IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable A. Bruce Campbell

In re:	)	
	)	
ms55, Inc., f/k/a	)	Case No. 01-20494 ABC
MSHOW.COM. INC.	)	Chapter 7
	)	
Debtor.	)	
_____	)	
	)	
JEFFREY HILL, Trustee,	)	Adversary No. 04-1652 ABC
	)	
Plaintiff,	)	
v.	)	
	)	
AKAMAI TECHNOLOGIES, INC.	)	
a Delaware corporation,	)	
	)	
Defendant.	)	
_____	)	

ORDER DISMISSING THIRD PARTY COMPLAINT
FOR LACK OF SUBJECT MATTER JURISDICTION

This adversary proceeding involves fraudulent transfer and preference claims brought by a Chapter 7 trustee. Defendant and third party plaintiff, Akamai Technologies, Inc. ("Akamai"), is a purported "insider" who allegedly acted as a "strategic partner" and lender to this debtor. Akamai responded to the trustee's complaint with its answer and third party complaint, naming the Howard H. Leach Living Trust ("Leach Trust") as third party defendant. Akamai asserts that if it is liable to the trustee, Leach Trust is, in turn, liable to Akamai under Leach Trust's written guaranty of the Debtor's obligations to Akamai that ran in favor of Akamai and under a promissory estoppel claim.

The immediate question before the Court is whether this Court has subject matter jurisdiction over Akamai's third party claims against Leach Trust.[1] These claims neither "arise under" the provisions of Title 11, nor do they "arise in" this Debtor's Title 11 case. 28 U.S.C. § 1334(b). As

[1]This issue was raised *sua sponte* in connection with the Rule 16(b) scheduling conference in this adversary proceeding. Akamai and Leach Trust, at the Court's request, have briefed the issue.

such, they are not "core proceedings" which may be heard and determined by the Bankruptcy Court. 28 U.S.C. § 157(b)(1). If this Court has subject matter jurisdiction over these third party claims, it is because they fall within Congress's most far-reaching grant of subject matter jurisdiction to the Bankruptcy Court – – "civil proceedings . . . 'related to' cases under Title 11."[2] 28 U.S.C. § 1334(b). For the reasons stated below, the Court determines that it is without "related to" subject matter jurisdiction over Akamai's third party claims against Leach Trust.

The cases defining the limits of "related to" subject matter jurisdiction of the bankruptcy courts in general and, with respect to Rule 14 third party practice in particular, are not consistent in either the standards they apply or the conclusions they reach. The United States Supreme Court has addressed the scope of the bankruptcy court's "related to" jurisdiction once in recent years. ***Celotex Corp. v. Edwards,*** 514 U.S. 300, 115 S. Ct 1493 (1995). The ***Celotex*** case, while finding "related to" jurisdiction in the proceedings in issue, offers almost nothing by way of a standard or other guideline to chart the boundaries of "related to" bankruptcy court subject matter jurisdiction.

A number of lower courts, as does the Supreme Court, refer to a split in the circuits in which several courts, including the Tenth Circuit, follow the more expansive "***Pacor*** test" of the Third Circuit.[3] ***Pacor's*** "related to" jurisdiction is ostensibly established if the proceeding in question could

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[2]Such non-core "related to" proceedings are, for constitutional reasons, not within the plenary purview of Article I bankruptcy courts to make final determinations unless the parties consent. ***Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,*** 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). Accordingly, "related to" matters are to be submitted on proposed findings and conclusions of the bankruptcy judge to the District Court for final rulings following the opportunity for *de novo* review. 28 U.S.C. §157(c).

[3]The U.S. Supreme Court in ***Celotex*** observes that the First, Fourth, Fifth, Sixth Eighth, Ninth, Tenth and Eleventh Circuits "have adopted the ***Pacor*** test with little or no variation." 514 U.S. at 308 n. 6. This is itself something of an overgeneralized simplification. The very case cited in ***Celotex*** from the Tenth Circuit, ***In re Gardner,*** 913 F.2d 1515 (10th Cir. 1990), purported to embrace the ***Pacor*** test, but declined to find "related to" jurisdiction in a dispute between two creditors of a bankruptcy debtor, the outcome of which would impact the amount of claims against the debtor on a dollar-for-dollar basis. Ironically, the ***Pacor*** case itself, in setting the expansive "any conceivable effect" standard, did so in declining to find "related to" jurisdiction over the claim in the proceeding before it between non-debtors, which claim, on resolution, might or might not trigger an indemnification claim against the debtor, which indemnification claim was held to be within the bankruptcy court's "related to" jurisdiction. ***Pacor, Inc. v. Higgins,*** 743 F.2d at 995.

"conceivably have any effect on the estate being administered in bankruptcy." ***Pacor, Inc. v. Higgins,*** 743 F.2d 984, 994 (3rd Cir. 1984). A more restrictive test of "related to" jurisdiction emanates from the Second and Seventh Circuits. See ***In re Turner,*** 724 F.2d 338, 341 (2nd Cir. 1983); ***In re Zonics, Inc.,*** 813 F.2d 127, 131 (7th Cir. 1987). The touchstone for the more restrictive test of "related to" jurisdiction is that the litigation in question "affects the amount of property for distribution or the allocation of property among creditors [of a bankruptcy estate]." ***In re Fed Pac Systems, Inc.,*** 80 F.3d 207, 213-14 (7th Cir. 1996). The competing measuring sticks for "related to" bankruptcy court subject matter jurisdiction – – "any conceivable effect" vs. "affecting the amount of estate property for distribution or its allocation" – – have been applied to produce opposite results concerning claims arising in Rule 14 third party practice.[4]

Having considered the cases and great uncertainty which surrounds determining "related to"

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[4]Contrast, e.g., ***In re Canion,*** 196 F.3d 579 (5th Cir. 1999) (finding "related to" jurisdiction for suit by creditor against non-debtors for interference with creditor's efforts to collect from debtor, reasoning that if successful in the claim against the nondebtors, the debtor's liabilities could be reduced, conceivably without substitution of other liability by way of subrogation); ***In re Red Ash Coal & Coke Corp.,*** 83 B.R. 399 (W.D. Va. 1988) ("related to" jurisdiction supports 28 U.S.C. §1452 removal to bankruptcy court for creditor claims against non-debtor maker of note in debtor-guarantor's bankruptcy); and ***In re Showcase Natural Casing Co., Inc.,*** 54 B.R. 142 (Bankr. S.D. Ohio 1985) ("related to" jurisdiction for suit by debtor's secured creditor against non-debtor guarantors); with ***In re Spaulding & Co.,*** 131 B.R. 84 (N.D. Ill. 1990) (declines "related to" jurisdiction over third party indemnity claim asserted by preference action defendant in adversary proceeding brought by Chapter 11 debtor); ***In re Doctors Hospital of Hyde Park, Inc.,*** 308 B.R. 311 (Bankr. N.D. Ill. 2004) (in suit by debtor to avoid its guaranty, court declines "related to" jurisdiction of defendant's third party claim that potentially could reduce the defendant/creditor's claims against the debtor); ***In re Foundation for New Era Philanthropy,*** 201 B.R. 382 (Bankr. E.D. Pa. 1996) (no "related to" jurisdiction over third party indemnity or contribution claims where debtor is neither third party plaintiff nor defendant); **See also** ***In re Remington Development Group, Inc.,*** 180 B.R. 365 (Bankr. D. R.I. 1995) (collecting cases declining related to jurisdiction over third party practice claims); and ***In re Kaiser Steel Corp.,*** 95 B.R. 782 (Bankr. D. Colo. 1989) where the court notes *in dicta*:

> [T]he determination of whether a defendant, who has been found liable for damages on the Plaintiff's complaint, should be allowed to recapture his loss from another defendant or some third party cannot be said to have any effect on [the debtor's] estate or the underlying bankruptcy case. Thus, the Court has concern about whether there is any jurisdiction in this forum to hear such claims.

95 B.R. at 791.

jurisdiction, this Court concludes, albeit not without doubt, that the Tenth Circuit's legacy of restraint in treating the breadth of subject matter jurisdiction of the bankruptcy court would likely result in its refusal to find "related to" jurisdiction for non-debtor third party plaintiff's claims against a non-debtor third party defendant except in extraordinary circumstances that with some certainty would substantially impact the administration of the bankruptcy estate.[5] Contribution or indemnity claims between non-debtor parties, such as Akamai's claims against Leach Trust now before the Court, lack sufficient nexus and are too speculative to come within the boundaries of "related to" subject matter jurisdiction, so conceived.

Accordingly, this Court concludes it is without jurisdiction over the third party claims of Akamai against Leach Trust, and it is

ORDERED that Akamai's third party complaint herein is DISMISSED, without prejudice.

DATED:

BY THE COURT:

_____

A. Bruce Campbell
United States Bankruptcy Judge

[5]In a case such as that now before the Court, several now unknown contingencies must occur before Akamai's third party claim against Leach Trust would have an economic impact on the administration of this bankruptcy. First, as with any third party claim, the plaintiff must prevail against the defendant/third party plaintiff Akamai. Next, Akamai, in order to have an allowable claim against the estate, must make payment on the trustee's successful avoidance and file a claim. 11 U.S.C. §502(d). Then, Akamai must prevail on the merits of its claim over against Leach Trust. Leach Trust must, in turn, duly prosecute its subrogation claim in the bankruptcy and be subject to some defense on that subrogation claim that did not burden the claim in Akamai's hands. Failing the occurrence of all these contingencies, Akamai's third party complaint against Leach Trust is of no financial consequence to this bankruptcy estate. It is better resolved in a different forum.