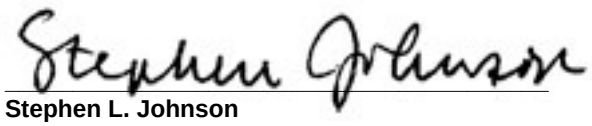

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re: TECHNOLOGY PROPERTIES LIMITED, LLC, Debtor.	Case No.: 13-51589 SLJ Chapter 11

ORDER DENYING PLAN IMPLEMENTATION MOTION

The Official Committee of Unsecured Creditors ("OCC") filed a Motion for an Order in Aid of Implementation of Plan ("Motion"). It seeks an order directing a company called Alliacense LLC to turn over work product prepared for reorganized debtor Technology Properties Limited, LLC ("TPL" or "Debtor"), among others, pursuant to a confirmed chapter 11 plan. Alliacense opposed the request contending I do not have jurisdiction to consider the matter and the authority to rule, and asserting that the relief sought required an adversary proceeding. For the reasons indicated below, I will deny the Motion. First, I do not have jurisdiction to consider the Motion. Second, to the extent that the OCC seeks an order

determining ownership of certain intellectual property, that relief must be sought by adversary proceeding. Finally, to the extent this proceeding seeks a competing, non-arbitration forum to resolve disputes arising out the obligations of two non-debtor parties, abstention is appropriate.

The hearing on the Motion took place on December 9, 2015. Robert Franklin, Esq. appeared for the OCC. Michael St. James, Esq. appeared for Alliacense. Charles Hogue, Esq. appeared for Patriot Scientific Corporation. Wendy Smith, Esq. appeared for Debtor. Finally, Kenneth Prochnow, Esq. appeared for Charles Moore.

I. BACKGROUND

Before deciding this matter, a brief factual background is important. Reorganized Debtor TPL is a co-owner of a Delaware LLC known as Phoenix Digital Solutions ("PDS"). The other co-owner is Patriot Scientific Corporation ("Patriot").

Patriot, TPL, PDS and Alliacense share a long history. The short version is that TPL and Patriot are the co-owners of PDS and they jointly appoint its board. PDS's job is to commercialize a group of patents that arose from the inventions of Charles Moore collectively called the MMP Portfolio. This means that PDS is supposed to identify companies that are using the MMP Portfolio patented processes and ask them to pay for licenses for that use. On occasion, PDS would sue to recover damages for unauthorized use. In the past, TPL actually had the responsibility to do this. It retained Alliacense (then a related company) to undertake the actual work. Later, due to disputes between TPL and Patriot, PDS was assigned the job of commercializing the patents. Like TPL before it, PDS retains Alliacense to do the actual work of commercializing the patents. When Alliacense enters into such agreements, or recovers money by suit, the funds flow to PDS, and ultimately to its members, TPL and Patriot.

The underlying dispute arises out of the Amended Alliacense Service and Novation Agreement ("Novation Agreement"). The Debtor is not a party to this agreement. The parties to the Novation Agreement are PDS and Alliacense. Under the Novation Agreement, Alliacense was to provide a list of potential infringers to Patriot (or, PDS). That list would

then be split in two by Patriot. Alliacense would retain one-half of the list and the other half would be assigned to a company called Dominion Harbor Group ("DHG"). From that point forward, Alliacense and DHG would work on their respective halves of the portfolio to generate funds for PDS.

During the course of its long association with TPL and PDS, Alliacense has developed certain work product pertaining to potential targets of licensing efforts or legal challenges. In the Novation Agreement, Alliacense agreed to turn over that work product to Patriot or PDS for use by DHG. Alliacense was to be paid 1% of commissions for that work product.

The OCC and Debtor confirmed a Joint Plan of Reorganization ("Plan") on March 19, 2015. The Plan discussed the Novation Agreement and other matters. The Plan provided that the TPL, with new management, would undertake the work of commercializing certain IP portfolios, with the proceeds of that work paying the claims of creditors. The Plan provided that TPL would receive funds from PDS based on its successful commercialization program. In other words, the money coming from PDS's effort to commercialize the MMP Portfolio, through the work of both Alliacense and DHG, would pay creditors of the bankruptcy estate.

The Plan treats the Novation Agreement as an Executory Contract. It states the contract will be assumed in the confirmed plan. No one seems to have contested this characterization.

The Plan has several provisions that might serve to provide Bankruptcy Court jurisdiction over this dispute. These include a reservation of jurisdiction for matters affecting the Debtor's right, title, or interest in property, and causes of action. It also included a reservation of jurisdiction of matters related to the assumption, the assumption and assignment, or the rejection of executory contracts. *See* Plan, § X, Retention of Jurisdiction.

The Novation Agreement has an extensive arbitration provision. Patriot has indicated in its public filings that PDS terminated the agreement. Patriot contends that Alliacense failed to carry out its obligation to provide the necessary and agreed to work product so that DHG can commence commercializing its part of the MMP Portfolio. PDS, the OCC, the Debtor,

and Moore all seem to agree with this conclusion. Alliacense contends it was not obligated to perform and asserts its termination was not lawful and is void.

Finally, PDS has filed a Demand for Arbitration before an arbitration service called JAMS, which is currently assigned to Bruce Belding, arbitrator. The parties to the arbitration are PDS and Alliacense. The parties appearing on the OCC's Motion dispute the precise status of the arbitration.

II. DISCUSSION

A. Jurisdiction

The parties argue about whether I have jurisdiction to consider this dispute. Like other federal courts, Bankruptcy Courts are courts of limited jurisdiction. *In re Valdez Fisheries Development Association, Inc.*, 439 F.3d 545, 549 (9th Cir. 2006). Bankruptcy jurisdiction arises under 28 U.S.C. § 1334. *In re U.S. Brass Corp.*, 301 F.3d 296, 305 n. 29 (5th Cir. 2002)("[T]he Bankruptcy Code does not confer jurisdiction… 28 U.S.C. § 1334 remains the source of this jurisdiction."). According to one influential treatise, "When a bankruptcy court is asked to consider a plan-related matter after confirmation, the court must, as a threshold matter, determine whether it has jurisdiction under 28 U.S.C. § 1334." 8 COLLIER ON BANKRUPTCY ¶ 1142.04[1] (A. Resnick and H. Sommer, 16th ed. 2015). Thus, in order to decide the jurisdiction question, I first look at the statutory grant of jurisdiction to Bankruptcy Courts found at 28 U.S.C. § 1334.

However, before I do so, I will address the OCC's argument that the Plan reserved jurisdiction over this dispute in the Bankruptcy Court. It is black letter law that parties cannot confer jurisdiction on themselves. *In re Resorts Intern., Inc.*, 372 F.3d 154, 161 (3rd Cir. 2004)("Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization"); *In re Ray*, 624 F.3d 1124, 1136 n. 8 (9th Cir. 2010). Terms of a plan retaining jurisdiction only have limited power. *See In re Captain Blythers, Inc.*, 311 B.R. 530, 538 (B.A.P. 9th Cir. 2004)("Such provisions, although binding on the debtor and creditors, are probably redundant: 'retained' jurisdiction is not created simply by including such a term in a plan or confirmation order."). Thus, while it

may be true that the Plan retains jurisdiction of the dispute in this court, I must evaluate whether I have jurisdiction over the dispute independent of these plan provisions. *See In re Resorts Intern., Inc.*, 372 F.3d at 161 ("If there is no jurisdiction under 28 U.S.C. § 1334 or 28 U.S.C. § 157, retention of jurisdiction provisions in a plan of reorganization or trust agreement are fundamentally irrelevant.").

B. 28 U.S.C. § 1334

Careful examination of § 1334 is warranted. The statute provides that the District Court has original and exclusive jurisdiction of all cases under title 11. 28 U.S.C. § 1334(a). The statute permits the District Court to assign a case under title 11 to me. General Order 24. Section 1334 states:

> Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). To summarize, I have jurisdiction if the dispute arises under title 11, arises in a case filed under title 11, or is related to a case under title 11.[1]

A matter "arises under" title 11 if it "depends on a *substantive* provision of bankruptcy law, that is, if it involves a cause of action created or determined by a statutory provision of the Bankruptcy Code." *In re Ray*, 624 F.3d at 1132 (emphasis added). This might apply to the allegation that § 1142 is a basis for finding jurisdiction, which will be discussed below.

A proceeding "arises in" a case under the Bankruptcy Code if it is an administrative matter unique to the bankruptcy process that has no existence outside the bankruptcy proceeding. *Id.*; *Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 161-62 (7th Cir. 1994); *U.S.*

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[1] I do not find the dispute implicates the Supreme Court's decision in *Stern v. Marshall*, 131 S.Ct. 2594 (2011). That case and the decisions following it discuss a Bankruptcy Court's Constitutional power to enter final judgments under 28 U.S.C. § 157(b) in so-called "core" cases where the court has jurisdiction. The issue presented here is different. This case presents a question of whether the court has statutory jurisdiction to rule. For the reasons indicated, I find that in the main I do not have jurisdiction to rule under 28 U.S.C. § 1334(b). To the extent that a party brings an adversary proceeding (as noted in this decision), jurisdiction and other issues will be taken up in that context.

Trustee v. Gryphon at Stone Mansion, Inc., 166 F.3d 552, 556 (3rd Cir. 1999)(collection of U.S. Trustee quarterly fees postconfirmation).

Finally, a dispute is "related to" a bankruptcy case and provides a jurisdictional premise if it bears a "close nexus" to the confirmed plan or proceeding. *In re Ray,* 624 F.3d at 1133-34. This, too, will be discussed below.

C. Bankruptcy Jurisdiction Shrinks Postconfirmation for Jurisprudential Reasons

Notwithstanding § 1334, the authorities state that a Bankruptcy Court's jurisdiction is proscribed postconfirmation. "On its face, section 1334 does not distinguish between pre-confirmation and post-confirmation jurisdiction. Nonetheless, courts sometimes have found a need to curtail the reach of related to jurisdiction in the post-confirmation context so that bankruptcy court jurisdiction does not continue indefinitely." *See, e.g., In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193–94 (9th Cir.2005) (suggesting that post-confirmation bankruptcy court jurisdiction is necessarily more limited than pre-confirmation jurisdiction); *In re Resorts Intern.*, 372 F.3d at 164–69; *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 106 (1st Cir. 2005). Why is that so?

The First Circuit explained why jurisdiction diminishes postconfirmation in *In re Boston Reg'l Med. Ctr.*, 410 F.3d 100. A woman left her estate to three entities, one of which later filed a bankruptcy case. The debtor's confirmed plan called for a liquidation of the bankruptcy estate to pay creditors' claims. Apparently thinking a bankrupt hospital unworthy of its legacy, the two competing beneficiaries filed suit in state probate court to prevent the bankruptcy estate from taking its share of the decedent's property. The debtor responded by bringing an adversary proceeding in the Bankruptcy Court to clarify its rights. The two competing beneficiaries sought to dismiss the adversary proceeding arguing the court did not have jurisdiction under § 1334(b).

The First Circuit explained that after confirmation jurisdiction changes: "[A] reorganized debtor is emancipated by the confirmation of a reorganization plan. It emerges from bankruptcy and enters the marketplace in its reincarnated form. From that point forward, it is just like any other corporation; 'it must protect its interests in the way provided

by non-bankruptcy law,' without any special swaddling." *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d at 106 (citation omitted). Not to limit jurisdiction in this way not only would work "an unwarranted expansion of federal court jurisdiction but would also unfairly advantage reorganized debtors by allowing such firms to funnel virtually all litigation affecting them into a single federal forum." *Id.*

As it turned out, the Court of Appeals did not dismiss this case on jurisdictional grounds because debtor had confirmed a liquidating plan. In the court's view, the limited role a Bankruptcy Court would play in a liquidating plan was not equivalent to supervising a reorganized debtor that is a going concern, and which has substantial market activity. This also served the overriding goal of ensuring prompt resolution of bankruptcy cases by giving the parties access to the federal courts. *Id.* at 107.

Adhering to this theory of reduced jurisdiction, it has been said that postconfirmation courts tend to collapse the categories of "arising in," "arising under," and "related to" jurisdiction. *See U.S. Brass Corp.*, 301 F.3d at 303-304 ("The second, third, and fourth categories, all listed in § 1334(b), 'operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy.'" (citations omitted)). Such matters would be restricted to those "pertaining to the implementation or execution of the plan." *In re Craig's Stores of Texas, Inc.*, 266 F.3d 388, 390 (5th Cir. 2001).

D. The Ninth Circuit Requires a "Close Nexus" to the Confirmed Plan

The Ninth Circuit retains the distinctions between arising in, arising under, and related to, but subscribes to the view of reduced jurisdiction postconfirmation. *In re Pegasus Gold Corp.*, 394 F.3d 1189; *In re Ray*, 624 F.3d 1124; *In re Wilshire Courtyard*, 729 F.3d 1279 (9th Cir. 2013). Postconfirmation, a Bankruptcy Court has jurisdiction only over matters that have a "close nexus" to the confirmed plan. This means matters involving the interpretation, implementation, consummation, execution, or administration of the confirmed plan. *Pegasus Gold*, 394 F.3d at 1194.

Several Ninth Circuit cases have explored the contours of jurisdiction in concluded chapter 11 cases and their analysis shows why I do not have jurisdiction here. In the first, *Pegasus Gold*, the Ninth Circuit concluded a Bankruptcy Court had jurisdiction to consider a lawsuit filed by a bankruptcy trustee against a company called RSC. As it happens, RSC came into being under the terms of the confirmed plan and the debtor funded it with estate assets. The trustee argued that the state agency charged with environmental enforcement terminated RSC before it could remediate a toxic site. The circuit found this company was so integral to the workings of the chapter 11 plan that the Bankruptcy Court had jurisdiction to rule on the lawsuit. As the court saw it, the creation and functioning of RSC was central to the implementation of the debtor's confirmed plan.

By contrast, in *In re Valdez Fisheries Devel. Ass'n*, 439 F.3d 545, the Ninth Circuit held there was no Bankruptcy Court jurisdiction post-dismissal. There, a creditor settled a dispute with the debtor and the chapter 11 case was dismissed. That same creditor then sued the State of Alaska alleging it took a fraudulent conveyance from the debtor before the bankruptcy case had commenced. The Ninth Circuit held there was no jurisdiction because the case was dismissed and thus the dispute did not have a close nexus to a confirmed plan. As pertinent here, the court observed that the lawsuit filed by the creditor *post-dated* the bankruptcy case, and the suit was between two non-debtor entities, a creditor and the state.

Finally, in *In re Ray*, the debtor's confirmed plan called for the sale of certain real property to pay creditors' claims. *See In re Ray*, 624 F.3d at 1134. The property at issue was subject to a right of first refusal in favor of BG Plaza. A few years after confirmation, the debtor moved the Bankruptcy Court for an order approving the sale of the property to a buyer called Maldonado. BG Plaza objected to the sale and requested discovery regarding it. The Bankruptcy Court later approved the sale free and clear of any claimed right of first refusal held by BG Plaza. BG Plaza then sued in Washington State court alleging breach of contract. The state court "remanded" the case to the Bankruptcy Court, which took jurisdiction of the breach of contract claim and granted summary judgment in favor of the Debtor and Maldonado.

The Ninth Circuit reversed. It held the Bankruptcy Court did not have jurisdiction over a state court lawsuit brought after confirmation by a third party. The court acknowledged that the debtor's confirmed plan called for a sale of the real property, but found the dispute amounted to a simple state court breach of contract claim that was tangential to the confirmed plan. "There is no doubt that BG Plaza's claims would undermine the effect of the bankruptcy court's well-reasoned determination that Sellers did not violate the right of first refusal. However, such attacks in a second court are routine—and routinely rejected, and [the parties] offer no convincing argument why that fact alone creates jurisdiction under § 1334(b)." *Id.* at 1135. The breach of contract claim did not bear a sufficiently close nexus to the confirmed plan for jurisdiction to exist. *Id.*

E. Other Circuits have Been Reluctant to Find Jurisdiction in Analogous Cases

The Fifth Circuit's decision in *Craig's Stores*, 266 F.3d 388, is instructive. The debtor confirmed a plan in 1994. Later, it sued a bank alleging state law claims arising in 1994 and 1995. The Bankruptcy Court held a trial and entered judgment for the debtor. On appeal, the District Court dismissed the case for want of jurisdiction and the Fifth Circuit affirmed. Reviewing § 1334(b), the circuit held that postconfirmation a court only has jurisdiction over disputes related to the bankruptcy case. Resolution of the dispute did not require analysis of the debtor's plan or the applicable bankruptcy law. The debtor's assumption of the contract by way of its chapter 11 plan was not especially important to the circuit. The court acknowledged the outcome of the dispute could conceivably affect creditors, but was unpersuaded this supplied the requisite jurisdiction because that could be said about any sort of dispute involving a reorganized company.

In *In re Zernad-Bernal Grp, Inc. v. Cox*, the purchaser of assets from a bankruptcy estate (Zerand-Bernal) was sued in state court years after the sale for products liability. *Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d at 162. Contending that the purchase and sale agreement insulated it from liability, Zerand-Bernal filed an adversary proceeding in the Bankruptcy Court seeking to enjoin the products liability claims.

The Seventh Circuit found the Bankruptcy Court lacked jurisdiction. The product liability suit Zerand-Bernal sought to enjoin was not a claim against the debtor because the debtor no longer existed. Given this, any recovery would never affect the estate because the entirety of the estate had been distributed. "So the products liability suit, and hence Zerand's adversary complaint, which is its mirror image, are not proceedings 'related' to the bankruptcy, within the meaning of section 1334." *Id.*, at 162.

Judge Posner emphasized the distance between the claim brought postconfirmation and the bankruptcy case. He reasoned that a dispute between a purchaser of assets and a third party is too remote to the original bankruptcy case to confer that jurisdiction:

> Because as a dispute becomes progressively more remote from the concerns of the body of federal law claimed to confer federal jurisdiction over it, the federal interest in furnishing the rule of decision for the dispute becomes progressively weaker. Here it is extremely weak. The bankruptcy is over and done with. The main dispute is one between a purchaser at the bankruptcy sale and a person who had nothing to do with the bankruptcy over a point of state law…The relation of these disputes to the bankruptcy is too tenuous to empower the bankruptcy court, through a capacious interpretation of the 'arising under' jurisdiction, to adjudicate a tort suit to which the (former) debtor is not even a party, years after the bankruptcy was wound up.

Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d at 162-63.

Finally, in *Resorts Intern., Inc.*, 372 F.3d 154, the Third Circuit considered a postconfirmation lawsuit brought by a bankruptcy trustee. The trustee alleged that Price Waterhouse & Co. committed professional malpractice in its accounting for a litigation trust established under a confirmed plan and brought suit in the Bankruptcy Court. The Bankruptcy Court dismissed the case for lack of jurisdiction but the District Court reversed.

The Court of Appeals reversed. The court observed that the confirmed plan created the litigation trust and distributions from that trust would inure to the benefit of creditors. The plan also retained jurisdiction over disputes under the plan. Finally, the plan provided for the employment of professionals like Price Waterhouse. However, adopting the "close nexus" test that has become commonplace, the court found the lawsuit was outside federal court jurisdiction. The applicable law was state law, not federal law. The possibility of payment to

creditors was too remote to merit jurisdiction. Performance under the plan was meant to free the estate from further Bankruptcy Court oversight. Moreover, the plan was not contingent on the results of the lawsuit. Finally, no part of the lawsuit required the court to interpret or construe the confirmed plan. *Id.*, at 168-70.

F. The Bankruptcy Court does not have Jurisdiction over this Dispute

Applying the above analysis, I find I do not have jurisdiction because the dispute does not have a "close nexus" to the confirmed Plan.

First, the operative document is the Novation Agreement, not the Plan.

Second, the parties to the Novation Agreement are PDS and Alliacense. Neither TPL nor the OCC is a party to the agreement. The signature page clearly shows TPL as a signatory but it has been stricken with a large mark. TPL appears not to have signed it.

Third, the Novation Agreement provides "TPL and Patriot are affected by the provisions related to a second licensing company in section 3(f) below, and so the two of them acknowledge the provisions of that section." Taken at its word, this indicates that the owners of PDS were merely beneficiaries who acknowledged the existence of a company that was to come into existence. That company is DHC. It is not Alliacense.

The OCC's argument that the work product Alliacense holds is estate property is not persuasive. Over many years, Alliacense worked for TPL and later PDS to commercialize the MMP Portfolio. The Novation Agreement itself suggests that Alliacense had some control over the work product because was supposed to be turned over to PDS for use by others. This dispute was never litigated in the Bankruptcy Case. Given the circumstances, the dispute seems remote to the estate and is best resolved, as necessary, by the arbitrator.

In the end, the dispute between the OCC and Alliacense is reminiscent of the decisions in *Resorts Intern., Inc., Boston Regional Med. Cntr., and U.S. Brass.* In those cases, the Circuit Courts warned that once a plan is confirmed, a court should be reluctant to continue to supervise a debtor. Unless a matter clearly involves interpretation of a plan or some act specified under the plan, reorganized companies should return to the regular market and state

courts. Reorganized entities must fend for themselves without the apron strings of the Bankruptcy Court.

Like the Fifth Circuit in *Craig's Stores*, I do not find the assumption of the Novation Agreement in the Plan to be significant in terms of jurisdiction. The dispute concerns postconfirmation relations between non-debtor parties. At best, it might be said that the Debtor could benefit from the Novation Agreement. That is, if DHG were successful in negotiating licenses and settlements, the funds from that would flow through PDS to TPL as its owner. This is too remote to support a finding of jurisdiction postconfirmation.

Because the dispute between PDS and Alliacense does not bear on the interpretation or execution of the Plan, it is difficult to see where jurisdiction lies here. This dispute can exist entirely apart from the bankruptcy proceeding and does not depend necessarily upon resolution of a substantial question of bankruptcy law. Under the case law cited above, this is insufficient to satisfy the "close nexus" test and to confer jurisdiction.

G. 11 U.S.C. § 1142 is not a Basis for Jurisdiction

The OCC's Motion is premised on Bankruptcy Code § 1142. Some courts have held that jurisdiction can be found if a postconfirmation motion relies on a specific provision of the Bankruptcy Code. I find this statute does not apply on its facts and, even if it did apply, does not support jurisdiction.

Section 1142 provides:

> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 1142(b).

Section 1142(b) does not apply. The OCC's motion seeks an order directing Alliacense to produce work product that the OCC contends is required under the terms of the Novation Agreement. Section 1142 does not empower me to enter such an order.

Section 1142(b)'s "language does not confer any substantive rights on a party apart from whatever the plan provides." *Village of Rosemont v. Jaffe*, 482 F.3d 926, 935 (7th Cir. 2007). To that end, the court may issue any order necessary for the implementation or consummation of the plan. However, "the court should refrain from issuing orders directing third parties to take action unless the action is directly called for by the terms of the plan or is necessary to allow the plan to be implemented. Nor should a party be required to execute an agreement unless the significant terms of the agreement have been set forth in the plan." 8 COLLIER ON BANKRUPTCY, ¶ 1142.03[2].

The OCC seeks a determination of whether Alliacense is performing under the Novation Agreement with PDS. The dispute is over the Novation Agreement, not the Plan. As such, I cannot find that § 1142(b), which is addressed to the implementation of a confirmed plan, applies.

It is not clear that § 1142 is an independent ground for postconfirmation jurisdiction in such cases. Some courts, like the Bankruptcy Appellate Panel in *In re Harlow Properties, Inc*., 56 B.R. 794 (B.A.P. 9th Cir. 1985), cite § 1142(b) as a source of postconfirmation jurisdiction. In that case, the Bankruptcy Appellate Panel reasoned, based on the legislative history of § 1334, that so long as a motion was grounded in a statutory provision of title 11, the court would have jurisdiction to consider it. *Harlow Properties, Inc*., was probably decided correctly because it involved a dispute about the precise mechanisms of the confirmed plan. But the decision's broad conclusion that jurisdiction exists under § 1334(b) simply because a motion is premised on § 1142 is not sound.

Now, it is generally understood that §1142(b) is not an independent source of post-confirmation bankruptcy court jurisdiction. *See In re U.S. Brass Corp*., 301 F.3d at 306 n. 29 ("Bankruptcy Code does not confer jurisdiction. Although § 1142(b) assumes that post-confirmation jurisdiction exists for disputes concerning the implementation or execution of a confirmed plan, 28 U.S.C. § 1334 remains the source of this jurisdiction."); *U.S. Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d at 555-556 ("The District Court correctly concluded that an analysis of the Bankruptcy Court's jurisdiction begins with 28 U.S.C. §

1334, not with 11 U.S.C. § 1142."); *In re Resorts Intern., Inc*., 372 F.3d at 165; *see also* 8 COLLIER ON BANKRUPTCY ¶ 1142.04[1] ("neither section 1142 nor the terms of a plan confer jurisdiction upon a bankruptcy court.").

A leading bankruptcy treatise notes that § 1142 can provide a jurisdictional premise for the court if the dispute involves the operation or interpretation of the plan itself: "In light of the provisions of Code § 1142(b), the bankruptcy court retains authority and concomitant postconfirmation jurisdiction for the limited purpose of resolving disputes arising from the presence of patent ambiguities in the plan or disputes which affect the operation of the plan as between the interested parties. Where no such ambiguities are discovered, and the operation of the plan as written is not affected, it lacks both authority and jurisdiction." 6 NORTON BANKR. L. & PRAC. 3d § 114:7.

Norton has this right. Section 1142 does not confer jurisdiction. Section 1142 gives the court the power to act as necessary but it still requires a jurisdictional premise. In the Ninth Circuit, if a matter has a "close nexus" to the confirmed plan, giving the court "related to" jurisdiction, the court has the authority to act under § 1142(b).

H. Necessity of Adversary Proceeding

The OCC contends that the work product Alliacense is refusing to turn over belonged to the TPL. It concludes the work product is property of the estate and argues the Plan reserved jurisdiction over proceedings related to "the title, rights or interests of the Debtor or the Reorganized Company in any property, including the recovery of all assets and property of the Bankruptcy Estate wherever located." The court is not sure how to interpret this provision given that under § XI, B. of the Plan, property of the bankruptcy estate vested in the Reorganized Company after confirmation of the Plan. Moreover, Alliacense contests that the work product belonged to the estate. Regardless, this argument does not fall within the purview of § 1142(b), and the court makes no determination on this point. If the OCC wishes to pursue this line of litigation, it should file an adversary proceeding. *See* FED. R. BANKR. P.

7001(1) ("The following are adversary proceedings: (1) a proceeding to recover money or property …").

I. Abstention in Favor of Arbitration

Finally, Alliacense contends the court should abstain from hearing this dispute in favor of the arbitration now pending between the parties to the Novation Agreement. As noted, the parties to the Novation Agreement, Alliacense and PDS, are arbitrating its terms. If TPL were a party, it would have been joined to that litigation. The court notes that according to Exhibit P to the Declaration of Clifford Flowers in Support of the Motion, Patriot made the demand for arbitration through PDS.

Abstention is governed by 28 U.S.C. 1334(c)(1). That section provides that a federal court can abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11 in the interests of justice, or in the interests of comity with State courts, or respect for State law. According to the case law, the court should consider a range of factors when making this determination. The factors include: (a) the effect or lack thereof on the efficient administration of the estate if the court recommends abstention, (b) the extent to which state law issues predominate over Bankruptcy Court issues; (c) the difficulty or unsettled nature of the applicable law; (d) the presence of a related proceeding commenced in state court or other non-Bankruptcy Court; (e) the jurisdictional basis, if any, other than 28 U.S.C. 1334; (f) the degree of relatedness or remoteness of the proceeding to the main Bankruptcy Court case; (g) the substance rather than form of an asserted "core" proceeding; (h) the feasibility of severing state law claims from core Bankruptcy Court matters to allow judgments to be entered in state court with enforcement left to Bankruptcy Court court; (i) the burden on the Bankruptcy Court court's docket; (j) the likelihood that the commencement of the proceeding in Bankruptcy Court involves forum shopping by one of the parties; (k) the existence of a right to a jury trial; (l) the presence in the proceeding of nondebtor parties. *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990).

Applying these factors, I find abstention makes sense.[2] There is a pending arbitration pending before JAMS between the two contracting parties Alliacense and PDS. Neither of those parties is the debtor in this proceeding. Under the terms of the Novation Agreement, JAMS clearly has jurisdiction to consider the dispute between PDS and Alliacense. As the real parties in interest, it would seem best that those parties resolve their disputes in a manner that is consistent with the Novation Agreement's terms.

Furthermore, the nature of the dispute—performance under a written agreement—is something arbitrators commonly hear and determine. The dispute does not involve bankruptcy law. To the extent the dispute requires the arbitrator to review the Plan, a Chapter 11 reorganization plan "resembles a consent decree and therefore should be construed basically as a contract." *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n.*, 997 F.2d 581, 588 (9th Cir. 1993).

Finally, the risk of competing orders from two judges hearing the same dispute is palpable. It is therefore appropriate for me to abstain from hearing the dispute that is now pending before JAMS.

III. CONCLUSION

The Motion is DENIED for the reasons indicated. If Debtor, the OCC, or another party believes the court has jurisdiction to consider their right to the work product that Alliacense has refused to produce, it should file an adversary proceeding.

IT IS SO ORDERED.

* * * END OF ORDER * * *

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[2] The parties should not read the court's decision to abstain as an implicit finding that jurisdiction exists.

UNITED STATES BANKRUPTCY COURT
for the Northern District of California

COURT SERVICE LIST

** ECF Notifications **