

Further, if this case is stayed, AAL will be prevented from pursuing its claims against the Defendants indefinitely in any court, which is particularly problematic in this case because there is substantial evidence that the Defendants committed fraud, have dissipated and hid assets, and will continue to do so. In the Circuit Court, Judge Bentley recognized this danger in granting a motion to prevent AAL from using the Jet. *See* Order (Ex. 54).

Finally, the Defendants have not met their burden to establish grounds for a stay. A stay is justified only in exceptional circumstances. "[A]lthough a motion to stay is directed to the district court's sound discretion…a stay order must be evaluated in light of the court's strong obligation not to dismiss or postpone the federal claim in the absence of exceptional circumstances." *Am. Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1525 (11th Cir. 1984) (finding that a stay was inappropriate). Defendants' motion to stay is their motion to abstain dressed in different clothes, and the Court should deny the motion to stay.

C. <u>The Court should not dismiss any count in the Complaint.</u>

1. AAL has adequately alleged a contract, so Counts Four and Nine state a claim.

Defendants argue that Counts Four and Nine (for Breach of Contract and Specific Performance) are due to be dismissed because AAL, they contend, has not

alleged the existence of the "Transfer Agreement" contract. *See* Doc. 8, p. 30. Defendants are incorrect; AAL alleges that there was a contract to transfer BHA's shares to AAL after receipt of BHA's Part 145 license. *See* Compl., ¶¶ 24-30; *see also* Compl., ¶¶ 75-77, 99-103.[17]

2. Counts Eight and Ten state a claim against Daigle, Woolford and their co-conspirators.

Defendants next argue that Counts Eight and Ten are due to be dismissed because the assets in question are in the possession of BHA, and AAL dismissed BHA. Doc. 8, p. 30. But AAL alleges that Defendants are in possession of or have otherwise dissipated AAL's assets. Specifically, Count Eight states a claim for an accounting because Defendants and their co-conspirators made unauthorized withdrawals of $3.2 million and absconded with innumerable other assets of AAL. *See* Compl., ¶¶ 97-98. Count Ten states a claim for a constructive trust to be placed on all of the Defendants' assets given the evidence of their fraud and self-dealing. *See* Compl., ¶¶ 104-06. Who or what possesses these assets has not been established, and regardless, Daigle and Woolford are in control of BHA, Corvis Arrow, Cold Harbor, etc. Absent the consideration of evidence or other matters

[17] *Brasfield v. Apple*, No. 7:16-CV-01058-LSC, 2016 WL 4414703, at *1 (N.D. Ala. Aug. 19, 2016) is easily distinguishable. There, a pro se plaintiff alleged that Apple, Google Play, and Amazon owed him $13 billion after he studied a website, applied online, and received a $13 billion electronic check online which he could not deposit. In contrast, AAL alleges a believable agreement, particularly when one keeps in mind that AAL paid for materials for BHA to operate, and that Defendants, BHA, and AAL all recognized that BHA was a wholly-owned subsidiary of its parent company AAL. *See* Compl., ¶¶ 23-31.

outside the pleadings, improper when considering a motion to dismiss, there is no basis to dismiss Counts Eight and Ten.

3. Count Fourteen states a claim for unjust enrichment.

Defendants contend that AAL does not state a claim for unjust enrichment because it does not allege that it was not compensated by Daigle and Woolford and that there was a dereliction of Daigle and Woolford's duties. Doc. 8, p. 31. Defendants are incorrect - Count Fourteen alleges that AAL conferred a benefit on Daigle, Woolford, and their co-conspirators, unjustly enriching them, and that Defendants should return the money to AAL. *See* Compl., ¶¶ 118-20. Further, AAL alleges Defendants have failed to compensate AAL and breached their duties to AAL in myriad ways, all in dereliction of their duties to AAL and none of which has been repaid to AAL. *See, e.g.*, Compl., § I, ¶¶ 32-38, 47, 50, 51, 53, 104-10, 121-24. The Complaint states a claim for unjust enrichment.[18]

[18] *Portofino Seaport Vill., LLC v. Welch*, 4 So. 3d 1095 (Ala. 2008) does not prove differently and is easily distinguishable. It affirmed a judgment entered after ore tenus testimony in the trial court ruled showed a property's annexation had not unjustly enriched property owners. It does not support dismissal based on the types of allegations in AAL's complaint.

Date: February 2, 2017

s/ Victor L. Hayslip
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by Notice of Electronic Filing, or, if the party served does not participate in Notice of Electronic Filing, by U.S. First Class Mail, hand delivery, fax, or email on February 2, 2017:

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