IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
	§	
TACCO FALCON POINT, INC.,	§	Case No. 02-42876
	§	(Chapter 11)
Debtor.	§	
	§	
INLAND MORTGAGE CORP., by its Assignee, TACCO FALCON POINT, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. Proc. No. 02-4312
	§	
ATLANTIC LIMITED PARTNERSHIP XII, ET AL.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION REGARDING MOTION TO DETERMINE VALIDITY OF JUDGMENT[1]

This matter is before the Court on the Motion to Determine Validity of Debtor's Judgment against Defendants and Application of Plan Discharge and Jurisdictional Provisions (the "Motion to Determine Validity of Judgment") filed by TacCo Falcon Point, Inc. (the "Debtor" or "TacCo") as the assignee of Inland Mortgage Corporation ("Inland"). Atlantic XIII, L.L.C. ("Atlantic XIII"), one of the defendants in this adversary case, filed an opposition the Motion to Determine the Validity of Judgment. David Clapper and Atlantic Limited Partnership XII ("Atlantic XII") (collectively, with Atlantic XIII, the "Defendants") joined Atlantic XIII's opposition. A hearing was held

[1] This Memorandum Opinion is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case, or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

on March 31, 2004, at which time the parties presented arguments regarding the Court's jurisdiction over TacCo's Motion to Determine Validity of Judgment.

I. INTRODUCTION

As discussed more fully below, this matter began as an Indiana lawsuit against Mr. Clapper and others. The lawsuit culminated in a consent judgment, which was assigned to TacCo by the original judgment holder. The Motion to Determine Validity of Judgment relates to TacCo's attempt to collect the consent judgment from Mr. Clapper. TacCo argues that its confirmed bankruptcy plan bars the Defendants from raising defenses to the collection of the consent judgment in several state court collection actions initiated by TacCo. TacCo also requests that this Court issue an order determining the enforceability of the consent judgment. For the reasons discussed more fully below, the Court concludes that TacCo's plan does not bar Mr. Clapper or the other Defendants from raising defenses to TacCo's claims against him. Further, in light of the confirmation of TacCo's plan, the Court does not have or should not exercise jurisdiction over TacCo's request for a declaratory judgment regarding the enforceability of the consent judgment.

A. The Pre-Bankruptcy History of TacCo Falcon Point, Inc.[2]

This adversary proceeding arises out of a breakdown in an agreement for the transfer of eight apartment complexes. Mr. Clapper is an investor in real estate companies, including Atlantic XIII. Mr. Clapper's entities agreed to convey eight apartment complexes to various wholly owned subsidiaries of ART Midwest, L.P. (collectively, "ART") in exchange for limited partnership units in ART Midwest, L.P.

[2] In constructing the pre-bankruptcy history of TacCo, the Court has reviewed the record in this adversary proceeding as well as the record in the underlying bankruptcy case, related adversary proceedings and appeals.

One of the properties to be transferred in the deal was an apartment complex in Indianapolis, Indiana, owned by Atlantic XIII and known as Country Squire Apartments ("Country Squire"). The Country Squire property was subject to a first priority mortgage held by Inland, which Mr. Clapper had guaranteed.

In November 1998, Atlantic XIII transferred the Country Squire property to ART in exchange for the assumption of all obligations and liabilities on the property, among other things. Mr. Clapper contends that ART began breaching the agreement soon after the transfer by, among other things, failing to make the mortgage payments on the Country Squire property. Additionally, in March 1999, a dispute arose between ART, Mr. Clapper and/or Mr. Clapper's companies regarding the transfer of a property located in Toledo, Ohio.

On June 17, 1999, the mortgage matured on the Country Squire property. Shortly thereafter, Inland commenced an action in the Civil Division of the Marion Superior Court of the State of Indiana seeking to foreclose on the property and also seeking judgment against the defendants in that action. On February 19, 2002, a Consent Judgment and Decree of Foreclosure (the "Consent Judgment") was entered against Atlantic XII, Atlantic XIII, David M. Clapper, ART Country Squire, L.L.C., and American Realty and Trust, Inc., by the Marion Superior Court, Civil Division, Marion County, Indiana in Case No. 49D06-9906-CP-00877 (the "Indiana Action"), for the total amount of $3,200,000.00, plus post-judgment interest thereon at the rate of 8% per annum and costs of suit.

The Debtor, TacCo, is wholly owned by TacCo Financial. The Debtor was organized and created as a subsidiary of TacCo Financial at the request of TacCo

Financial's primary secured creditor, Inland, to acquire the Consent Judgment from Inland. On March 15, 2002, Inland assigned the Consent Judgment to TacCo.

After acquiring the Consent Judgment, TacCo sought to enforce it by instituting foreclosure proceedings against the Country Squire property. Mr. Clapper and his companies sought to enjoin the foreclosure sale through post-judgment motions filed in the Indiana Action. In particular, in April 2002, Mr. Clapper, Atlantic XII and Atlantic XIII filed a Motion for Entry of Satisfaction of Judgment or, in the Alternative, Injunctive Relief and Additional Discovery (the "Motion for Entry of Satisfaction of Judgment") in the Indiana Action. In the Motion for Entry of Satisfaction of Judgment, the Defendants argued that TacCo was created as part of a $3 million settlement between Inland and their co-defendant, ART, and that, under Indiana law, the Consent Judgment has been satisfied as a matter of law.[3]

B. The Bankruptcy of TacCo Falcon Point, Inc.

TacCo filed a petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") on May 1, 2002 (the "Petition Date") in this Court. [4]

TacCo commenced the instant adversary proceeding on May 9, 2002, by filing a notice of removal regarding the Indiana Action and a motion to transfer the case in the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division. Atlantic XIII and Mr. Clapper, among others, opposed the motion to transfer

[3] A copy of the Motion for Entry of Satisfaction of Judgment has been provided to this Court. However, the documents referenced in the motion, which purportedly support Mr. Clapper's argument that TacCo was created by Inland as part of a settlement between Inland and two of Mr. Clapper's co-defendants (ART Country Squire, L.L.C. and American Realty and Trust, Inc.), are not attached.

[4] Many of the parties involved in the events leading up to this adversary proceeding have filed bankruptcy petitions at one time or another. ART Midwest L.P. and ART Country Squire, L.L.C. filed chapter 7 bankruptcy petitions in the Northern District of Texas on August 11, 1999. Additionally, Atlantic XIII filed a chapter 11 bankruptcy petition in the Eastern District of Michigan on June 24, 2002.

the Indiana Action as well as the notice of removal, requesting that the case be remanded to state court. The Indiana bankruptcy court overruled their opposition, granted the request to transfer the case, and transferred the Indiana Action to the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division.

The Defendants, among others, filed a separate adversary proceeding in this Court on May 24, 2002.[5] The Defendants requested that the Court enjoin a public foreclosure sale of the Country Squire property, which was scheduled to occur on June 19, 2002. After a hearing on June 11, 2002, the Court denied their request for injunctive relief. The Defendants allege in their response to the Motion to Determine Validity of Judgment that the apartments were thereafter sold to TacCo based on a "grossly inadequate" credit bid of $1 million. The Defendants further allege that TacCo agreed to pursue only Mr. Clapper, and not ART, for the deficiency when it purchased the Country Squire property.

C. The Michigan and Florida Collection Suits

TacCo has filed two actions in state court seeking to collect the Consent Judgment from Mr. Clapper. On August 7, 2002, the Debtor filed a lawsuit in Michigan state court against Mr. Clapper seeking to domesticate the Consent Judgment and enforce it against Mr. Clapper. On August 26, 2002, Mr. Clapper answered the Debtor's complaint, arguing that the Consent Judgment had been satisfied, and asserted a counterclaim for declaratory judgment, among other things. Mr. Clapper also brought ART into the suit as a necessary third party.

On October 25, 2002, Mr. Clapper filed a "precautionary" motion in TacCo's bankruptcy case requesting *nunc pro tunc* relief from the automatic stay imposed by

[5] This adversary case was styled as follows: *Atlantic Midwest, LLC, Atlantic Limited Partnership XII, Atlantic XIII, LLC, and David M. Clapper v. TacCo Falcon Point, Inc.*, Adv. Proc. No. 02-4271.

§362(a). TacCo opposed Mr. Clapper's motion. A hearing on the stay relief motion was held on January 7, 2003. On January 16, 2003, the Court entered an order denying Mr. Clapper's motion and ordering him to withdraw any claims or counterclaims filed against the Debtor in the Michigan state court proceedings.

In January 2003, TacCo commenced an action in Florida seeking to register the Consent Judgment so that TacCo could collect against property owned by Mr. Clapper in Florida. Mr. Clapper requested emergency relief from the automatic stay, asserting that, in order to establish that the judgment had been satisfied, he was required to file a counterclaim against TacCo.[6] This Court entered an order denying relief on March 5, 2003, on the grounds that Mr. Clapper had failed to present sufficient evidence establishing that he was required to file a counterclaim against TacCo under Florida law. Mr. Clapper appealed. The United States District Court for the Eastern District of Texas, Sherman Division, entered an order affirming this Court's order and dismissing Mr. Clapper's appeal on July 17, 2003.

D. TacCo's Plan of Reorganization

TacCo filed a Plan of Reorganization (the "Plan") on October 8, 2002. TacCo's Plan contemplated a sale of the Country Squire property to Housing for Seniors of Falcon Point, L.L.C. for a gross purchase price of $3,400,000.00. The Plan provided for TacCo to continue to manage and operate the apartment complex until the sale closed in or around April 2003. TacCo proposed to satisfy Inland's secured claim through the sale. The Plan likewise provided that administrative expenses, priority claims and unsecured

[6] Notably, Mr. Clapper's motion was filed post-confirmation. Section 362(c)(2) provides that the automatic stay continues until the case is closed, the case is dismissed, or the debtor is discharged. Since the Plan in TacCo's case contemplated the sale and liquidation of its assets, and since the confirmation of a liquidating plan does not discharge a debtor, the stay arguably continued until the case was closed in February 2004. *See* 11 U.S.C. §1141(d)(3).

claims were to be paid from the funds received from the sale of the apartment complex, and that Southwest Bank would retain its lien on a $250,000 certificate of deposit. *See* Plan at 2.16, 7.1, 7.2, 7.5. The only remaining classes of creditors – Class 6 (which consisted of TacCo Financial as a creditor of TacCo) and Class 7 (which consisted of TacCo Financial as the sole shareholder of TacCo) would receive any excess proceeds from the sale of the apartment complex as well as any proceeds from TacCo's efforts to collect the Consent Judgment.

This Court entered an order confirming TacCo's Plan on January 21, 2003, over the objection of the Defendants, among others. Upon confirmation, the Consent Judgment became the property of the reorganized TacCo.[7] However, the Plan provided that the Court would retain jurisdiction over certain matters, including all claims and disputes against TacCo, until the case closed. *See* Plan, art. XII. Additionally, the second paragraph of the confirmation order expressly stated as follows:

> Nothing in this Order or the Debtor's Plan of Reorganization confirmed hereby shall prejudice the rights, claims, defenses, or affirmative defenses that have been or may be asserted by any party in: (i) Case No. 02-471 styled Atlantic Midwest, L.L.C., et al. v. TacCo Falcon Point, Inc., pending in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, (ii) Case No. 02-42917 styled TacCo Falcon Point, Inc. v. David M. Clapper pending in the Circuit Court for Oakland County, Michigan, (iii) any action filed by TacCo Falcon Point, Inc. against David M. Clapper in the state courts of the State of Florida, or (v) such other lawsuits, wherever filed, as may be commenced among some or all of the parties thereto **concerning the Consent Judgment and Decree of Foreclosure** entered by the Superior Court of Marion County, Indiana, on or about February 19, 2002, held by the Debtor **and its enforceability and collection**.

(Emphasis added.)

[7] In the Motion to Determine Validity of Judgment, TacCo incorrectly states that this Court retained jurisdiction over TacCo's assets following the confirmation of the Plan. *See* 11 U.S.C. §1141(b) ("[T]he confirmation of a plan vests all of the property of the estate in the debtor.").

On December 12, 2003, TacCo filed an Application for Final Decree Closing Chapter 11 Case (the "Application"). TacCo requested that the Court close the bankruptcy case subject to retention of jurisdiction over this adversary proceeding. On February 2, 2004, this Court granted TacCo's Application and entered a final decree closing the case subject to retention of whatever jurisdiction existed regarding any and all matters arising in this adversary proceeding.

E. The Application for Turnover

On May 7, 2003, TacCo filed an Application for Turnover Against Judgment Debtor David Clapper (the "Application for Turnover") in the instant adversary proceeding. As noted previously, Mr. Clapper was among the defendants in the Indiana Action and was a party to the Consent Judgment. In the Application for Turnover, TacCo asked this Court to enter an order directing Mr. Clapper, an alleged Michigan resident, to turnover various assets located outside of Texas to TacCo. Mr. Clapper opposed the Debtor's Application for Turnover and filed a Motion for Remand and Abstention.

The Court heard arguments regarding several pending motions in the instant adversary proceeding on July 22, 2003. The Court refused to revisit the question of remand, which had previously been decided by the Indiana bankruptcy court, and entered an order denying Mr. Clapper's Motion for Remand and Abstention. Additionally, the Court denied TacCo's Application for Turnover. Judge Sharp, the predecessor to Judge Rhoades,[8] summarized his reasoning as follows:

> But I guess the summary of what I'm saying is that you don't remove a final judgment from a State Court to Bankruptcy Court and have it enforced on behalf of a reorganized debtor. What you remove from State Court to this court is a claim or cause of action that is subject to

[8] Judge Brenda T. Rhoades was appointed to the United States Bankruptcy Court, Eastern District of Texas, effective September 1, 2003.

> litigation. If we have such a thing as that in this case, it is properly removed to this court. There has been an attempt to remand it, and that attempt has been denied.
>
> So it is in this court – and whenever somebody points out to me what that is, if you do it in a hurry in the next 30 days we'll litigate it. Otherwise, you can deal with it.

Hearing Tr. (7/22/03) at 94.

F. The Validity of the Consent Judgment

On November 14, 2003, the Defendants withdrew their Motion for Entry of Satisfaction of Judgment, which was pending in the Indiana Action at the time the case was removed and transferred to this Court. On December 31, 2003, TacCo filed the instant Motion to Determine Validity of Judgment in which it argued that this Court has jurisdiction to determine the enforceability of the Consent Judgment. TacCo also argued that any attempt by the Defendants to challenge the enforceability of the Consent Judgment violates the discharge provisions contained within the Plan. *See* Plan, art. XIV.

At the hearing on March 31, 2004, the Defendants opposed the Motion to Determine Validity of Judgment. The Defendants asserted that it is procedurally improper in that it seeks declaratory relief in the form of a motion. The Defendants also referred this Court to Judge Sharp's prior determination that this Court generally is not the proper forum for a debtor to enforce a judgment. Finally, the Defendants argued that neither the Plan nor the Bankruptcy Code bar them from seeking to defend themselves against TacCo's collection efforts.

III. DISCUSSION

A. Jurisdiction (Generally)

A reorganization plan functions as a contract in its own right. *U.S. Brass Corp. v. Travelers Ins. Group (In re U.S. Brass Corp.)*, 301 F.3d 296, 307 (5th Cir. 2002); *U.S. v.*

Ramirez, 291 B.R. 386, 392 (N.D. Tex. 2002) (stating that a "confirmed Chapter 11 plan constitute[s] a binding contract"). However, since federal courts are courts of limited jurisdiction, having "only the authority endowed by the Constitution and that conferred by Congress," *Epps v. Bexar-Medina-Atascosa Counties Water Improvement Dist. No. 1*, 665 F.2d 594, 595 (5th Cir. 1982) (quoting *Save the Bay, Inc. v. U.S. Army*, 239 F.2d 1100, 1102 (5th Cir. 1981)), the retention of jurisdiction provisions of the Plan cannot confer or expand the Court's subject matter jurisdiction. *U.S. Brass*, 301 F.3d 296 at 303. Thus, this Court must look solely to 28 U.S.C. §1334 for its jurisdiction and must consider the effect of confirmation of the Plan on its jurisdiction.

After a debtor's reorganization plan has been confirmed, the bankruptcy estate and bankruptcy jurisdiction under §1334(b) cease to exist except for matters pertaining to the plan. *See Bank of Louisiana v. Craig's Stores of Tex., Inc., (In re Craig's Stores of Texa., Inc.)* 266 F.3d 388, 390-91 (5th Cir. 2001). In the case of *In re Craig's Stores of Texas, Inc*., the debtor – after confirmation of its plan – sued its pre-petition credit card servicer (a bank) under the parties' contract. The debtor's state law claim for damages against the bank "principally dealt with postconfirmation relations between the parties." *Id*. at 391. The debtor asserted that it could bring its post-confirmation claims against the bank in the bankruptcy court eighteen months after confirmation because as long as a bankruptcy case remains open, jurisdiction exists if a dispute is "related to" the bankruptcy under §1334(b).

The Fifth Circuit rejected that expansive view, attaching critical significance to the debtor's emergence from bankruptcy protection. The Fifth Circuit explained that various circuit courts have used the "related to" theory of jurisdiction to describe the

scope of jurisdiction during the pendency of a bankruptcy case. *Id.* However, the Fifth Circuit declined to apply the same broad theory to post-confirmation jurisdiction. *Id.* The Fifth Circuit applied a "narrower perspective" and concluded, on the particular facts of the case, that the bankruptcy court lacked jurisdiction because: (i) the claims principally dealt with post-confirmation relations between the parties, (ii) there was "no antagonism or claim pending between the parties as of the date of the reorganization," and (iii) "no facts or law deriving from the reorganization or the plan were necessary to the claim asserted by [the debtor] against the [b]ank." *Id.* at 391. The Fifth Circuit expressly rejected the argument that jurisdiction existed because the status of its contract with the bank would affect its distribution to creditors under the plan, noting that the "same could be said of any other post-confirmation contractual relations . . . ." *Id.*

The Fifth Circuit refined its analysis of post-confirmation jurisdiction in *U.S. Brass Corp. v. Travelers Ins. Group (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002), noting that §1334 does not expressly limit bankruptcy jurisdiction upon plan confirmation. However, the Fifth Circuit explained that:

> [S]everal courts have adapted the broad "related to" test for application in postconfirmation disputes. Those courts find that a proceeding falls within the jurisdictional grant if it has a 'conceivable effect on the debtor's ability to consummate the confirmed plan . . . In the recent case of *In re Craig's Stores of Texas, Inc.*, however, we rejected this expansive view in favor of a 'more exacting theory': 'After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.

U.S. Brass, 301 F.3d 296, 304 (quoting *Craig's Stores*, 266 F.3d 388, 390-91)). At issue in *U.S. Brass* was a post-confirmation debtor's request for court approval of a proposed agreement to liquidate claims through binding arbitration where the confirmed plan

provided that the claims would be resolved in a court of competent jurisdiction and determined by settlement or final judgment. The Fifth Circuit noted that "[b]ankruptcy law will ultimately determine this dispute, and the outcome could affect the parties' post-confirmation rights and responsibilities . . . this proceeding will certainly impact compliance with or completion of the reorganization plan. Consequently, the . . . motion pertains to the plan's implementation or execution and therefore satisfies the *Craig's Stores* test for post-confirmation jurisdiction." *U.S. Brass*, 301 F.32d 296 at 305.

B. The Motion to Determine Validity of Judgment is Untimely

Here, as a preliminary matter, TacCo's Motion to Determine Validity of Judgment is untimely. TacCo never responded to Judge Sharp's direction at the hearing on July 22, 2003, for it to point out to him what claims or controversies, if any, relating to the Indiana Action remained for this Court to decide within thirty days. TacCo took no action in this adversary case until after the Defendants withdrew the Motion for Entry of Satisfaction of Judgment in November 2003. More than a month later – after TacCo had requested that the Court close the underlying bankruptcy case – TacCo filed the instant Motion to Determine Validity of Judgment, which cited no rules and no case law.

C. The Confirmed Plan Does Not Bar Defenses to TacCo's Claims

Setting aside the tardiness of TacCo's Motion to Determine Validity of Judgment, TacCo requests this Court to decide two separate issues: (1) the effect of the confirmation of the Plan on the Defendants and (2) the enforceability of the Consent Judgment. The Court concludes, with regard to the first issue, that it has jurisdiction under §1334(b). Bankruptcy law will ultimately determine any dispute regarding the Defendants' post-confirmation rights vis-à-vis the Plan. Thus, to the extent it relates to

the interpretation of the Plan and confirmation order, the Motion to Determine Validity of Judgment satisfies the *Craig's Stores* test for post-confirmation jurisdiction.[9]

Turning to the Plan, Article XIV provided that confirmation would "discharge the Debtor from all claims that arose before the Confirmation Date."[10] Article II, Section 2.14 defined a "claim" as a right to payment from the debtor or any right to an equitable remedy for future performance if such breach gives rise to a right of payment from the Debtor. A claim does not, by this definition, include a defense to a claim asserted by the Debtor. Further, a defense that simply seeks to reduce a claim asserted by a debtor is not a "claim" against the bankruptcy estate and is not subject to a discharge injunction. *See, e.g., In re Luongo*, 259 F.3d 323, 333-34 (5th Cir. 2001) (permitting the defensive use of setoff under §553 because, "where the creditor's use of §553 is defensive, the spirit of §524(a)(2), to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts is not violated) (internal citations and quotations omitted); *Matter of Gaither*, 200 B.R. 847, 850 (Bankr. S.D. Ohio 1996) (discussing the defensive use of recoupment). *Cf: Matter of Holford***,** 896 F.2d 176 (5th Cir. 1990) (equitable doctrine of recoupment not barred by the automatic stay in bankruptcy).

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[9] This jurisdiction is not exclusive to this Court. A confirmed plan of reorganization acts like a contract that is binding on all of the parties. *See U.S. Brass*, 301 F.3d at 307. Because contract interpretation is an issue of state law, the state courts are perfectly well-suited to interpret the Plan. *See, e.g., In re Kmart Corp.*, 307 B.R. 586, 596 (Bankr. E.D. Mich.2004).

[10] In their objection to confirmation of the Plan in the underlying bankruptcy case, the Defendants argued that the Plan had not been proposed in good faith and was not feasible. *See* "Objection to Debtor's Plan of Reorganization" [Docket No. 113]. The Defendants did not raise any objection to the discharge provisions in the Plan. In their response to the Motion to Determine Validity of Judgment, the defendants argue that, since they were not pre-petition creditors of TacCo, they are not bound to the terms of the confirmed Plan. *See* 11 U.S.C. §1141(a). While §1141(a) may not bind the Defendants, this conclusion does not mean they cannot be bound under general principles of contract law. *See Paul v. Monts***,** 906 F.2d 1468, 1072-73 (10th Cir. 1990). Further, regardless of the propriety of discharging TacCo in what appears to be a liquidating Chapter 11 case, parties-in-interest who had an opportunity to object to this provision but failed to do so are bound by the terms of the Plan. *Cf: Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987) (regardless of the propriety of including a non-debtor release in the plan in violation of §524(e), *res judicata* barred the creditor from seeking to collect from the the non-debtor).

Although the Defendants were not pre-petition creditors of TacCo,[11] and TacCo argued that they were not entitled to vote on the Plan,[12] the order confirming TacCo's Plan expressly preserved any claims and defenses that the Defendants had asserted or might assert concerning the Consent Judgment. The confirmation order does not require that such claims and defenses be determined by this Court, nor does it preclude the Defendants from arguing that the Consent Judgment has been satisfied as a matter of law. In fact, the state courts are better situated to determine whether the Defendants are raising defenses beyond what is permissible in the context of domesticating a judgment, as TacCo argues. For all the foregoing reasons, the Court concludes that the Motion to Determine Validity of Judgment should be denied to the extent TacCo requests an order prohibiting the Defendants from raising any defenses or claims regarding the collection or enforcement of the Consent Judgment on the basis that such claims and defenses are barred by the Plan or TacCo's bankruptcy discharge.

C. The Enforceability of the Consent Judgment

1. The Court Lacks Jurisdiction over TacCo's Request for Declaratory Judgment

With regard the remainder of the relief requested by TacCo in its Motion to

[11] Section 101(10)(A) of the Bankruptcy Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order of relief concerning the debtor." Section 101(5) defines a "claim" as a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." Here, Atlantic XIII asserted a post-petition administrative claim against TacCo for TacCo's alleged violation of the automatic stay in Atlantic XIII's bankruptcy case. *See* "Notice of Administrative Claim" [Docket No. 149]. The Plan, which was ultimately confirmed, did not make any provision to pay Atlantic XIII's administrative claim.

[12] In the underlying bankruptcy case, TacCo moved to strike an objection to its disclosure statement filed by the Defendants, among others, on the grounds that they were not creditors of TacCo and lacked standing to object to the disclosure statement or Plan. *See* "Debtor's Objection and Motion to Strike Objections to Debtor's Disclosure Statement Filed by Atlantic Entities" [Docket No. 90]. Although no order was entered approving TacCo's motion to strike, the Court approved TacCo's disclosure statement. Mr. Clapper, Atlantic Midwest, Atlantic XIII and Atlantic L.P. subsequently filed an objection to the Plan. *See* "Objection to Debtor's Plan of Reorganization" [Docket No. 113]. They did not, however, vote on the Plan. *See* "Debtor's Submission and Tabulation of Ballots Received from Parties Voting on Debtor's Plan of Reorganization" [Docket No. 120].

Determine Validity of Judgment, TacCo seeks, in essence, a declaratory judgment from this Court regarding the enforceability of an agreed judgment entered by an Indiana state court.[13] However, as the Defendants point out, a request for declaratory judgment should be brought not as a motion, but as a separate adversary proceeding. *See* FED. R. BANKR. P. 7001(9). Further, the Court's ability to exercise jurisdiction over a post-confirmation adversary proceeding is limited by §1334(b). This Court's confirmation order obviously could not and does not provide this Court with roving jurisdiction over any proceedings brought by and against the parties to the Indiana Action.

TacCo attempts to fit its request for declaratory judgment within §1334(b) by arguing that collection of the Consent Judgment is necessary to fund payments to creditors under its Plan. In addition to ignoring the fact that TacCo's Motion to Determine Validity of Judgment should have been brought as a separate adversary case to the extent it requests declaratory relief, TacCo's argument fails to take into account that TacCo brings its request for declaratory relief post-confirmation. The Fifth Circuit expressly rejected a broad, "related to" approach to post-confirmation jurisdiction in *Craig's Stores* and *U.S. Brass*. It is also significant that the collection of the Consent Judgment will inure not to the benefit of unsecured creditors, but will benefit only TacCo and TacCo Financial (TacCo's sole shareholder).

TacCo also argued at the hearing on March 31, 2004, that the defenses pled by Mr. Clapper in the Michigan and Florida collections actions are really defenses to the

[13] A consent judgment has a dual aspect under Indiana law. It represents an agreement between the parties settling the underlying dispute and providing for the entry of judgment in a pending or contemplated action as well as the entry of such a judgment by a court--with all that this means in the way of finality. *See, e.g., Hanover Logansport, Inc. v. Robert C. Anderson, Inc.*, 512 N.E.2d 465, 470 (Ind. App. 3d Dist.,1987). Because a consent judgment is a written agreement, it is interpreted as a contract according to the general rules relating to the construction of contracts. *See, e.g., Ingoglia v. The Fogelson Companies, Inc.*, 530 N.E.2d 1190, 1200 (Ind. App. 4th Dist., 1988).

Consent Judgment under Federal Rule of Civil Procedure 60(b). TacCo's argument confuses the remedies afforded by Federal Rule of Civil Procedure 60(b) with similar remedies provided under the Uniform Enforcement of Foreign Judgments Act ("UEFJA"). The UEFJA, as adopted by Florida and Michigan, allows a party in whose favor a judgment has been rendered to enforce that judgment in any jurisdiction where the judgment debtor can be found. *See* FL. ST. 55.501 *et seq.*; MICH COMP. LAWS §691.1171 *et seq*. The UEFJA also allows a judgment debtor to litigate the validity of a foreign judgment and seek a stay of enforcement of the judgment. Both the Florida and Michigan versions of the UEFJA provide that a properly recorded foreign judgment is subject to the same rules of civil procedure, legal and equitable defenses, and proceedings for reopening, vacating, or staying judgments. FL. ST. §55.503(1); MICH. COMP. LAWS §691.1173. In particular, under the Florida and Michigan procedural rules, a judgment debtor can assert that a judgment has been satisfied, among other things. *See* FLA. R. CIV. P. RULE 1.540(b) (modeled after Federal Rule 60(b)); MICH. COURT RULE 2.620 (addressing the satisfaction of a judgment).

TacCo's argument that the Defendants should be precluded from asserting any claims or defenses in the state court collection actions is contrary to the UEFJA. TacCo's argument also appears to contradict this Court's confirmation order, which expressly preserved such claims and defenses without requiring that the claims and defenses be decided by this Court. TacCo has provided this Court with no authority that would render the Consent Judgment immune to any defense under the UEFJA simply because the Indiana Action was removed to a federal court and transferred to this Court pending resolution of the Defendants' post-judgment Motion for Entry of Satisfaction of

Judgment. Further, to the extent the Motion to Determine Validity of Judgment was properly filed as a motion in this adversary case, TacCo has provided no authority that would allow this Court, sitting as a surrogate on removal for the Indiana state court, to issue post-judgment declarations regarding the enforceability of the Consent Judgment in other jurisdictions.

In short, TacCo is simply seeking to use this adversary case as a means for a reorganized debtor to collect a debt from third parties. Creditors and debtors by consent cannot impose upon this Court the duty to serve as a foreclosure or collection forum. *See In re Malone*, 74 B.R. 315, 320 (Bankr. E.D. Pa. 1987). The Consent Judgment is now property of the reorganized TacCo, not the bankruptcy estate. If TacCo Financial is of the opinion that TacCo is individually uniquely qualified to serve as its collection agent, this relationship should be pursued outside of bankruptcy administration and not under the official mantle of this Court. *See In re Crisp*, 26 B.R. 274 (Bankr. W.D. Ky. 1982).

2. The Court Should Abstain from Exercising Jurisdiction

Even assuming this Court has "related to" jurisdiction over TacCo's tardy and procedurally flawed request for a declaratory judgment regarding the enforceability of the Consent Judgment, the existence of bankruptcy jurisdiction under §1334(b) is not a mandate for a bankruptcy court to exercise it. This Court may raise the propriety of abstention under §1334(c) *sua sponte*.[14] *See, e.g., Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 737 (5th Cir.1999).

[14] The Court's consideration of abstention here is distinct from the Court's denial of the Defendants' prior request for abstention or remand. The Defendants' prior request for abstention was made in connection with a dispute regarding the propriety of the removal and transfer of the Indiana Action to this Court. The Court's present consideration of abstention relates to the proper role of this Court in a post-judgment action seeking declaratory relief regarding the domestication and enforcement of the Consent Judgment in Florida and Michigan. It also is notable that this adversary case effectively came to an end when the Defendants withdrew their Motion for Entry of Satisfaction of Judgment, which was the only

While Congress clearly intended to give the bankruptcy courts broad jurisdictional limits to allow for the efficient adjudication of matters affecting the bankruptcy case, it also recognized that not all controversies which *could* be relevant to the effective administration of the case *would* always be so relevant and it is incumbent upon any bankruptcy court to recognize that distinction. Thus, Congress provided statutory provisions for both mandatory and discretionary abstention to allow a bankruptcy court to prudently exercise its judgment by refraining from hearing those controversies which, though related to the bankruptcy case, should more properly be heard in another forum. 28 U.S.C. §1334 defines both forms of abstention:

> (c)(1) [Discretionary] Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding ... related to a case under title 11.
>
> (2) [Mandatory] Upon timely motion of a party in a proceeding based upon a State law claim ..., related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Courts look to a non-exclusive list of twelve factors in deciding whether to exercise discretionary abstention under 28 U.S.C. §1334(c)(1). These twelve factors are:

> (1) The effect or lack thereof on the efficient administration of the estate if a court recommends abstention;
> (2) The extent to which state law issues predominate over bankruptcy issues;
> (3) The difficulty or unsettled nature of the applicable state law;
> (4) The presence of a related proceeding commenced in state court or other nonbankruptcy court;

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motion pending in the Indiana Action at the time of removal and which formed the legal basis for the adversary case. As discussed *supra*, TacCo's Motion to Determine Validity of Judgment is neither procedurally nor substantively equivalent to the Defendants' Motion for Entry of Satisfaction of Judgment.

(5) The jurisdictional basis, if any, other than 28 U.S.C. §1334;
(6) The degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
(7) The substance rather than form of an asserted "core" proceeding;
(8) The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
(9) The burden on the bankruptcy court's docket;
(10) The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
(11) The existence of a right to jury trial; and
(12) The presence in the proceeding of nondebtor parties.

See, e.g., Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton County Elec. Coop.), 281 B.R. 876, 881 (Bankr. N.D. Tex. 2002).

Here, with regard to TacCo's request for declaratory relief on the enforceability of the Consent Judgment, there is no basis for federal jurisdiction other than §1334. Second, state law issues do not merely predominate -- they overwhelm. The Motion to Determine Validity of Judgment seeks to enforce a state court judgment against Mr. Clapper and others in Florida and Michigan. If the Motion to Determine Validity of Judgment now forms the basis for this adversary case, as TacCo argues, it is a non-core proceeding which neither arises in nor under title 11. *See Broyles v. U.S. Gypsum Co.*, 266 B.R. 778, 783 (E.D. Tex. 2001) (noting that where all alleged tortious conduct and breaches of contract occurred pre-petition, the case is non-core). Third, the automatic stay has expired and is no longer a factor in the prosecution or defense of the state court litigation.[15] *See* 11 U.S.C. §362(c)(2). Fourth, as discussed *supra*, both Florida and Michigan law contemplate that litigation may be brought by judgment debtors regarding the validity of foreign judgments. Further, TacCo provided no authority supporting its

[15] In contrast, Mr. Clapper's appeal from this Court's order denying his request for relief from the automatic stay involved the question of whether actions taken by Mr. Clapper during the pendency of TacCo's bankruptcy case violated the automatic stay imposed by 11 U.S.C. §362(a).

argument that the Defendants can challenge the validity of the Consent Judgment only through a motion under Federal Rule of Civil Procedure 60(b)(5) filed in this Court. Finally, the parties have not tried their claims or initiated discovery before this Court or in the state court collection actions,[16] and there is no reason to believe that the parties' claims cannot be timely adjudicated in a state court familiar with the relevant state collection procedures.

IV. CONCLUSION

The Court concludes that the Motion to Determine Validity of Judgment should be denied. First, with respect to TacCo's request for an order prohibiting Mr. Clapper from raising claims and defenses in state court collection actions regarding the enforceability of the Consent Judgment, the confirmation order expressly preserves such claims and defenses. Second, with respect to TacCo's request for a declaratory judgment regarding the enforceability of the Consent Judgment, TacCo improperly presented its request in the form of a motion rather than attempting to initiate a separate adversary case. Even if the Motion to Determine Validity of Judgment had been properly filed as an adversary complaint, the Court lacks jurisdiction based on its narrower jurisdiction following confirmation of a bankruptcy plan, or, alternatively, the Court should abstain from hearing TacCo's complaint. The Court will enter an appropriate order incorporating this Memorandum Opinion.

Signed on 9/2/2005

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE

[16] Although the parties may not have initiated discovery in this Court or in the state court collection actions, the record submitted to this Court relating to the Indiana Action suggests that the parties engaged in extensive post-judgment discovery through which Mr. Clapper claims to have discovered that TacCo is acting as a "strawman" for ART. In particular, Mr. Clapper and his related entities asserted in the Motion for Entry of Satisfaction of Judgment that Inland entered into a secret settlement agreement with ART whereby Inland received $3 million and ART received the right to select and designate a purchaser for the Consent Judgment, among other things. Under Indiana law, the payment of a judgment by one of several joint debtors extinguishes the judgment. *See Klippel v. Shields*, 90 Ind. 81 (Ind. 1883); *Lapworth v. Jones*, 182 N.E.2d 453, 455 (Ind.App. 1962).