

**IN THE UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**IN RE: ATHLETIC CLUBS OF AMERICA, LLC  
d/b/a FAYETTEVILLE ATHLETIC CLUB, Debtor**

**No. 5:09-bk-73460  
Ch. 11**

**ORDER**

Before the Court is the *Motion of Robert and Katherine Shoulders to Enforce Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code* filed by Robert and Katherine Shoulders on April 26, 2011, and the *Motion to Dismiss Motion of Robert and Katherine Shoulders to Enforce Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code* filed by SM-WLJ FAC Owner, Inc. [SM-WLJ] on May 11, 2011. The Court heard both motions on May 18, 2011--first, the motion to dismiss, which the Court took under advisement, and second, the motion to enforce the chapter 11 plan over the continuing objection of SM-WLJ's counsel.<sup>1</sup> After considering the exhibits and the arguments of counsel, the Court grants SM-WLJ's motion to dismiss for lack of jurisdiction rendering the motion to enforce the chapter 11 plan moot.

The burden of proof relating to jurisdiction is on the party asserting jurisdiction. *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir. 1969). In this case, the Shoulders have that burden.

The bankruptcy court, through the district court, has "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. §§ 157(a), 1334(b); *GAF Holdings, LLC v. Rinaldi (In re Farmland Indus., Inc.)*, 567 F.3d 1010, 1017 (8th Cir. 2009). Proceedings that arise

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<sup>1</sup> SM-WLJ's continuing objection related to the Court's lack of jurisdiction to hear the Shoulders' motion to enforce the plan in the first place. Alternatively, even if the Court found that jurisdiction was proper, SM-WLJ objected to the form of the action as a motion instead of an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001(1).

under title 11 or in a case under title 11 are core proceedings; proceedings that are related to a case under title 11 are non-core proceedings. 28 U.S.C. § 157(b)(3); *Farmland Indus., Inc.*, 567 F.3d at 1017. The Shoulders suggest in the title of their pleading and in argument that the dispute is effectively a core proceeding because the dispute relates to the enforcement of a plan provision; in other words, the dispute arose under the plan. However, the provision that is in dispute is part of a management agreement between the Shoulders and SM-WLJ that neither arises under title 11 nor arises in a case under title 11.<sup>2</sup> Because the dispute is between non-debtors and concerns an agreement between those parties, the Court’s jurisdiction is invoked only if the matter is related to the debtor’s bankruptcy case. According to the Eighth Circuit, “the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . . An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate.” *National City Bank v. Coopers and Lybrand*, 802 F.2d 990, 994 (8th Cir. 1986) (quoting and agreeing with the reasoning of *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)); *Farmland Indus., Inc.*, 567 F.3d at 1019. As discussed below, the dispute between the Shoulders and SM-WLJ does not relate to the debtor’s plan of reorganization but to the enforcement of an agreement between third parties, and the Court finds that resolution of the dispute will not have any conceivable effect on the debtor’s estate.

The evidence before the Court in support of the Shoulders’ assertion of jurisdiction consists of the following documents:

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<sup>2</sup> Claims arising under title 11 involve a cause of action that is either created or determined by a statutory provision of the bankruptcy code. *Farmland Indus., Inc.*, 567 F.3d at 1018. Claims arising in a case under title 11 are not based on any right created by the bankruptcy code, but nevertheless, would have no existence outside bankruptcy. These are typically administrative matters. *Id.*

1. Plan of Reorganization For Debtor Pursuant to Chapter 11 of the United States Bankruptcy Code [Plan].
2. Findings of Fact, Conclusions of Law and Order Confirming the Debtor's Plan of Reorganization [Confirmation Order].
3. Athletic Club Management Agreement [Employment Agreement].

A review of these documents substantiates the Court's conclusion that it does not have jurisdiction to hear the *Motion of Robert and Katherine Shoulders to Enforce Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code*.

The debtor's Plan provides for the specific retention of jurisdiction pursuant to 11 U.S.C. § 105(a) and § 1142 over "all matters arising out of, and related to, the Bankruptcy Cases and the Plan to the fullest extent permitted by law." (Shoulders' Ex. 1, Plan § 15.1.) The Plan then lists seventeen non-exclusive events, at least two of which would clearly include the enforcement of the Employment Agreement:

g. [To] hear and determine disputes arising in connection with the interpretation, implementation, consummation, or enforcement of the Plan, *including disputes arising under agreements, documents, or instruments executed in connection with the Plan.*

...

k. [To] hear and determine any matters arising in connection with or relating to the Plan, the Disclosure Statement, the Confirmation Order, or *any contract, instrument, release, or other agreement or document created in connection with the Plan, the Disclosure Statement, or the Confirmation Order.*

Additionally, the Court's Confirmation Order confirms the retention of jurisdiction "to aid in the confirmation and consummation of the Plan and its implementation, including, without limitation, the interpretation and enforcement of any of the Plan Documents." (Shoulders' Ex. 2, Confirmation Order p.16, ¶ 31.)

Generally, after a debtor's plan of reorganization has been confirmed, the debtor's estate and the bankruptcy court's jurisdiction ceases to exist. *Fairfield Comms., Inc. v. Daleske (In re Fairfield Comms., Inc.)*, 142 F.3d 1093, 1095 (8th Cir. 1998) (citing *Northwest Equip. Fin., Inc. v. Nath (In re D&P P'ship)*, 91 F.3d 1072, 1074 (8th Cir. 1996)).

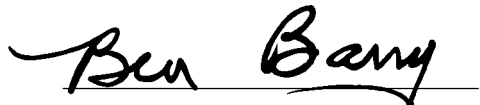
However, the court can retain jurisdiction specifically in its confirmation order with regard to “aspects of a plan related to its administration and interpretation.” *Id*; *see also In re Jr. Food Mart of Arkansas, Inc.*, 161 B.R. 462, 463 (Bankr. E.D. Ark. 1993) (“The purpose of post-confirmation jurisdiction is essentially and necessarily limited to protecting the order confirming the plan and preventing interference with the execution of the plan.”); 11 U.S.C. § 1142(b). The Plan and the Confirmation Order each retain jurisdiction specifically in this instance. However, to be effective, the retained jurisdiction must either arise under title 11 or arise in or be related to a case under title 11. Here, the Shoulders argue that the Court’s retention of jurisdiction includes resolving any dispute arising out of the Employment Agreement because the Employment Agreement is part of the Plan. While the Court agrees that the Plan and Confirmation Order both contemplate the retention of jurisdiction, the Court respectfully disagrees that the retention of jurisdiction includes enforcement of the Employment Agreement.

It is axiomatic that the Court cannot retain jurisdiction where jurisdiction does not exist in the first place. *See Diagnostic Int’l, Inc. v. Aerobic Life Prods. Co. (In re Diagnostic Int’l, Inc.)*, 257 B.R. 511, 514 (Bankr. D. Ariz. 2000) (recognizing court cannot confer subject matter jurisdiction when it does not have jurisdiction in the first place). The Confirmation Order contemplates the Court retaining jurisdiction over any post-confirmation dispute related to an agreement created in connection with the Plan. Although the Employment Agreement appears to be such an agreement, the Court would exceed its jurisdiction if it were to hear the dispute. One of the conditions set forth in the Plan related to what was referred to as the SM-WLJ Settlement, and one of the six enumerated terms under this subsection listed the agreed upon terms to be included in the Employment Agreement. (Shoulders’ Ex. 1, Plan § 3.2(c).) The Court’s specific retention of jurisdiction would be applicable to enforce the *execution* of the Employment Agreement between the parties but would not be applicable to enforce the terms of the Employment Agreement post-confirmation. *See In re Fairfield Comms., Inc.*, 142 F.3d at 1095 (finding that property owners’ claims that arose post-confirmation lie outside the scope of the debtor’s plan resulting in no basis for bankruptcy court jurisdiction). In its

Confirmation Order, the Court found that “[a]ll of the conditions to the Effective Date set forth in the Plan have been met, will be met prior to the Effective Date, or will be waived.”<sup>3</sup> (Shoulders’ Ex. 2, Confirmation Order p.7, ¶ 28(a).) The execution of the Employment Agreement was one of the conditions precedent to the Effective Date.

The dispute between the Shoulders and SM-WLJ relating to the Employment Agreement does not arise under title 11, and does not arise in and is not related to a case under title 11. Additionally, the absence of a final decree in the debtor’s chapter 11 case does not automatically confer jurisdiction with this Court to hear the dispute. The Court simply does not have jurisdiction to hear the Shoulders’ motion. The retention of jurisdiction language contained in the Plan and the Order of Confirmation cannot confer jurisdiction where jurisdiction does not exist. Accordingly, SM-WLJ’s motion to dismiss is granted for lack of jurisdiction.

IT IS SO ORDERED.

  
Ben Barry  
United States Bankruptcy Judge  
Dated: 05/27/2011

cc: James F. Dowden, attorney for the Shoulders  
James E. Smith Jr., attorney for SM-WLJ

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<sup>3</sup> The Court notes that the debtor, Athletic Clubs of America, filed a *Notice of (A) Effective Date Associated With Plan of Reorganization For Debtor Pursuant to Chapter 11 of the United States Bankruptcy Code; and (B) Certain Deadlines Associated Therewith* on April 11, 2011. The notice states that the Effective Date of the plan was April 11, 2011.