

Robert A. Scher (RS 2910)
FOLEY & LARDNER LLP
90 Park Avenue
New York, NY 10016
Telephone: (212) 682-7474
Facsimile: (212) 687-2329

Richard J. Morvillo (RM 0441)
Mark D. Plevin (MP 5788)
Jeffrey F. Robertson (JR 0024)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116

Attorneys for E*TRADE Financial Corp.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____)	
In re:)	
)	Chapter 7
AMANAT, OMAR SHARIF,)	
)	Case No. 04-43361 (ALG)
Debtor.)	
_____)	
E*TRADE FINANCIAL CORP.,)	
)	
Plaintiff,)	
v.)	
)	Adv. No. 05-01083 (ALG)
OMAR SHARIF AMANAT,)	
)	
Defendant.)	
_____)	

**E*TRADE FINANCIAL CORPORATION'S OBJECTION
TO TRUSTEE'S MOTION TO DISMISS**

Neither of the two arguments made by Mark S. Tulis, the Chapter 7 trustee (the “Trustee”), in his motion to dismiss have merit. As a consequence, the Trustee’s motion to dismiss should be denied.

Initially, plaintiff E*TRADE Financial Corporation (“E*TRADE”) did not violate the automatic stay by filing this adversary proceeding against Debtor in the bankruptcy court in which Debtor’s bankruptcy case is pending. It is well-established that actions taken against a debtor *in the bankruptcy court* (including the filing of an adversary proceeding) do not violate the automatic stay.

In addition, the Trustee’s argument that the adversary proceeding should be dismissed or, in the alternative, recharacterized as a proof of claim, is both incorrect and insufficiently sensitive to concerns of judicial economy. First, this adversary proceeding is in the proper form under the Bankruptcy Rules and established practice. Second, the Trustee’s argument ignores the fact that under Bankruptcy Rule 7001, the injunctive and declaratory relief that E*TRADE seeks can *only* be sought in an adversary proceeding such as this. Combining E*TRADE’s damages claims with its requests for injunctive and declaratory relief in a single adversary proceeding thus promotes judicial economy and eliminates the need for wasteful, duplicative parallel proceedings on the same underlying facts and allegations. Combining all of E*TRADE’s claims in a single adversary proceeding is particularly appropriate here because the reference of this adversary proceeding to this Court should be withdrawn to the district court so this action can be litigated together with related litigation involving non-debtor parties who, of course, could not be joined to a claims objection proceeding.¹

¹ Motions to withdraw the reference of both this adversary proceeding and a virtually identical adversary proceeding filed in the MarketXT bankruptcy case (No. 04-12078, Bankr.

(continued...)

FACTUAL BACKGROUND

E*TRADE does not, for purposes of contesting this motion to dismiss, dispute the facts alleged by the Trustee, but does believe that the following additional facts should be set forth to frame the issues in their proper context.

1. In this adversary proceeding, E*TRADE asserts claims against the defendant, debtor Omar Amanat (“Amanat”), for: violation of federal securities laws; common law fraud and deceit; control person liability; tortious interference with contract; breach of fiduciary duty; conversion; unjust enrichment; breach of contract; declaratory judgment; and recovery of attorneys’ fees. (*See* Counts I through XI of Ex. B to Trustee’s Mot. to Dismiss.) The claims arise out of actions and omissions by Amanat, his former company, MarketXT Holdings Corp., and others in connection with E*TRADE’s acquisition of certain entities owned and controlled by Amanat. Based on its claims, E*TRADE demands relief against Amanat in the form of a monetary award (\$50 million in compensatory damages and \$100 million in punitive damages), as well as the following non-monetary relief: an accounting by Amanat of all assets misappropriated from E*TRADE; the turnover by Amanat of all such assets; an injunction barring Amanat from diverting or removing assets from E*TRADE-owned entities; a declaratory judgment that E*TRADE is excused from any further performance under the agreement (the “Merger Agreement”) pursuant to which E*TRADE purchased the various Amanat entities; and a declaratory judgment that Amanat’s alleged rights under the Merger Agreement are null and void. (*See* Demand for Judgment and Relief in Ex. B To Trustee’s Mot. to Dismiss.)

(...continued)

S.D.N.Y.) were filed with the district court in February, 2005. Judge Batts has those motions to withdraw the reference under submission. This Court may wish to defer ruling on the Trustee’s motion until it sees whether Judge Batts decides to withdraw the references.

2. E*TRADE filed a nearly identical adversary proceeding against a related debtor, MarketXT Holdings, in the related bankruptcy case of In re MarketXT Holdings Corp., No. 04-12078 (Bankr. S.D.N.Y.), also pending before Your Honor.² No motions to dismiss that adversary proceeding have been filed.

3. Pre-petition, E*TRADE had commenced an action in the U.S. District Court for the Southern District of New York against Amanat and others asserting substantially the same claims that are the subject of this adversary proceeding and the related adversary proceeding in the MarketXT Holdings Corp. bankruptcy. See E*TRADE Fin. Corp. v. Amanat, et. al., No. 04-CV-2745 (S.D.N.Y.). That action, along with a related action filed by MarketXT Holdings Corp. (see MarketXT Holdings Corp. v. Masayoshi Son, et al., No. 04-CV-2707 (S.D.N.Y.)), continues to pend before Judge Batts.

4. On February 1, 2005, E*TRADE moved to withdraw the references of both this adversary proceeding and the similar adversary proceeding against MarketXT Holdings Corp. The motions were served not only upon the defendants, but also upon the trustees representing the estates of both debtors (including the Trustee). See E*TRADE Fin. Corp. v. Amanat (In re Amanat), 05-1291 (S.D.N.Y. Feb. 1, 2005); E*TRADE Fin. Corp. v. MarketXT Holding Corp. (In re MarketXT Holdings Corp.), 05-1290 (S.D.N.Y. Feb. 1, 2005). Both motions were assigned to Judge Batts.

5. E*TRADE averred in those motions that withdrawing the references will promote judicial economy by consolidating the claims in the two adversary proceedings with related claims asserted against non-debtor parties in the other actions already pending before Judge

² MKXT, LLC was named as a co-defendant with MarketXT Holdings Corp. and is apparently a successor in interest to MarketXT Holdings Corp.

Batts. E*TRADE further argued that withdrawing the references will expedite the administration of the bankruptcy estates by (i) removing from the bankruptcy court the burden of supervising complicated, multi-party, securities-related litigation and (ii) promoting uniformity of decision because all of the related litigation (concerning debtors and non-debtors alike) would be resolved in a single court. *See Mem. of Law in Support of E*TRADE Fin. Corp.'s Mot. to Withdraw Reference, E*TRADE Fin. Corp. v. Amanat (In re Amanat)*, 05-1291 (S.D.N.Y. Feb. 1, 2005), attached hereto as Ex. A.

6. Although responses to the motions to withdraw the references were due in February, 2005, none were filed. As a result, E*TRADE expects Judge Batts to grant the motions.

7. Amanat and the Trustee dispute the claims in the adversary proceeding. In bankruptcy schedules filed on or about May 23, 2005, E*TRADE's claims are listed as "disputed." Additionally, in these same schedules, Amanat and the Trustee assert claims against E*TRADE in the amount of \$500 million.

ARGUMENT

A. E*TRADE Did Not Violate The Automatic Stay By Filing An Adversary Proceeding Against Debtor In Debtor's Own Bankruptcy Case.

8. The Trustee argues that E*TRADE committed a willful violation of the automatic stay by filing this adversary proceeding. The Trustee's argument is nonsense.

9. Other than citing to the relevant automatic stay provision, 11 U.S.C. § 362(a), and a completely irrelevant First Circuit decision,³ the Trustee does not support his argument with

³ In re Soares, 107 F.3d 969 (1st Cir. 1997), cited by the Trustee, holds that post-petition foreclosure judgments by state courts violate the automatic stay and that bankruptcy courts may

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any authority. This is not surprising because it is well-established that the automatic stay does not prohibit actions brought against the debtor *in the bankruptcy court having jurisdiction over the debtor*. See, e.g., J.T. Moran Fin. Corp. v. American Consol. Fin. Corp. (In re J.T. Moran Fin. Corp.), 124 B.R. 931, 940 (S.D.N.Y. 1991); Dibbern v. Adelphia Comms. Corp. (In re Adelphia Comms. Corp.), 325 B.R. 89, 97, 97 n.31 (Bankr. S.D.N.Y. 2005); In re Toyota of Yonkers, Inc., 135 B.R. 471, 477 (Bankr. S.D.N.Y. 1992); Lighthouse Bluffs Corp. v. Atreus Enters., Ltd. (In re Atreus Enters., Ltd.), 120 B.R. 341, 346 (Bankr. S.D.N.Y. 1990).

10. Indeed, courts have pointed out that allowing such proceedings to go forward in the bankruptcy court furthers the policy undergirding the automatic stay by centralizing actions against the debtor in the “home court.” Armco, Inc. v. North Atlantic Ins. Co. Ltd. (In re Bird), 229 B.R. 90, 95 (Bankr. S.D.N.Y. 1999). See also In the Matter of Thomson McKinnon, Inc., 130 B.R. 721, 724 (Bankr. S.D.N.Y. 1991) (the “automatic stay is a temporary umbrella protecting the debtor from a torrent of creditor litigation *outside the bankruptcy court*”) (emphasis added).

11. E*TRADE filed this adversary proceeding in this Court precisely *because* Amanat is protected by the automatic stay: this is the only court in which E*TRADE could have lawfully brought its claim without lifting the automatic stay.⁴ Complete inaction is not a viable option for E*TRADE – E*TRADE cannot stand idly by and allow the bankruptcy case to proceed, possibly toward discharge, without taking some form of action within the bankruptcy to

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grant retroactive relief in compelling circumstances. Neither of these holdings are in any way noteworthy or, more importantly, pertinent to the Trustee’s argument.

⁴ The Trustee’s argument, if taken literally, is that section 362 of the Bankruptcy Code would have precluded even the filing of a lift stay motion.

protect its rights against Amanat.⁵ By bringing its claims in the bankruptcy court, E*TRADE fully complied with the Code's policy of centralizing all disputes in the "home" bankruptcy court.

12. As the cited cases show, E*TRADE properly filed the adversary proceeding against Amanat. The Trustee's argument that E*TRADE somehow violated the automatic stay is against the full weight of the case law. Moreover, the notion that a creditor must first move to lift the stay to file suit against the debtor *in the bankruptcy court* is wholly unsupported and not in accord with regular bankruptcy practice. No stay violation occurred here. The Trustee's arguments to the contrary should be summarily rejected.

B. E*Trade's Claims Need Not Be Dismissed Or Recharacterized As A Proof Of Claim.

13. The Trustee's request that this adversary proceeding be dismissed because it allegedly circumvents the proof of claim process should also be rejected. First, this adversary proceeding is a proper form for the presentation of E*TRADE's claims under the Bankruptcy Rules and established practice. Second, the Trustee's argument ignores that E*TRADE's adversary proceeding complaint seeks injunctive and declaratory relief in addition to money damages, and – at most – only E*TRADE's damages claims could possibly be recharacterized as a proof of claim. The injunctive and declaratory relief claims could not have been set forth in a proof of claim. Thus, requiring that one portion of E*TRADE's claims be litigated through the claim objection process, while the rest of E*TRADE's claims are litigated in a separate adversary proceeding despite being based on common facts and allegations, would waste time,

⁵ E*TRADE is fully aware that it cannot collect on its damages claims against Amanat outside the bankruptcy case. Once it prevails on its claims, it will then participate as a general unsecured creditor in any distributions made in the case.

money, and judicial resources. Finally, dividing E*TRADE's claims against Amanat into two separate proceedings would make it difficult, if not impossible, to then coordinate those claims with E*TRADE's related adversary proceeding against Market XT Holdings Corp. and with the two pending district court actions before Judge Batts, further undermining judicial economy.

i. An Adversary Proceeding Is The Proper Form For The Presentation Of E*TRADE's Claims Before The Court.

14. Rule 7001 of the Federal Rules of Bankruptcy Procedure sets forth what types of proceedings *must* be filed as adversary proceedings. It states, in pertinent part, that an adversary proceeding is required for:

(1) a proceeding to recover money or property . . . ; (7) a proceeding to obtain an injunction or other equitable relief . . . ; [or] (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing . . .

As examples of the types of cases that fall within the above-listed Rule 7001 proceedings, actions concerning breach of contract, turnover of property, fraud, unfair trade practices, accountings, and unjust enrichment, as well as declaratory judgment claims with respect to any of the foregoing, have all been litigated as adversary proceedings. *See, e.g.,* In the Matter of Perkins, 902 F.2d 1254, 1258 (7th Cir. 1990) (turnover); J.T. Moran, 124 B.R. at 940 (fraud); Dibbern, 325 B.R. at 92, 96-97 (breach of contract, fraud, unjust enrichment, constructive trust, unfair trade practices, and accounting claims); Lighthouse Bluffs, 120 B.R. at 342 (declaratory judgment); Toyota of Yonkers, 135 B.R. at 477 (same); In re Harry C. Partridge, Jr. & Sons, Inc., 43 B.R. 669, 672 (Bankr. S.D.N.Y. 1984) (breach of contract); In re Mitchell, 44 B.R. 485, 490-91 (Bankr. N.D. Ala. 1984) (accounting and specific relief).

15. The claims asserted by E*TRADE in the adversary proceeding fall within the listed categories in Rule 7001 and parallel many of the same types of claims that, as shown above, have been allowed to proceed in the form of adversary proceedings: claims for the

recovery of money and/or property based on fraud, breach of contract, and violation of statutes; claims for an accounting; claims for injunctive relief; claims for unjust enrichment; claims for declaratory judgment that contracts have been breached and performance is no longer owing; and claims for other similar equitable relief. Therefore, the adversary proceeding is the proper vehicle for the Court to hear E*TRADE's claims, and it should not be dismissed.

16. The Trustee's argument here is the same argument that was rejected by the court in Dibbern. In that case, the plaintiff filed an adversary complaint alleging claims for damages based on violations of unfair trade statutes, breach of contract, fraud, and unjust enrichment. The plaintiff's complaint also sought an accounting and imposition of a constructive trust. 325 B.R. at 92. The complaint essentially reiterated claims which the plaintiff had asserted against the debtor pre-petition in state court and in proofs of claim filed in bankruptcy court. *Id.* at 93. The debtor argued that because the claims were based on pre-petition events, the claims should have been asserted exclusively through the proof of claim process, not through an adversary proceeding. *Id.* at 96. Rejecting the debtor's argument, the court noted that the plaintiff's claims were not limited to monetary claims, but included claims for equitable relief that could only be brought in an adversary proceeding. *Id.* at 97. The court further observed that the parties would have the same due process and procedural rights however the litigation proceeded. *Id.* at 97.

17. Just as in Dibbern, the complaint here includes claims that, pursuant to Rule 7001, can only be brought in an adversary proceeding (*e.g.*, claims for an accounting, the return of certain property, injunctive and declaratory relief) and not pursued through a proof of claim. Also as in Dibbern, the Trustee here is not disadvantaged in any way from a due process standpoint by having to litigate some of E*TRADE's claims in an adversary proceeding instead of in a claims objection proceeding. Finally, it would be inefficient and probably more costly for

the Trustee, and more burdensome for both E*TRADE and the Court, to litigate certain claims in a claims objection proceeding and related claims in a separate adversary proceeding, particularly when the same facts would be in issue in both proceedings.

18. In other words, the Trustee's argument seeks to elevate form over substance, with the result that the time, effort, and expense involved in litigating these issues would needlessly be multiplied. Such a result is completely unjustifiable – more so here than in other cases because the “form” chosen by E*TRADE for the assertion of its claims was correct in the first place. So, perhaps a better characterization of the Trustee's argument is that he seeks to elevate “incorrect form” over substance.

19. The cases which the Trustee cites as alleged support for his position either do not, in fact, support his arguments or they are distinguishable.

20. For example, in none of DBL Liquidating Trust v. P.T. Tirtamas Majutama (In re Drexel Burnham Lambert Group, Inc.), 148 B.R. 993 (S.D.N.Y. 1992), Welt v. Conston Corp. (In re Conston, Inc.), 181 B.R. 175 (Bankr. D. Del. 1995), or Institut Pasteur and Genetic Sys. Corp. v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.), 186 F.3d 1356 (Fed. Cir. 1999), did the courts address the circumstance presented here: an adversary proceeding complaint that asserts, in addition to a claim for money damages, one or more claims that are required under Rule 7001 to be brought in an adversary proceeding. As a result, these courts' rulings that money claims can only be brought through the filing of a proof of claim are entirely unremarkable and completely irrelevant. Here, by contrast, E*TRADE has asserted non-monetary claims in its adversary proceeding that must be litigated in an adversary proceeding, outside the proof of claim process. As the court held in Dibbern, these non-monetary claims

should be litigated together with E*TRADE's related monetary claims in an adversary proceeding.⁶

21. Even if the Trustee were correct that E*TRADE's claims (in whole or in part) could not be brought in the form of an adversary proceeding and instead must be asserted via a proof of claim, there is no basis whatsoever for ordering the adversary proceeding dismissed *with prejudice*. That would truly be a windfall outcome for the Trustee, and completely unwarranted. Any failure to use a correct procedure should not be fatal to a party's claims. The Trustee does not cite any case that supports his astonishing request for dismissal *with prejudice*. See Lernout & Hauspie Speech Products, N.V. v. Baker (In the Matter of Lernout & Hauspie Speech Products, N.V.), 264 B.R. 336, 340 (Bankr. D. Del. 2001) (so long as due process is afforded, the form of a proceeding will not be elevated over substance; request for dismissal denied).

- ii. **At Most, Only The Damages Claims In The Adversary Proceeding Should Be Recharacterized As A Proof Of Claim, But Even Doing That Would Waste Time And Judicial Resources Because The End Result Will Be No Different.**

⁶ Dade County Sch. Dist. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 53 B.R. 346 (Bankr. S.D.N.Y. 1985), another case cited by the Trustee, also does not justify ignoring the holding in Dibbern. In Johns-Manville, the court held that an adversary proceeding seeking money damages and an injunction requiring the debtor to perform asbestos abatement and monitoring procedures should have been brought as a proof of claim. The court rejected the plaintiff's argument that the claims for injunctive relief had to proceed in the form of an adversary proceeding because the equitable relief sought -- asbestos abatement and monitoring -- was capable of being reduced to a money judgment (in the form of an award of the costs needed to conduct such abatement and monitoring). *Id.* at 354. Here, in contrast, E*TRADE's claims for injunctive relief cannot be reduced to a monetary judgment because E*TRADE seeks to, *inter alia*, *prohibit* Amanat from taking certain actions. Moreover, Dade County Sch. Dist. did not involve claims for declaratory judgment relief that are present in E*TRADE's adversary complaint.

22. At most, only the damages claims asserted in the adversary proceeding should be recharacterized into a proof of claim proceeding. But the adversary proceeding alleges more than just damages claims, and E*TRADE's claims asserting equitable and/or declaratory relief as a matter of the Bankruptcy Rules may *only* be brought in the form of an adversary proceeding. *See* Fed. R. Bankr. P. 7001(7) and (9).

23. As the court explained in Dibbern, the debtor is not in any way disadvantaged by litigating damages claims in an adversary proceeding together with related claims for non-monetary relief. The Trustee will have the same due process and discovery rights in an adversary proceeding as he would in a contested matter, if not more. *See* Dibbern, 325 B.R. at 97 (comparable due process procedural rights in adversary proceedings and contested matters); Fed. R. Bankr. P. 9014(c). To force the damages claims to be litigated in a claims objection proceeding therefore is completely unnecessary and, since it would result in duplicative proceedings, wasteful. In fact, it will only serve to delay the adjudication of all the related claims and complicate the scheduling of discovery and trial of the issues.

iii. If The Damages Claims Are Recharacterized As A Proof Of Claim, The Claims Should Be Consolidated With, And Not Litigated Separately From, The Other Claims In This Adversary Proceeding As Well As The Other Related Claims Now Pending In District Court.

24. If the Court nevertheless decides to recharacterize the damages claims, such claims should be consolidated with, and not litigated separately from, the other claims asserted by E*TRADE against Amanat in the adversary proceeding. The claims involve the same facts and allegations, and the interests of judicial economy require that these related claims be litigated together. *See, e.g.*, E*TRADE's brief in support of withdrawing the reference of this action to the district court (Ex. A).

25. In addition, consolidating all of E*TRADE's claims together into a single proceeding may permit E*TRADE's claims against Amanat to be litigated together with E*TRADE's related claims against MarketXT Holdings Corp. and, once the reference of these proceedings are withdrawn, the two actions currently pending in district court before Judge Batts. All of these matters involve the same facts, allegations, and legal principles. There is every reason they should be litigated together, and no good reason they should be litigated in a piecemeal fashion. Combining all these matters together will not only save time, money, and effort, from the perspective of the parties and the judicial system, but will also ensure the uniform adjudication of related claims.

26. Because the non-debtor defendants in the two district court actions cannot be made parties to any claims objection litigation, a ruling that E*TRADE's damages claims against Debtor must be litigated separately from its non-monetary claims against Debtor would defeat the purpose of having this adversary proceeding withdrawn to the District Court to be litigated with the related claims involving non-debtors. The Trustee, having opted to not oppose E*TRADE's motion to withdraw the reference, should not now be allowed to throw up a roadblock to prevent all of E*TRADE's claims from being taken up in one consolidated proceeding in the district court. Indeed, the Trustee's motion to dismiss is a belated back-door attempt to litigate issues it elected some time ago not to challenge.

C. Separate Answering Memorandum Requirement.

27. E*TRADE's objection does not raise any novel issues of law and includes citations to supporting authorities. Accordingly, E*TRADE respectfully requests that the Court waive the requirement contained in Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York that respondents file a separate answering memorandum of law in

support of a response. E*TRADE reserves the right to file an answering memorandum of law in response to any reply to this objection.

CONCLUSION

28. In sum, E*TRADE acted properly in filing this adversary proceeding against Amanat in his own bankruptcy case, and it makes no sense to require that E*TRADE's monetary claims be litigated apart from its non-monetary claims based on the same facts, allegations, and law. Simply stated, the Trustee is not entitled to the relief he seeks. Moreover, granting the relief sought by the Trustee would be inimical to the interests of judicial economy and would be wasteful.

29. For all of the foregoing reasons, E*TRADE respectfully requests that the Court deny the Trustee's motion to dismiss and that the Court issue such other and further relief as is just.

Dated: July 12, 2005
New York, NY

Respectfully submitted,
FOLEY & LARDNER LLP

By: /s/ Robert A. Scher.
Robert A. Scher (RS 2910)
90 Park Avenue
New York, NY 10016
Telephone: (212) 682-7474
Facsimile: (212) 687-2329

CROWELL & MORING LLP

By: /s/ Richard J. Morvillo.
Richard J. Morvillo (RM 0441)
Mark D. Plevin (MP 5788)
Jeffrey F. Robertson (JR 0024)
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500

Facsimile: (202) 628-5116

Attorneys for Plaintiff E*TRADE Financial
Corp.

2249139.05