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2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5
6 SACRAMENTO DIVISION
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9 In re) Case No. 03-32180-A-11
10 JOMED INC., and JOMED USA,) Jointly Administered with
11 INC.,) Case No. 03-32183-A-11
12) Docket Control No. MTW-2
13 Reorganized Debtors.) Date: April 25, 2005
Time: 9:00

14 On April 25, 2005 at 9:00 a.m. the court considered the
15 motion of motion of Richard A. Johnson and Michael J. Sorna for
16 relief from a permanent injunction and/or abstention. The text
17 of the final ruling appended to minutes of the hearing follows.
18 This final ruling constitutes a "reasoned explanation" for the
court's decision and accordingly is posted to the court's
Internet site, www.caeb.uscourts.gov, in a text-searchable format
as required by the E-Government Act of 2002. The official record
of this ruling remains the minutes of the hearing.

19 **FINAL RULING**

20 The motion will be denied for the reasons discussed below.
21

22 I. The Relief Requested

23 The movants, Richard A. Johnson and Michael J. Sorna, seek
24 relief from an injunction and/or for the court to abstain from
25 resolving the debtors' objections to their proofs of claim.
26 Instead, they seek to liquidate their claims in the Texas
27 district court where their civil action was originally filed
28 against Jomed Inc. as well as Jomed N.V.

1 Prior to the filing of these chapter 11 cases, the movants
2 commenced litigation against Jomed Inc. and its Dutch parent
3 company, Jomed N.V., in Texas. That litigation remains pending
4 in the United States District Court for the Southern District of
5 Texas. The movants asserted claims for breach of employment
6 contracts with Jomed N.V.

7 This litigation was automatically stayed as against Jomed
8 Inc. when its chapter 11 petition was filed. See 11 U.S.C. §
9 362(a). While the automatic stay expired (see 11 U.S.C. §
10 362(c)) when the chapter 11 plan was confirmed on July 29, 2004
11 and became effective on August 11, 2004, the litigation continues
12 to be stayed according to the terms of the confirmed chapter 11
13 plan, jointly proposed by Jomed Inc. and Jomed USA. The
14 confirmed plan provides for an injunction against the
15 commencement or continuation of proceedings to liquidate or
16 enforce any claim against Jomed Inc. other than in connection
17 with the bankruptcy claims allowance process. That process is
18 well underway.

19 As to the movants' claims and the objections to them, the
20 court has set a discovery deadline and expects to set a trial for
21 the late summer or early fall of this year. Because this court
22 has three recalled judges available for trial assignments, there
23 is no likelihood of delay.

24 Delaying the resolution of the movants' claims is a concern
25 to all creditors. Under the confirmed chapter 11 plans, the
26 liquidated assets of Jomed Inc. and Jomed USA will be distributed
27 to creditors and to interest holders once all objections to
28 claims have been determined.

1 The motion attempts to derail the claims allowance process
2 in this court and in favor of a return to the Texas district
3 court. This motion is made on several grounds, none of which is
4 convincing or compelling.

5
6 II. Background

7 Jomed Inc. and Jomed USA are the wholly-owned subsidiaries
8 of Jomed N.V., a Swedish corporation, currently in a Dutch
9 insolvency proceeding. On January 13, 2004, the Dutch curators
10 of Jomed N.V. filed a petition to commence an ancillary
11 proceeding under 11 U.S.C. § 304. Section 304 permits an
12 ancillary proceeding to be opened in the United States in aid of
13 a foreign insolvency proceeding.

14 Just as the movants filed their claims in these chapter 11
15 cases, they filed them against Jomed N.V. in its foreign
16 insolvency proceeding. Just as Jomed Inc. has disputed the
17 claims, so have the curators. Unlike the automatic stay enjoyed
18 by Jomed Inc., the Dutch insolvency proceeding did not stay the
19 movants from continuing with their suit in Texas against Jomed
20 N.V.

21 Hence, the reason for the ancillary proceeding. In an
22 ancillary proceeding, the foreign representative of the foreign
23 debtor may ask, among other things, that creditors in the United
24 States be enjoined from commencing or continuing judicial
25 proceedings against it in the United States. See 11 U.S.C. §
26 304(b)(1). Jomed N.V.'s curators asked this court to enjoin the
27 movants from continuing their suit in Texas district court. The
28 curators also wanted to compel the movants to litigate the

1 dispute concerning their claim in the Dutch insolvency proceeding
2 or in this court.

3 The movants countered by asking this court to not stay the
4 Texas action. Instead, they asked that they be permitted to
5 resolve both Jomed N.V.'s and Jomed Inc.'s objections regarding
6 their claims before the Texas district court. To this end they
7 also sought relief from the automatic stay in the chapter 11
8 case. In the ancillary proceeding they asked that injunctive
9 relief be limited to enjoining the movants from enforcing any
10 judgment received from the Texas court other than by presenting
11 claims for payment in the chapter 11 case and the Dutch
12 insolvency proceeding.

13 Jomed Inc., as distinct from Jomed N.V., wanted its
14 objection to movants' claims litigated in this court and so it
15 opposed the motion for relief from the automatic stay. And,
16 while Jomed Inc. did not oppose Jomed N.V.'s objections to the
17 movants' claims being resolved by this court, it made clear that
18 if the Texas district court was permitted to resolve Jomed N.V.'s
19 objections to the claims, Jomed Inc. still wanted its objections
20 resolved by this court.

21 In its February 19, 2004 Memorandum Opinion, the court
22 concluded that cause did not then exist to modify the stay to
23 permit the Texas litigation to continue against Jomed Inc. It
24 also preliminarily enjoined the movants from proceeding against
25 Jomed N.V. pending a determination as to whether permanent relief
26 should be granted in the ancillary proceeding.

27 In denying relief from the automatic stay, the court stated
28 that "[s]hould the court in the Netherlands permit Johnson and

1 Sorna to pursue their claims in Texas, or should this court not
2 grant the petition under section 304, the court will reconsider
3 this denial."

4 The ancillary petition was later granted. Then, for the
5 reasons given in its July 29, 2004 Memorandum Opinion (filed in
6 the ancillary proceeding), the court "enjoined [the movants] from
7 commencing or continuing any action against Jomed N.V., its
8 property, or its curators other than by presenting their claims
9 to the court with jurisdiction over Jomed N.V.'s insolvency
10 proceeding."

11 However, if the respondents received leave from the Dutch
12 court to proceed with their litigation in Texas or some other
13 court, including this court, they would be permitted do so
14 without further order from this court. In no event, however,
15 were the movants to enforce any judgment against Jomed N.V. other
16 than by presenting a claim to the court in the Netherlands.

17 At this point, then, the movants were left defending their
18 claim against Jomed Inc. in this court and defending their claim
19 against Jomed N.V. in the Netherlands. While the claim
20 objections of Jomed Inc. have been proceeding in this court, the
21 Dutch court punted.

22 When the movants and the curators returned to the Dutch
23 court, it informed them that even though the movants had
24 submitted to its jurisdiction by filing claims in the
25 Netherlands, it was without jurisdiction to resolve the curators'
26 objections to those claims. If further ruled that it was also
27 without jurisdiction to dictate which court in the United States
28 should resolve the curators' objections.

1 Consequently, this court and the Dutch court had left the
2 parties in limbo. This court had enjoined the Texas litigation
3 from moving forward, and despite the fact that Johnson and Sorna
4 had submitted to the jurisdiction of the Dutch court by filing
5 claims, that court had declined to resolve the curators'
6 objection to those claims. Hence, if the curators' objections
7 were to be adjudicated, this court had to modify its previous
8 injunction.

9 The movants then sought leave to activate the dormant Texas
10 litigation with the proviso that any judgment in their favor not
11 be enforced against the U.S. assets of Jomed N.V. Any judgment
12 would be satisfied to the extent allowed by the Dutch court
13 administering Jomed N.V.'s insolvency proceeding. The curators,
14 on the other hand, wanted their objections resolved by this court
15 in connection with resolution of Jomed Inc.'s similar objections.

16 For the reasons given in its February 17, 2005 Memorandum
17 Opinion (filed in the ancillary proceeding), this court agreed
18 with the movants and it modified the injunctive relief granted in
19 the ancillary proceeding to permit them to liquidate their claims
20 against Jomed N.V. in Texas. In granting this relief, however,
21 the court explained that it was not prepared to permit the Texas
22 court to resolve Jomed Inc.'s objections to the movants' claims.
23 It held:

24 *This court is in a position to promptly adjudicate*
25 *the objections raised by [Jomed Inc.] to Johnson's and*
26 *Sorna's chapter 11 claims. Given the procedural*
27 *posture of those objections, and given the absence of a*
28 *right to a jury trial in the chapter 11 cases, these*
 objections are likely to be resolved long before the
 Texas litigation goes to trial. This holds out the
 prospect of the only real efficiencies likely to be
 achieved.

1 III. Discussion

2 Given its decision to permit the Texas court to resolve
3 Jomed N.V.'s curators' objections to the movants' claims, this
4 court is willing to reconsider its decision to not let the Texas
5 court resolve Jomed Inc.'s objections to the movants' claims.
6 That reconsideration, however, does not counsel in favor of
7 abstention or modification of the plan's injunction.

8
9 A.

10 The motion sets forth supposed "stipulations" in which the
11 movants attempt to demonstrate that Jomed Inc. and Jomed N.V.
12 agreed that the claims and objections should be tried in one
13 forum. These stipulations, based on quotes from the prior
14 documents of Jomed Inc., are unhelpful and unpersuasive. The
15 quotes are edited and are not presented in their full and proper
16 context.

17 Their proper context implicates the ancillary proceeding and
18 the lengthy history recited above. While Jomed Inc. was in favor
19 of adjudicating all objections and all claims in this court,
20 counsel for Jomed Inc. always made clear that if this court
21 declined to resolve the objections to the claims filed against
22 Jomed N.V., Jomed Inc. was prepared to litigate independently its
23 objections to the claims in this court.

24
25 B.

26 The movants allege that Jomed Inc. and Jomed N.V. entered
27 into a joint defense agreement in order to defend themselves
28 against the movants' claims in a single lawsuit.

1 In its opposition to the motion, Jomed Inc. persuasively
2 responds that this agreement generally covers the chapter 11
3 cases of Jomed Inc., Jomed N.V.'s Dutch insolvency proceeding and
4 the ancillary proceeding, and the adversary proceedings related
5 to the ancillary proceeding. It was not entered into in
6 anticipation of a single proceeding involving the movants.
7 Rather, it contemplates a multiplicity of proceedings.

8
9 C.

10 The movants utilize a "balance of the hardships" test to
11 argue that it would not be prejudicial, or add expense, to
12 require Jomed Inc. to litigate in the Texas district court. In
13 fact, they believe that one lawsuit instead of two will conserve
14 resources.

15 The balance of hardships test invoked by the movants is not
16 the standard for modification of a permanent injunction like the
17 one in the confirmed chapter 11 plan. Instead, modification of a
18 permanent injunction requires a significant change of law or
19 facts, neither of which has occurred in this case.

20 If it were the standard, the court is unconvinced that the
21 movants should prevail.

22 First, the only potential witnesses identified by the
23 parties as residents of Texas are the movants. At least two
24 potential witnesses, who are former Jomed Inc. employees, reside
25 in the Sacramento area. All other potential witnesses appear to
26 be from other states and foreign countries. These witnesses
27 cannot be compelled to attend trial in either Texas or
28 Sacramento. Their depositions can be used in either forum.

1 Jomed Inc. notes that the movants' assertion that three
2 foreign witnesses would appear voluntarily for trial in Texas is
3 inadmissible hearsay. The court agrees. If the hearsay is
4 ignored, the court concludes that if these witnesses would
5 voluntarily appear in Texas, they are just as likely to appear in
6 California.

7 Second, Jomed Inc.'s assets have been liquidated. They will
8 not be sufficient to pay all claims in full. Resolving
9 objections in one centralized forum has the best hope of
10 conserving those assets.

11 The movants contend that Jomed Inc. has sufficient funds
12 available from its insurance carrier to defend against their
13 claim in the Texas action. In its opposition, however, Jomed
14 Inc. reports that the extent of insurance coverage for the
15 movants' claims cannot be ascertained until the results of the
16 litigation are known. While Jomed Inc. is seeking reimbursement
17 of legal expenses expended to defend against the movants' claims,
18 the insurer has been slow to respond to such reimbursement
19 requests. Therefore, Jomed Inc. maintains that the burden of
20 defense costs remains very much at issue.

21 Third, allowing Jomed Inc.'s objections to be resolved in
22 Texas is likely to delay the payment of claims and the
23 consummation of its plan. As noted above, payment of claims must
24 await the completion of the claims allowance process. In Texas
25 the movants will seek a jury trial. In connection with the
26 objections to the claims in the chapter 11 case, there is no jury
27 trial right.

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1 An objection to a proof of claim does not entitle the
2 claimant to a jury trial. Resolution of an objection is a matter
3 within the core jurisdiction of the bankruptcy court. See 28
4 U.S.C. § 157(b) (2) (B), (C). By filing a proof of claim, the
5 claimant submits to this equitable jurisdiction and waives any
6 right to a jury trial in connection with any claim objection.
7 See Langenkamp v. Culp, 498 U.S. 42, 44, 111 S.Ct. 330, 331
8 (1990); Katchen v. Landy, 382 U.S. 323, 329 86 S.Ct. 467, 472
9 (1966); Benedor Corp. v. Conejo Enterprises, Inc. (In re Conejo
10 Enterprises, Inc.), 96 F.3d 346, 354, n.6 (9th Cir. 1996).

11 Fourth, the court does not believe there is a likely risk of
12 inconsistent fact finding. To the extent this court determines
13 issues that also arise in the Texas litigation, application of
14 issue preclusion will likely prevent relitigation of those issues
15 in Texas. Unlike claim preclusion, which applies only as between
16 the original parties, issue preclusion may be applied in later
17 litigation with others. Section 29 of Restatement (Second) of
18 Judgments provides: "*A party precluded from relitigating an issue*
19 *with an opposing party . . . is also precluded from doing so with*
20 *another person unless the fact that he lacked full and fair*
21 *opportunity to litigate the issue in the first action or other*
22 *circumstances justify affording him an opportunity to relitigate*
23 *the issue.*"

24
25 D.

26 When the court indicated in its February 19, 2004 Memorandum
27 Opinion that it would reconsider its denial of the motion for
28 relief from the automatic stay, it had not then confirmed Jomed

1 Inc.'s plan of reorganization. That plan, as noted above,
2 contained an injunction barring all creditors of Jomed Inc. and
3 Jomed USA from commencing or continuing any proceedings to
4 liquidate or enforce any claim against Jomed Inc. other than in
5 connection with the bankruptcy claims allowance process.

6 Absent modification of the confirmed plan (see 11 U.S.C. §
7 1127(b)), modification of that injunction in the plan is
8 problematic and modification of the plan is unlikely.

9 First, modification of the plan pursuant to section 1127(b)
10 is unlikely given the plan's substantial consummation and the
11 requirement that the plan proponent or the reorganized debtor
12 propose any modification. The movants were not the plan
13 proponent, they are not the reorganized debtor, and because
14 distributions have commenced under the plan, it has been
15 substantially consummated. See 11 U.S.C. § 1101((2)(C)).

16 Second, the authority cited for the contrary position
17 generally relates to abstention and relief from the automatic
18 stay. In re Brotby, 303 B.R. 177, 199 (B.A.P. 9th Cir. 2003)
19 comes the closest to helping the movants. Brotby, however, is
20 distinguishable on some key points. In Brotby, a creditor
21 appealed the order confirming a chapter 11 plan contending, among
22 other things, that the plan impermissibly enjoined him from
23 collecting a nondischargeable debt while the debtor performed the
24 plan. The appellate panel concluded:

25 . . . the bankruptcy court failed to make the
26 necessary specific findings of fact to support
27 imposition of the injunction in this case. The
28 bankruptcy court did not address why the inclusion of
the collection injunction against [the creditor] in
Debtor's Plan was "necessary for the success of the
plan." [Citation omitted.] Perhaps since Debtor is

1 funding his plan in large part from his earnings, if
2 [the creditor] were allowed to pursue collection of its
3 claim "outside" the Plan, Debtor's ability to complete
4 the Plan and to reorganize may be jeopardized and the
5 rights of creditors adversely impacted. If those
6 circumstances in fact exist, delaying [the creditor's]
7 collection efforts may be reasonably necessary to the
8 success of Debtor's Plan. But the record at this point
9 does not include such findings.

6 On this record, it is also unclear whether the
7 bankruptcy court engaged in any balancing of the
8 relative hardships resulting from the imposition of the
9 collection injunction, or whether it agreed that the
10 scope and duration of the collection injunction was
11 properly limited in the Plan so as to not unfairly
12 prejudice the creditor . . . [S]uch findings are the
13 necessary foundation to the bankruptcy court's use of
14 its equitable powers under § 105(a).

11 While the bankruptcy court correctly interpreted §
12 1141(d)(2), absent appropriate factual findings to
13 support the use of the collection injunction in this
14 case, the matter must be remanded to the bankruptcy
15 court. [Citations omitted.]

14 In re Brotby, 303 B.R. at 191.

15 In this case, the movants did not appeal the confirmation
16 order. Consequently, they are bound by the terms of the plan,
17 including the injunction. See 11 U.S.C. § 1141(a). This is not
18 unfair. The movants have been represented throughout this case
19 by able counsel. Not only did the movants vote for confirmation,
20 they were members of the creditors' committee. It is exceedingly
21 unlikely, given these facts, that the injunction went unnoticed.

22 In addition to abstention, the movants cite a variety of
23 statutes and argue they permit the court to ignore the plan and
24 the injunction in it. 11 U.S.C. § 105(a) gives the court the
25 power to "issue any order, process, or judgment that is necessary
26 or appropriate to carry out the provisions of this title." Under
27 11 U.S.C. § 1142(b), the court may "direct the debtor . . . to
28 perform any other act . . . that is necessary for the

1 consummation of the plan." Finally, 11 U.S.C. § 1334(c)(1)
2 provides that in the interest of comity and justice, a district
3 court may abstain from hearing a proceeding arising under title
4 11.

5 None of these sections gives the court authority to modify a
6 final injunction provided in a debtor's confirmed plan.

7 However, and more to the point, even if invested with such
8 authority, the case before the court does not justify such relief
9 whether it be based on an abstention doctrine or these statutes.

10 In short, the movants have not persuaded the court that it
11 should abstain from the determination of their claims or that
12 relief from the injunction in the plan should be granted. The
13 issue of whether the movants should be free to litigate in some
14 other forum has been presented to this court on several
15 occasions. In each instance, the court has already carefully
16 considered the appropriate place to litigate claims. The court
17 finds no cause to now reconsider (assuming it can reconsider).
18

19 IV. Conclusion

20 This court has been in, and remains in, the best position to
21 adjudicate promptly the objections raised by Jomed Inc. to the
22 movants' claims. Given the procedural posture of those
23 objections, and given the absence of a right to a jury trial in
24 the chapter 11 cases, these objections are likely to be resolved
25 with less expense and long before the Texas litigation goes to
26 trial.

27 The court, as well as the reorganized debtors, have a
28 responsibility to all creditors of Jomed Inc. to adjudicate claim

1 disputes in a timely and efficient manner, thereby conserving
2 assets of an insolvent debtor for the maximum benefit of all
3 creditors. This responsibility may impose some constraints on
4 some creditors that would not otherwise be imposed outside of the
5 bankruptcy context. Considering this responsibility and the
6 needs of all creditors, the burden imposed on the movants is not
7 unfair.

8 A separate order will be entered denying the motion.
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