IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	**CASE NO. 05-35291 (Chapter 11)**
DOCTORS HOSPITAL 1997, L.P.,	§	
Debtor,	§	
	§	
CHARLES R. VELDEKENS, ASHRAF VELDEKENS, and TIDWELL PROPERTIES, INC.,	§	
	§	
Plaintiffs,		
v.	§	**ADVERSARY NO. 05-3772**
GE HFS HOLDINGS, INC., et al.,	§	
Defendants.	§	

MEMORANDUM OPINION ON CHARLES VELDEKENS, ASHRAF VELDEKENS, AND TIDWELL PROPERTIES, INC'S AMENDED MOTION TO ABSTAIN AND TO REMAND AND, ALTERNATIVELY, FOR A RECOMMENDATION FOR THE WITHDRAWAL OF THE REFERRAL ORDER REFERRING THIS CASE TO BANKRUPTCY COURT BY THE UNITED STATES DISTRICT COURT

I. INTRODUCTION

This adversary proceeding considers whether a bankruptcy court loses jurisdiction over a pending lawsuit, which was filed prior to the date of plan confirmation, upon confirmation of the plan. Stated differently: Is jurisdiction automatically extinguished upon confirmation of a plan? This Court believes the answer is in the negative. Assuming that this Court does have subject matter jurisdiction, the Plaintiffs nevertheless request this Court to abstain from adjudicating the dispute and to remand the suit to a Texas state court. The Court finds that it should not abstain and remand,

but rather keep the suit and adjudicate the disputes. The purpose of this Memorandum Opinion is to explain how this Court has arrived at these conclusions.

The Court makes the following Findings of Fact and Conclusions of Law under Federal Rule of Civil Procedure 52 as incorporated into Federal Rule of Bankruptcy Procedure 7052. To the extent that any finding of fact is construed to be a conclusion of law, it is adopted as such. To the extent that any conclusion of law is construed to be a finding of fact, it is adopted as such. The Court reserves the right to make any additional findings and conclusions as may be necessary or as requested by any party.

II. FINDINGS OF FACT

The facts, either as stipulated to or admitted by counsel of record, or as determined from the record, in chronological order, are as follows:

A. Factual background

1. Plaintiffs Charles Veldekens (**Mr. Veldekens**) and Dr. Ashraf Veldekens (**Dr. Veldekens**) owned land located at 510 West Tidwell Road in Houston, Harris County, Texas and certain improvements on the land, including a hospital facility (all of which property and improvements are hereinafter collectively referred to as **the Tidwell Property**). [Docket No. 12, ¶ 13.][1]

2. Mr. Veldekens and Dr. Veldekens purchased the Tidwell Property in 1992 for $7.3 million. [Docket No 63, p. 11:1-3.]

[1]Unless otherwise noted, Docket No. references are to the Docket in Adversary Proceeding Number 05-3772.

3. On or about January 23, 1998, Mr. Veldekens and Dr. Veldekens entered into a Lease Agreement with Doctors Hospital 1997, L.P. (**the Debtor**), whereby they leased the Tidwell Property to the Debtor. [Docket No. 63, p. 2:8-14, 18-19; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 1.] The Debtor is a Limited Partnership based in Houston, Texas that was founded in January of 1998 for the purpose of leasing and operating the hospital facility located on the Tidwell Property in north Houston. [Docket No. 6, ¶ 6.]

4. On or about May 18, 1998, the governing board of the Debtor held its monthly meeting, which was attended by Mr. Veldekens, among others. [Docket No. 63, p. 6:6-9; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44A, p. 1.] John Styles, Jr. (**Styles**), a member of the governing board, provided an update on the ongoing construction and renovations at the Tidwell Property. [Docket No. 63, p. 6:6-9; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44A, p. 1-2.] Additionally, Styles signed the Lease Agreement in his capacity as President of HealthPlus Corporation under the section in the Lease Agreement that states: "IN WITNESS WHEREOF, HealthPlus Corporation, a Delaware corporation, which owns all of the outstanding capital stock of North Houston HealthPlus, L.L.C., the general partner of [the Debtor], by its signature below joins herein for the purpose of agreeing to and acknowledging the representations and covenants applicable to it or made by it in this Lease." [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 1, p. 39.]

5. On or about June 10, 1998, Mr. Veldekens attended another monthly meeting of the Debtor's governing board. [Docket No. 63, p. 6:13-16; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44B, p. 1.] Styles provided an update of the ongoing construction

and renovations on the Tidwell Property and expressed concern about problems that the Debtor was experiencing with the Veldekens. [Docket No. 63, p. 6:21-24; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44B, p. 1, part III.] Specifically, the minutes of the June 10, 1998 meeting reflect that Styles reported that the Debtor was "[a]ttempting to put the Professional Office Building to bed," and that "[w]e are fully prepared to change plans and build on the land we own across the street if the issues of land for the proposed cannot be resolved with the Veldekens in the next few days." [Docket No. 63, pp. 6:24-25, 7:1-4; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Defs' Ex. 44B, p. 1, part III(A)(8).]

6. On or about July 27, 1998, the Debtor borrowed $7 million from HCFP Funding II, Inc. (**the Loan**) pursuant to a Loan Agreement. [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 12.] Defendant, GE HFS Holdings, Inc. (**GE**) was the most recent holder and owner of the Loan Agreement and all other instruments at issue in this Adversary Proceeding. [Docket No. 63, p. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

7. On or about July 27, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed the Assignment of Leases, Rents and Profits in favor of HCFP Funding II, Inc. [Docket No. 63, p. 3:3-6; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 3.]

8. On or about July 27, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed a Deed of Trust and Security Agreement for the benefit of HCFP Funding II, Inc. [Docket No. 63, p. 3:7-11; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 4.] GE was the most recent holder and owner of the Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

9. On or about July 27, 1998, Mr. Veldekens and Dr. Veldekens, as guarantors, also executed a Limited Guaranty Agreement with HCFP Funding II, Inc. [Docket No. 63, pp. 2:15-18, 3:24-25, 4:1-2; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 2.], which specifies the following:

> D. The proceeds from the Loan shall be used by [the Debtor] to construct new improvements on, and substantially renovate existing improvements on, the Facility and upon [the Tidwell Property], and therefore [Mr. Veldekens and Dr. Veldekens], as owner of the fee simple interest in the Property, will receive substantial benefits and increase in the value of its property from the making of the Loan to the [the Debtor].
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> E. In consideration of the benefits to be received by the [Mr. Veldekens and Dr. Veldekens] by the making of the Loan to the [the Debtor] and subject to the express limitation on personal liability set forth in Section 22, the [Mr. Veldekens and Dr. Veldekens have] agreed to execute and deliver to [HCFP Funding II, Inc.] this Guaranty.

[Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 2, Recitals D, E.] GE was the most recent holder and owner of the Limited Guaranty Agreement. [Docket No. 63, pp. 2:21-24, 8:25, 9:1-6.]

10. On or about November 6, 1998, Mr. Veldekens, Dr. Veldekens, and the Debtor executed the First Amendment to Deed of Trust and Security Agreement for the benefit of HCFP Funding II, Inc. [Docket No. 63, p. 3:12-15; Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 5.] GE was the most recent holder and owner of the First Amendment to Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

11. On or about December 22, 1999, Mr. Veldekens, Dr. Veldekens and the Debtor executed the Second Amendment to Deed of Trust and Security Agreement for the benefit of Heller Healthcare Finance, Inc. [Docket No. 63, p. 3:16-19; Dec. 2, 2005 Hrg. on Veldekens'

Application for Prelim. Inj., Joint Ex. 6.] Heller Healthcare Finance, Inc. was the successor to HCFP Funding II, Inc. and became the holder of the instruments HCFP Funding II, Inc. originally held. [Docket No. 63, p. 3:19-23; *see* Docket 71, Ex. 2, ¶ 11.] GE was the most recent holder and owner of the Second Amendment to Deed of Trust and Security Agreement. [Docket No. 63, pp. 8:25, 9:1-6; *see* Docket No. 63, p. 2:21-24.]

12. Since purchasing the Tidwell Property in 1992 for $7.3 million, Mr. Veldekens and Dr. Veldekens received income therefrom in the form of lease payments from the Debtor and fees from sitting on the governing board, among other income. [Docket No. 63, p. 11:1-6.] The amount of income that they received totaled approximately $10.3 million. [Docket No. 63, p. 11:6-8.]

13. Mr. Veldekens and Dr. Veldekens transferred title to the Tidwell Property to Plaintiff Tidwell Properties, Inc. by a warranty deed filed in Harris County, Texas on December 26, 2002. [Docket No. 12, ¶ 13.] Pursuant to Federal Rule of Evidence 201(a), (b), and (c),[2] this Court takes judicial notice of the Texas Secretary of State Business Organization records, which indicate that **Mr. Veldekens is the registered agent and sole officer and director of Tidwell Properties, Inc.**

B. Procedural background

14. On April 6, 2005, the Debtor filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. [Main Case No. 05-35291; Docket No. 1.]

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[2]The Federal Rules of Evidence apply to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 9017 and Federal Rule of Evidence 1101(a), (b).

15. On August 19, 2005, Mr. Veldekens, Dr. Veldekens, and Tidwell Properties, Inc. (collectively, **the Veldekens**) filed suit against GE in the 334th Judicial District of Harris County, Texas **(the State Court Lawsuit)**. [Docket No. 71, Attach. 4.] The Original Petition in this State Court Lawsuit alleged that: (1) the Veldekens had leased the Tidwell Property to the Debtor; (2) the Debtor's lenders[3] had agreed to issue loans to the Debtor solely for the construction of improvements on the Tidwell Property; (3) GE is a Delaware corporation[4] doing business in Texas which acquired the Debtor's lenders; (4) the Veldekens had agreed to grant the Debtor's lenders a lien upon the Tidwell Property only to the extent that the lenders extended loans to the Debtor for improvements on the Tidwell Property; and (5) the lenders made loans to the Debtor for purposes other than the construction of improvements on the Tidwell Property, thereby encumbering the Veldekens' fee simple interest in the property with liens related to loans "for purposes totally unrelated to improving the Tidwell Property, including purchasing a separate hospital facility on a different property not owned by the [Veldekens]." [*Id.* at ¶¶ 6, 9, 11, 13, 14.]

16. The State Court Lawsuit sought relief under the following causes of action: breach of contract, suit to remedy cloud/suit to quiet title, fraudulent inducement, fraud, and negligent misrepresentation. [*Id.* at ¶¶ 15-53.] The State Court Lawsuit also sought damages, exemplary damages, attorneys' fees, and the following declaratory relief: (1) "to have the

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[3]The Veldekens' suit alleged that the Debtor's lenders were Heller Healthcare Finance, Inc. and HCFP Funding, Inc., a/k/a HCFP Funding II, Inc. [Docket No. 71, Ex. 2, ¶ 11.]

[4]**The Veldekens' Original Petition alleges that GE "is, based on knowledge and belief, a Delaware Corporation doing business in Texas." [Docket No. 6, Ex. 7, ¶ 6.] Pursuant to Federal Rule of Evidence 201(a), (b), and (c), this Court takes judicial notice of the Texas Secretary of State Business Organization records, which indicate that GE is a Connecticut Corporation, with "Jurisdiction" in "DE/USA."**

[Tidwell] Property immediately delivered back to [the Veldekens'] possession;" (2) "to have the cloud on [the Veldekens'] title created by the alleged liens on their interest in the [Tidwell] Property vacated and cancelled;" and (3) "If possession of the [Tidwell] Property is not immediately delivered back to [the Veldekens] and the cloud on [the Veldekens' title created by Heller/GE's alleged lien is not remedied, then [the Veldekens] seek to disgorge from Heller/GE's unjust enrichment, either through a return of the Loans that [the Debtor] unjustly received or a constructive trust placed upon any interest Heller/GE has in the [Tidwell] Property." [*Id.* at ¶¶ 54-58.]

17. On September 30, 2005, GE removed the State Court Lawsuit to the United States District Court for the Southern District of Texas, Houston Division (**the District Court**), where it was assigned Civil Action No. 4:05-cv-03381 and assigned to the Honorable Vanessa D. Gilmore, United States District Judge. [Civil Action No. 4:05-cv-03381, Docket No. 1.]

18. In a letter to Mr. Veldekens and Dr. Veldekens dated October 7, 2005, GE demanded payment of $15,540,000.00 in indebtedness under the documents executed on July 27, 1998. [Dec. 2, 2005 Hrg. on Veldekens' Application for Prelim. Inj., Joint Ex. 18; Docket No. 6, Ex. 11.] The letter also included a Notice of Substitute Trustee's Sale, which set forth that: (1) the Veldekens granted liens pursuant to the Deed of Trust to "secure a Limited Guaranty Agreement . . . dated as of July 27, 1998, executed jointly and severally by [the Veldekens] to secure indebtedness (the "Debt");" (2) GE was the current owner of the liens; and (3) "default has occurred in the payment of the Debt," which had matured, so that GE "authorized and directed the Substitute Trustee to file, post and mail this Notice of Substitute Trustee's Sale and to sell the Property and apply the proceeds against the Debt, as provided

in the [Limited] Guaranty [Agreement]." The letter and the Notice of Substitute Trustee's Sale indicated that the sale would occur on November 1, 2005. *Id.*

19. On October 14, 2005, the Veldekens and GE jointly filed the following motion in the removed suit (bearing Civil Action No. 4:05-cv-03381) pending before District Judge Gilmore: Agreed Motion for Referral to the United States Bankruptcy Court for the Southern District of Texas, Houston Division **(the Agreed Motion for Referral)**. [Docket No. 104, Ex. A.] This Agreed Motion for Referral made the following representations to District Judge Gilmore:

> Plaintiffs Charles R. Veldekens, Ashraf Veldekens, and Tidwell Properties, Inc. ("Plaintiffs") and defendant GE HFS Holdings, Inc. ("GE HFS"), formerly known as Heller Healthcare Finance, Inc. and, before that, HCFP Funding, Inc., and the successor in interest to HCFP Funding II, Inc., *jointly move the Court to refer this case to the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division.*
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> . . . .
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> *Both parties now move the Court to refer this case to the Bankruptcy Court, which is familiar with the dispute at issue.*
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> 2. Currently pending before the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division (Bohm, J.) (the "Bankruptcy Court") is a Chapter 11 bankruptcy, Cause No. 05-35291-H4-11, styles *In re Doctors Hospital 1997, L.P.* Doctors Hospital 1997, L.P. is the lessee of the real property which is the subject of this case. Further, already pending in Bankruptcy Court is Adversary Proceeding No. 05-3315, in which the Plaintiffs assert claims similar to the ones Plaintiffs brought in this matter. *The parties agree that the Bankruptcy Court is the appropriate forum to resolve the parties' dispute.*
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> 3. *The parties agree that the Bankruptcy Court may hear and determine this case, and may enter appropriate final orders or judgment, pursuant to 28 U.S.C. § 157. To the extent necessary, the parties consent to the entry of final orders or judgment in this case by the Bankruptcy Court.*

Id. (emphasis added).

20. On October 18, 2005, District Judge Gilmore signed an agreed order referring the suit (Civil Action No. 4:05-cv-3381) to the Bankruptcy Court. [Docket No. 1.] This order (**the Referral Order**) was entered on the docket on October 19, 2005. *Id.*

21. Upon referral of this suit from the District Court to this Court, the Clerk of Court assigned this suit Adversary Proceeding No. 05-3772 (**the Adversary Proceeding**).

22. On October 31, 2005, the Veldekens filed their Verified Emergency Application for Temporary Restraining Order and Preliminary Injunction, requesting that this Bankruptcy Court enjoin the foreclosure sale of the Tidwell Property scheduled for November 1, 2005. [Docket No. 6, ¶ 39.]

23. On November 1, 2005, the parties appeared before this Court and announced that GE had agreed to remove posting of the notice of the November 1, 2005 foreclosure sale of the Tidwell Property; the Veldekens had agreed to pass on their request for a Temporary Restraining Order hearing; GE would be entitled to repost the Tidwell Property for a foreclosure sale in December of 2005; and the parties wanted the Court to set a hearing on the Veldekens' Application for Preliminary Injunction at the end of November. [Docket Entry Nov. 1, 2005.]

24. On November 4, 2005, in the Main Case, the Debtor filed its Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code. [Main Case No. 05-35291; Docket No. 357.]

25. On November 4, 2005, the Veldekens filed their Verified First Amended Complaint Pursuant to 11 U.S.C. §§ 362 and 105(a) and Application for Preliminary Injunction. [Docket No. 12.] The Veldekens added two defendants—Newbanks, Inc. (**Newbanks**) and Clifton D.

Thomason (**Thomason**)—as parties to the Adversary Proceeding. [*Id.* at ¶¶ 10-11.] The Veldekens **alleged that Newbanks is a foreign corporation with its place of business in Texas and that Thomason is an architect with his principal place of business in Texas**. *Id.* The Veldekens' First Amended Complaint alleged that Thomason and Newbanks were acting as authorized agents of GE [*Id.* at ¶ 80.] when they failed to perform GE's contractual obligations [*Id.* at ¶ 39.] and made negligent misrepresentations. [*Id.* at ¶ 50.] The Veldekens also asserted causes of action under the Texas Deceptive Trade Practices Act [*Id.* at ¶ 65] and alleged a conspiracy among GE, Thomason, and Newbanks. [*Id.* at ¶ 77.]

26. On December 2, 2005, this Court held a full day hearing on the Veldekens' Application for Preliminary Injunction. [Docket No. 6.]

27. On December 5, 2005, this Court announced, from the bench, its oral Findings of Fact and Conclusions of Law and denied the Veldekens' Application for Preliminary Injunction. [Docket Nos. 60, 63.] With this Court's refusal to issue a preliminary injunction, GE soon thereafter foreclosed its lien on the Tidwell Property.

28. In denying the Veldekens' Application for Preliminary Injunction, the Court found that the Veldekens failed to satisfy all four prerequisites for obtaining a preliminary injunction, which the Fifth Circuit has set forth as the follows: "(1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and (4) that granting the preliminary injunction will not disserve the public interest." *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). [Docket No. 63, pp. 12:20-25, 13:1-10, 29:5-8.]

29. On December 15, 2005, Defendant Newbanks filed its answer to the Veldekens' First Amended Complaint. [Docket No. 61.]

30. On January 24, 2006, in the Main Case, the Debtor filed its First Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket Nos. 469, 473.][5]

31. On February 10, 2006, in the Main Case, the Debtor filed its Second Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket No. 504.]

32. On March 3, 2006, in the Main Case, the Debtor filed an additional Second Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket No. 530.][6]

33. On March 16, 2006, GE filed its Motion for Summary Judgment. [Docket No. 66.]

34. On March 31, 2006, in the Main Case, the Veldekens filed their Motion for Withdrawal of Claim Pursuant to FED. R. BANKR. P. 3006, stating that the disputes related to the Lease Agreement were "properly within determination" of this Court in this Adversary Proceeding. [Main Case No. 05-35291; Docket No. 556, ¶ 4.]

35. On the same day, in the Main Case, the Veldekens filed their Objection to Confirmation of the Debtor's Second Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code and Supporting Memorandum of Charles Veldekens, Ashraf Veldekens, and Tidwell Properties, Inc. [Main Case No. 05-35291; Docket No. 557.]

36. On April 4, 2006, Newbanks filed its Motion for Summary Judgment. [Docket No. 70.]

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[5] The docket in the Main Case shows that on the same date, January 24, 2006, two documents titled "Debtor's First Amended Plan of Reorganization" were filed. There is a slight variation between the two documents and the second entry should have been correctly titled Second Amended Plan of Reorganization.

[6] Again, the Debtor filed two slightly varying documents with identical titles. In light of the two "first" Amended Plans that were filed, these documents should have been titled the third and fourth Amended Plans.

37. On April 5, 2006, in the Main Case, the Debtor filed its Plan Supplement with respect to Debtor's Second Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code, relating to the Disclosure Statement and Second Amended Chapter 11 Plan filed at Docket Nos. 529 and 530 [Main Case No. 05-35291; Docket No. 577], submitting draft forms of certain documents necessary to implement the Plan. [*See* Main Case No. 05-35291; Docket No. 620, at ¶ 12.]

38. On May 8, 2006, in the Main Case, the Debtor filed a modified Second Amended Chapter 11 Plan. [Main Case No. 05-35291; Docket No. 619.][7]

39. On May 8, 2006, in the Main Case, this Court entered its Order Confirming Debtor's Second Amended Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, as Modified relating to the Second Amended Plan at Docket No. 619 (**the Plan**). [Main Case No. 05-35291; Docket No. 621.] Counsel for the Veldekens appeared at this confirmation hearing to withdraw the Veldekens' prior objection to confirmation of the Plan. *Id.*

40. The Plan calls for Healthcare Financial Services Realty, LLC, an affiliate of GE, to transfer the Tidwell Property to the reorganized Debtor, or to Tidwell/Parkway Realco, a holding company of the reorganized Debtor. In exchange, the reorganized Debtor will have a new $2.5 million obligation to GE and GE will have senior liens and security interests in the Tidwell Property. [*Id.*, Ex. B, Art. 8.9.]

41. On May 23, 2006, the Veldekens filed a Motion for a Rule 7016 Scheduling Conference and for Entry of Pretrial Scheduling Order. [Docket No. 80.]

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[7] At least three versions of the Debtor's Second Amended Plan appear on the docket. This final version, which modifies the version filed on March 3, 2006, is the Second Amended Plan that was eventually confirmed. [*See* Finding of Fact No. 39.]

42. On May 30, 2006, Thomason filed his Answer to the Veldekens' First Amended Complaint. [Docket No. 82.]

43. On May 30, 2006, Thomason filed his Motion for Summary Judgment. [Docket No. 83.]

44. On June 5, 2006, in the Main Case, this Court signed an Order Authorizing and Approving Proposed Exit Financing and Related Loan Documentation in Connection with Debtor's Second Amended Plan of Reorganization under Chapter 11 of the United State Bankruptcy Code, as Modified. [Main Case No. 05-35291; Docket No. 646.] In the Order, this Court stated that "the exit financing is a necessary and integral part of the Plan." [*Id.* at 2.]

45. On June 9, 2006, GE filed its Response to the Veldekens' Motion for Rule 7016 Scheduling Conference asserting that its Motion for Summary Judgment was timely and should be heard before a scheduling conference. [Docket No. 86.]

46. On June 15, 2006, the Veldekens filed their Response to Thomason's Motion for Summary Judgment arguing that their claims are not barred by the statute of limitations because Thomason did not prove when each cause of action accrued. [Docket No. 87.]

47. On June 16, 2006, the Veldekens filed a Motion to Abstain and to Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this Case to the Bankruptcy Court by the United States District Court. [Docket No. 88.]

48. On June 20, 2006, Newbanks filed a Motion for More Definite Statement [Docket Nos. 90, 91.], Joinder in Defendant GE's Response to Motion for Rule 7016 Scheduling Conference [Docket No. 93.], and Reply in Support of Summary Judgment. [Docket No. 94.]

49. On June 23, 2006, the Veldekens filed an Amended Motion to Abstain and to Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this

Case to Bankruptcy Court by the United States District Court (**the Amended Motion**). [Docket No. 99.]

50. On June 27, 2006, GE, Newbanks, and Thomason (collectively, **the Defendants**) filed a Joint Motion In Opposition to the Veldekens' Motion to Abstain and to Remand. [Docket No. 104.]

51. On the same day, the Defendants filed their First Amended Joint Opposition to Plaintiffs' Motion to Abstain and Remand. [Docket No. 109.]

52. On June 27, 2006, the Veldekens also filed their Supplemental Response to Defendants' Motions for Summary Judgment. [Docket No. 108.]

53. On June 28, 2006, the Veldekens filed their Reply in Support of Motion to Abstain and Remand and, Alternatively, for a Recommendation for the Withdrawal of the Referral Order Referring this Case to Bankruptcy Court by the United States District Court. [Docket No. 112.]

54. On June 28, 2006, the Court held a hearing on the Amended Motion and the Defendants' Motions for Summary Judgment. [Docket Entry June 8, 2006.] Most of this hearing concerned arguments on the Amended Motion. At the close of the hearing, the Court asked both parties to file post-hearing briefs. The Court continued the hearing on the Motions for Summary Judgment and the Amended Motion until August 10, 2006. *Id.*

55. On June 30, 2006, in the Main Case, the Plan became effective. [Main Case No. 05-35291; Docket No. 663.]

56. On July 12, 2006, the Veldekens filed their Response to Newbanks' Motion for More Definite Statement. [Docket No. 113.]

57. On July 14, 2006, the Defendants filed their Joint Hearing Brief Regarding Plaintiffs' Motion for Remand. [Docket No. 115.]

58. On August 4, 2006, the Veldekens filed their Post-Hearing Brief in Support of the Motion. [Docket No. 116.]

59. On August 8, 2006, the Newbanks filed its Reply in Support of Motion for More Definite Statement. [Docket No. 119.]

60. On August 9, 2006, GE filed its Response to Plaintiffs' Post-Hearing Brief in Support of Motion to Remand. [Docket No. 121.]

61. On August 10, 2006, the Court reconvened the hearing on the Amended Motion and the Defendants' Motions for Summary Judgment. [Docket Entry Aug. 10, 2006.] The Court orally announced that it had decided to deny the Amended Motion,[8] and would be issuing a written opinion to that effect. The Court also stated that it would be submitting a Report and Recommendation to the District Court recommending against withdrawal of the Referral Order. Finally, this Court determined that it was appropriate to delay ruling on the Motions for Summary Judgment until the District Court makes a decision on the Report and Recommendation. *Id.*

62. On August 25, 2006, Newbanks and Thomason filed their Separate Supplement to All Defendants' Supplemental Brief in Support of Motion for Summary Judgment and GE's Advisory to the Court Re: Motion to Strike. [Docket No. 124.]

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[8] This Court denied the Amended Motion only as to the abstention and remand issues.

63. On August 25, 2006, the Veldekens filed their Post-Hearing Brief in Opposition to Defendants' Motions for Summary Judgment [Docket No. 125] and Post-Hearing Brief in Opposition to Defendants' Motions for Summary Judgment. [Docket No. 126]

III. CONCLUSIONS OF LAW REGARDING JURISDICTION

Despite (1) requesting the District Court to refer this suit to this Court; and (2) stipulating to this Court adjudicating the dispute and entering a final judgment [Findings of Fact Nos. 34, 35], the Veldekens now argue that this Court does not have subject matter jurisdiction over this suit.[9]

A. Whether this Court has subject matter jurisdiction over the Adversary Proceeding is determined as of the date that the District Court referred this lawsuit to this Court.

Subject matter jurisdiction is tested at the time the lawsuit is removed to federal court. *Arnold v. Garlock, Inc.* 278 F.3d 426, 434 (5th Cir. 2001); *Bankruptcy Trading & Inves., L.L.C. v. Chiron Financial Group, Inc.*, 342 B.R. 474, 477 (S.D. Tex. 2006). At first blush, it would appear that the date to test this Court's jurisdiction is September 30, 2005, which is when GE removed the Veldekens' State Court Lawsuit to the District Court. [Civil Action No. 4:05-cv-03381, Docket No. 1.] However, at the request of both the Veldekens and GE, the District Court then referred the suit to the undersigned bankruptcy judge on October 19, 2005. [Docket Nos. 1, 104, Ex. A.] Under these circumstances, the subject matter jurisdiction of this Bankruptcy Court is tested at the time the

[9] This Court recognizes that a party "cannot create subject-matter jurisdiction by waiver [or] estoppel." *Finley v. United States*, 490 U.S. 545, 559 (1989), *overruled on other grounds by* 28 U.S.C. § 1367(a); *see also Robinson v. Johnson*, 975 F. Supp. 950, 954 n.5 (1996) (explaining that 28 U.S.C. § 1367(a) overruled *Finney*, 975 F. Supp. at 954). However, for purposes of considering possible issues of bad faith and forum shopping, it is noteworthy that the Veldekens are now attempting to flee this Court's jurisdiction and avoid a ruling on the Defendants' Motions for Summary Judgment after originally agreeing that this Court would have the authority to enter final judgments and orders and after this Court has spent considerable time on this suit, including holding a full day hearing on the Veldekens' Application for Temporary Injunction.

District Court referred the Adversary Proceeding to this Court. *See Garlock*, 278 F.3d at 434; *In re Canion*, 196 F.3d 579, 587 (5th Cir. 1999). Accordingly, whether this Bankruptcy Court has subject matter jurisdiction over the Adversary Proceeding is tested as of October 19, 2005.

B. Because the Adversary Proceeding was filed pre-confirmation, this Court, in testing whether it has jurisdiction over this suit, relies upon case law regarding a bankruptcy court's jurisdiction over pre-confirmation filed lawsuits.

In the main Chapter 11 case at bar, the Plan was confirmed on May 8, 2006, i.e. more than six months after the Adversary Proceeding was referred to this Court. [Docket No. 1; Main Case No 05-35291; Docket No. 621.] Because this suit was referred to this Court on October 19, 2005 and was pending in this Court prior to confirmation of the Plan, this Court, in testing subject matter jurisdiction, will rely upon case law from the Fifth Circuit analyzing a bankruptcy court's jurisdiction over adversary proceedings that were pending in the bankruptcy court prior to confirmation of a plan.[10]

In *Federal Deposit Insurance Corp. v. Majestic Energy Corp.* (*In re Majestic Energy Corp.*), 835 F.2d 87 (5th Cir. 1988), the Fifth Circuit analyzed whether the bankruptcy court had jurisdiction over a lawsuit filed five months after the filing of the Chapter 11 petition but before confirmation of the plan. The Fifth Circuit articulated the appropriate steps for making such a determination:

> Analysis of bankruptcy court jurisdiction in a particular action involves a two-step inquiry. First, whether federal jurisdiction over bankruptcy cases and proceedings exists is determined under § 1334(b), which is to be read as a broad grant of jurisdiction. *Id.* at 92. Second, if jurisdiction is found, § 157 is examined to determine the extent to which a bankruptcy court, rather than a district court, can

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[10]In the Fifth Circuit, if a suit is filed *after* plan confirmation, the analysis as to whether the bankruptcy court has subject matter jurisdiction is different from the analysis that is done if the suit is pending *prior* to plan confirmation. *See Bank of Louisiana v. Craig's Stores of Texas, Inc.* (*In re Craig's Stores of Texas, Inc.*), 266 F.3d 388, 390-91 (5th Cir. 2001). The Court will subsequently discuss more fully herein the issue of jurisdiction over suits filed post-confirmation.

> adjudicate the matter, which depends on whether the matter is a core or non-core proceeding. In this case, the parties consented to the matter being determined by the bankruptcy judge. Thus, even if the matter is a non-core proceeding, a determination by the bankruptcy judge was proper as long as the matter was at least related to the bankruptcy case. *See* U.S.C. § 157(c)(2). Therefore, the key issue in this case is whether bankruptcy jurisdiction attached. Since § 1334(b) defines jurisdiction conjunctively as either "arising under," "arising in" or "related to" a case under Title 11, we need only determine whether this matter is at least related to the bankruptcy. *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 93 (5th Cir. 1987).

Id. at 90.

This Court now applies the two-step inquiry required by *Majestic Energy* to the Adversary Proceeding at bar:

Step No. 1: This Court must first determine whether as of October 19, 2005 (i.e. the date that the District Court referred the suit to this Court) the Veldekens' suit was "at least related to" this Chapter 11 case. In *Wood*, the Fifth Circuit set forth that a suit is a "related to" proceeding under 28 U.S.C. § 1334(b) if the outcome of the proceeding "could *conceivably* have any effect on the estate being administered in bankruptcy." *Wood*, 825 F.2d at 93 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis added in *Wood*). The Fifth Circuit expressly noted that it was adopting this definition of a "related to" proceeding from the Third Circuit's opinion in *Pacor*. Indeed, since its adopting this definition, the Fifth Circuit has cited *Pacor* in elaborating on the broad scope the phrase "could conceivably have any effect on the estate." Specifically, in *Majestic Energy*, the Fifth Circuit, quoting *Pacor*, stated that "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Majestic Energy*, 835 F.2d at 90.

Thus, there are four independent scenarios in which an adversary proceeding is a "related to" proceeding. Each of these scenarios has two elements, with the second element being the same for each scenario:

(1) The suit's outcome could alter the debtor's rights and in any way impacts upon the handling and administration of the bankrupt estate;
(2) The suit's outcome could alter the debtor's liabilities and in any way impacts upon the handling and administration of the bankrupt estate;
(3) The suit's outcome could alter the debtor's options and in any way impacts upon the handling and administration of the bankrupt estate; or
(4) The suit's outcome could alter the debtor's freedom of action (positively or negatively) and in any way impacts upon the handling and administration of the bankrupt estate.

As of October 19, 2005—the date the suit was referred to this Court—the "live" pleading before this Court was the Plaintiffs' Original Petition that the Veldekens had filed in the State Court Lawsuit. [Docket No. 6, Ex. 7.] This pleading set forth the claims which the Veldekens were asserting against GE at that time.[11] From an examination of these claims, this Court can reach no conclusion other than that the Veldekens' suit is related to the Debtor's Chapter 11 case. Part of the relief requested by the Veldekens is for this Court to declare that the liens claimed by GE on the Tidwell Property are invalid and that the Tidwell Property belongs to the Veldekens free and clear of these allegedly invalid liens. [*Id.* at ¶¶ 25, 54, 55, and Conclusion.] As described below, if the Court grants such relief, then the outcome could easily produce any or all of the four independent scenarios that make a lawsuit a "related to" proceeding:[12]

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[11] On November 4, 2005, the Veldekens filed their First Amended Complaint and Application for Preliminary Injunction. [Docket No. 12.] This Amended Complaint included nine additional causes of action that did not appear in the Original Petition in the State Court Lawsuit. Because the Court is analyzing jurisdiction as of October 19, 2005, only the claims and relief requested in the Original Petition are considered.

[12] As already discussed, the jurisdictional analysis must consider matters as of October 19, 2005 because this is the date that subject matter jurisdiction is tested. *See Arnold*, 278 F.3d at 434; *Canion,* 196

Scenario One: If the suit's outcome could alter the debtor's rights and in any way impacts upon the handling and administration of the bankrupt estate—Invalidating GE's liens on the Tidwell Property and conveying title of the Tidwell Property to the Veldekens could alter the Debtor's rights as to GE. With GE no longer having its liens on the Tidwell Property, GE could decide to cease providing financing to the Debtor, which would deprive the Debtor of working capital financing. Such a result would force the hospital to shut down, which would certainly have an impact on the handling and the administration of the bankruptcy estate.

Scenario Two: If the suit's outcome could alter the Debtor's liabilities and in any way impacts upon the handling and administration of the bankrupt estate—The Veldekens filed a proof of claim against the Debtor in the Main Case prior to October 19, 2005.[13] This claim included both past due rent and also "accruing monthly lease charges and attorneys' fees". A ruling in this Adversary Proceeding against the Veldekens and in favor of GE could limit the amount of the Veldekens' claim to only past due rent and not for future payments. A claim against the Debtor is a liability. Therefore, a judgment against the Veldekens would alter the Debtor's liabilities, and could impact the handling and administration of the bankruptcy estate.

Scenario Three: If the suit's outcome could alter the Debtor's options and in any way impacts upon the handling and administration of the bankrupt estate—Invaliding GE's liens on the Tidwell Property and conveying title of the Tidwell Property to the Veldekens could alter the Debtor's options because the Debtor would probably no longer have the option of obtaining financing from GE. Were GE to lose its liens on the Tidwell Property, GE could decide to cease lending further monies to

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F.3d at 587; *Chiron*, 342 B.R. at 477. Although this date has long since passed and although important events have occurred since October 19, 2005—such as GE foreclosing on the real property that is the subject of the lawsuit—the analysis set forth in the four scenarios is based upon the circumstances as they existed on October 19, 2005. For purposes of clarity, the analysis is set forth in the present tense.

[13] The Veldekens originally filed two claims on July 1, 2005, one in the name of Charles and Ashraf Veldekens [Main Case No. 05-35291; Claim No. 127.] and the other on behalf of Tidwell Properties. [Main Case No. 05-35291; Claim No. 129.] These claims were amended and consolidated into one claim on September 6, 2005. [Main Case No. 05-35291; Claim No. 186.] Therefore, on October 19,2005, Claim No. 186 was the "live" pleading. Six months later, the Veldekens filed a withdrawal of claim relating only to Claim Nos. 127 and 129. [Main Case No. 05-35291; Docket No. 556] The Veldekens have never sought to withdraw Claim No. 186, and, as of the date of this Memorandum Opinion, Claim No. 186 is still a "live" pleading.

the Debtor, a result which, once again, could impact the handling and administration of the bankruptcy estate.

Scenario Four: If the suit's outcome could alter the Debtor's freedom of action (positively or negatively) and in any way impacts upon the handling and administration of the bankrupt estate—Invaliding GE's liens on the Tidwell Property and conveying title of the Tidwell Property to the Veldekens could negatively alter the Debtor's freedom of action because the Debtor would probably no longer have the option of obtaining financing from GE. GE has been extending financing to the Debtor, both prior to the bankruptcy filing and thereafter. GE has provided such financing under the express understanding that its liens on the Tidwell Property are valid.[14] A judgment or order from this Court invaliding these liens could conceivably jeopardize the Debtor's ability to obtain working capital financing to operate the hospital and pay ongoing bills.[15] Such a scenario could easily lead to

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[14] By way of example, set forth below are three instances where GE has provided financing to the Debtor under the express understanding that GE was, among other consideration, receiving a lien on the Tidwell Property or on any leasehold interest relating to the Tidwell Property:

(1) Lessor's Consent, Waiver, Estoppel Certificate and Agreement of July 2, 1998 ("For so long as the Borrower's obligations under the Loan Documents are outstanding but for the Assignment Period only as defined in the Assignment of Leases, Rents and Profits of even date herewith, *the Lessor subordinates to the Lender's lien and security interest under the Loan Documents* each and every right to payment of rent, security interest, landlord's lien, levy, or right of distraint other right which the Lessor now has or may hereafter have, under the laws of the State of Texas or any other State or by the terms of any real estate lease, sublease, security agreement, mortgage or deed of trust now in effect or hereafter executed by the Lessor or the Borrower or any other tenant of the Mortgaged Property, to execute upon, sell, levy or distrain upon for rent, in arrears, in advance or both, or to claim or assert title to, the Mortgaged Property.")(emphasis added) [Docket No. 05-3315, Ex. W, ¶ 14];

(2) Interim Order dated April 7, 2005 Authorizing Secured and Super Priority Post-Petition Financing Pursuant to 11 U.S.C. § 363, 364 and 507(B) ("GE HFS shall have and is hereby granted...valid and perfected security interests and liens in all present and after-acquired real property and personal property of the Debtor.") [Main Case No. 05-35291; Docket No. 24, p. 15.]; and

(3) Final Order dated June 1, 2005 Authorizing Secured and Super Priority Post-Petition Financing Pursuant to 11 U.S.C. § 363, 364 and 507(B)("Notwithstanding the foregoing, no Challenge (or any other action of any kind) by the Committee or by any other party shall affect in any way the validity, enforceability, or amount of the post-petition GE DIP Obligation owing under the GE DIP Loan Documents, or the validity, enforceability, perfection, or priority of the GE Liens granted to GE HFS under the GE DIP Loan Documents, the Interim Order, and this Order.") [Main Case No. 05-35291; Docket No. 141, Att. 1, p. 19.]

[15] By way of one example only, the Debtor-in-Possession Loan and Security Agreement dated April 6, 2005 provides that an event of default includes the following: "Borrower *or any Affiliate of Borrower*,

> a shutdown of the hospital's operations, which could destroy any chance of claims being paid. Such a result could impact the handling and administration of the bankruptcy estate.

Because the analysis is done with an eye on October 19, 2005—almost 7 months prior to confirmation of the Plan—there is no question that a Chapter 11 estate was in existence on October 19, 2005. Therefore, the suit's outcome could impact the handling and administration of the Debtor's bankruptcy estate. The Veldekens constantly reiterate in their briefs that there is no estate because the Plan has been confirmed; and therefore, because there is no estate, the second element of the "related to" test—i.e. whether the outcome "in any way impacts upon the handling and administration of the bankrupt estate"—cannot be satisfied. The flaw in the Veldekens' argument is that the jurisdictional analysis must be done as of the date of the referral of this suit to this Court (i.e. as of October 19, 2005), and not as of the date that the Plan was confirmed (i.e. May 8, 2006) or any time thereafter; and because the Debtor's Chapter 11 estate was in existence as of October 19, 2005, all elements of the "related to" test can be satisfied.

Because the Veldekens' suit could conceivably have an effect on the Debtor's estate, this suit is "related to" the Debtor's Chapter 11 case within the meaning of 28 U.S.C. § 1334(b). Accordingly, this Court has jurisdiction over this Adversary Proceeding.

Step No. 2: Having determined that this Court has subject matter jurisdiction over the Adversary Proceeding, this Court now applies the second step the Fifth Circuit set forth in *Majestic Energy*: to determine the extent to which this Court, rather than the District Court, can adjudicate

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shall challenge or contest, in any action, suit or proceeding, the validity or enforceability of this Agreement, or any of the other DIP Loan Documents, the legality or the enforceability of any of the obligations or the perfect or priority of any Lien granted to Lender." Upon event of default, one of the remedies available to GE is that the lender may "[t]erminate the DIP Loan, whereupon all outstanding Obligations shall be immediately due and payable.") [Docket No. 05-3315, Ex. B, Art. 8.1(p) and 8.3(a)(i).]

the matter; in other words, to determine whether this Court may: (1) enter a judgment which can only be appealed to the District Court; or (2) only submit proposed findings of fact and conclusions of law to the District Court, whose review is entirely *de novo*. *See Majestic*, 835 F.2d at 90.

Because step one necessarily requires a determination of whether the Adversary Proceeding was a "related to" proceeding, there is no question that this Court, at a minimum, may hear this dispute and then submit proposed findings of fact and conclusions of law to the District Court pursuant to 28 U.S.C. § 157(c)(1). The remaining question therefore is whether this Court, rather than only hearing the dispute and then submitting proposed finding of facts and conclusions of law, may instead hear and determine the merits of the suit and then enter judgment. The Court may do so under either of the following statutes: (1) if all parties have consented to this Court adjudicating the dispute and entering a judgment pursuant to 28 U.S.C. § 157(c)(2); or (2) even if all parties have not consented, if the suit is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(1). Here, the Veldekens and GE expressly consented to this Court trying the suit when they filed their Agreed Motion for Referral in District Court on October 14, 2005 [Docket No. 104, Ex. A; Findings of Fact Nos. 34-35], so the Court may try the suit and then enter judgment pursuant to 28 U.S.C. § 157(c)(2).[16]

The fact that the Veldekens now want to try this lawsuit elsewhere is of no moment. By affirmatively representing to District Judge Gilmore that they wanted her to refer this suit to the undersigned bankruptcy judge for final adjudication, the Veldekens have waived any right they may

[16] It is worth noting that on October 19, 2005, when the suit was referred to this Court, the only parties were the Veldekens and GE. [Docket No. 1.] Since that date, the Veldekens have added Thomason and Newbanks as defendants. Counsel for both Thomason and Newbanks have stated on the record that they consent to this Court adjudicating the suit and entering judgment.

have had to prosecute their claims in the District Court or any state court.[17] The Court arrives at this conclusion based upon two Fifth Circuit cases: *McFarland v. Leyh* (*In re Texas General Petroleum Corp.*), 52 F.3d 1330 (5th Cir. 1995) and *M.A. Baheth Construction Co. v. Schott* (*In re M. A. Baheth Construction Co.*, 118 F.3d 1082 (5th Cir. 1997). In both of these cases, the party seeking to avoid a trial in bankruptcy court failed to object to the bankruptcy court entering a final judgment. *Id.* In each instance, the Fifth Circuit held that the failure to object allowed the bankruptcy court to hold trial and enter judgment. *Baheth,* 118 F.3d at 1084 ("Furthermore by failing to object to the bankruptcy court's assumption of core jurisdiction, [the Debtor] impliedly consented to the court's entry of final judgment. Thus, the bankruptcy court was statutorily authorized to enter judgment in this case, *even if the matter could be characterized as non-core.*" (emphasis added and citations omitted)); *Texas Gen. Petroleum*, 52 F.3d at 1337 ("By failing to object in the bankruptcy court, [the party] *consented impliedly to the court's assumption of core jurisdiction* . . . . We conclude that [the party's] failure to object to bankruptcy court jurisdiction allowed the court to enter judgment against him.")(emphasis added).

In the dispute at bar, *the consent of the Veldekens is not implied; it is express.* The Veldekens, through their counsel, signed the Agreed Motion for Referral to the United States Bankruptcy Court for the Southern District of Texas, Houston Division and represented to District Judge Gilmore that they "agree that the Bankruptcy Court may hear and determine this case, and may enter appropriate final orders or judgment, pursuant to 28 U.S.C. § 157. To the extent necessary, the

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[17] The Veldekens have asked this Court to recommend withdrawal of the Referral Order as alternative relief if this Court will not remand the Adversary Proceeding to state court. This Court has written a Report and Recommendation to the District Court and recommends that the District Court not withdraw the Referral Order. A true and correct copy of the Report and Recommendation is attached to this Memorandum Opinion.

parties consent to the entry of final orders or judgment in this case by the Bankruptcy Court." [Docket No. 104, Ex. A, ¶ 3.] In order to escape from this Court, the Veldekens may not now recant what they represented to District Judge Gilmore. To bless this tactic would be to endorse blatant forum shopping and undermine judicial efficiency and economy.

C. Even if this Court is incorrect that it should rely on case law regarding a bankruptcy court's jurisdiction on pre-confirmation filed lawsuits, but rather should rely upon case law regarding post-confirmation filed lawsuits, this Court nevertheless has subject matter jurisdiction over the Adversary Proceeding.

1. The case law regarding a bankruptcy court's jurisdiction over suits filed post-confirmation has developed a more exacting test than the test for bankruptcy court jurisdiction over pre-confirmation filed suits.

The Veldekens contend that this Court, in determining whether it has subject matter jurisdiction, must focus on the fact that the Plan has been confirmed and that therefore the applicable cases are the opinions that focus on lawsuits filed after plan confirmation.[18] As noted previously, the Court disagrees with this argument based upon the Court's interpretation of the Fifth Circuit's holding in *Garlock*. However, if this Court is wrong and the Veldekens' argument is correct, then application of the case law involving post-confirmation filed suits nevertheless leads this Court to conclude that it has jurisdiction over the Adversary Proceeding.

As a starting point, there is no question that analysis of a bankruptcy court's subject matter jurisdiction over post-confirmation suits must begin with 28 U.S.C. § 1334(b). *In re U.S. Brass*, 301

[18] It is worth noting that the Veldekens cite cases which involves lawsuits that were filed after confirmation of a Chapter 11 plan. They cite no case where, as here, the suit was filed pre-confirmation but was still unadjudicated by the date of the confirmation hearing, and thus was a pending suit that still needed to be tried at some point after confirmation of the Plan. This Court believes that under this scenario, the applicable cases are those opinions analyzing jurisdiction over lawsuits that were filed pre-confirmation. However, for purposes of this section III.C., this Court will assume, as the Veldekens clearly have, that the applicable cases for analyzing jurisdiction are those opinions discussing a bankruptcy court's jurisdiction over suits filed after confirmation of a plan.

F.3d 296, 303-304 (5th Cir. 2002); *In re Coho Energy, Inc.*, 309 B.R. 217, 220 (Bankr. N.D. Tex. 2004). As noted previously, 28 U.S.C. § 1334(b) defines jurisdiction conjunctively as either "arising under," "arising in," or "related to" a case under Title 11. Therefore, jurisdiction certainly exists if the post-confirmation pending lawsuit is at least related to the Chapter 11 case. *In re U.S. Brass*, 301 F.3d at 304 ("Therefore, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy."). Because 28 U.S.C. § 1334 does not expressly limit bankruptcy court jurisdiction upon plan confirmation, *Id.*, it is necessary to look to case law to determine the extent of such jurisdiction. In *Majestic Energy*, which concerned a pre-confirmation filed suit, the Fifth Circuit used *Wood*'s extremely broad definition of the meaning of "related to" in analyzing whether the suit came within the jurisdictional grant of 28 U.S.C. § 1334(b). Now, in analyzing whether a suit filed post-confirmation comes within 28 U.S.C. § 1334(b), the question is whether the same expansive *Wood* definition of "related to" used in *Majestic Energy* for pre-confirmation filed suits also applies to post-confirmation filed suits?[19]

In the Fifth Circuit, the answer is resoundingly in the negative. The watershed case is *In re Craig's Stores of Texas, Inc.*, 266 F.3d 388 (5th Cir. 2001). There, 18 months after a plan was confirmed, the reorganized debtor sued a bank asserting state law claims. The debtor argued that the bankruptcy court had "related to" jurisdiction under 28 U.S.C. § 1334(b) because, using the

[19] In *Bankruptcy Trading & Investments v. Chiron Financial Group, Inc.*, which involved a suit filed post-confirmation, the District Court stated, "Use of the 'related to' test for 28 U.S.C. § 1334 jurisdiction is not appropriate, however, because [the debtor's] bankruptcy reorganization plan has been confirmed." 342 B.R. at 478. This Court, with utmost respect for the District Court, disagrees with this statement. 28 U.S.C. § 1334(b) does not expressly limit bankruptcy court jurisdiction in post-confirmation pending suits. Accordingly, the "related to" analysis still needs to be done. The key inquiry is whether the scope of the phrase "related to" is different for post-confirmation suits than it is for pre-confirmation suits.

Wood definition of "related to," the outcome of the suit "could conceivably have an effect on the debtor's estate." *Id.* at 390.

In ruling against the debtor, the Fifth Circuit expressly rejected use of the *Wood* definition of "related to" for analyzing whether a bankruptcy court has jurisdiction of a suit filed post-confirmation. The Fifth Circuit stated that:

> Some circuits have utilized this theory [i.e. the expansive definition of "related to" used in *Wood*, 825 F.2d 90], which originated to describe the scope of bankruptcy jurisdiction during the pendency of the case, to assess jurisdiction after confirmation of a reorganization plan, but they have not applied it on post-confirmation facts like those before us. [citations omitted]
>
> The more persuasive theory of post-confirmation jurisdiction, however, attached critical significance to the debtor's emergence from bankruptcy protection. As the Seventh Circuit put it,
>
> > Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens.
>
> [citations omitted] *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.* [citations omitted] No longer is expansive bankruptcy court jurisdiction required to facilitate "administration" of the debtor's estate, for there is no estate left to reorganize. This theory has antecedents in our court's jurisprudence, which has observed that the reorganization provisions of the former Bankruptcy Act "envisage[ ] that out of the proceedings will come a newly reorganized company capable of sailing forth in the cold, cruel business world with no longer the protective wraps of the federal Bankruptcy Court." [citations omitted] Because it comports more closely with the effect of a successful reorganization under the Bankruptcy Code than the expansive jurisdiction cases, we adopt this more exacting theory of post-confirmation bankruptcy jurisdiction. (emphasis added)

Id. at 390-391.

The emphasized language above is the Fifth Circuit's definition of "related to" for suits filed post-confirmation. If the suit concerns "matters pertaining to the implementation or execution of

the confirmed plan," then the suit is "related to" and the bankruptcy court has jurisdiction over the suit; otherwise, the court does not.

In *Craig's Stores*, the Fifth Circuit held that the bankruptcy court did not have jurisdiction because the facts reflected that the suit in no way pertained to the implementation or execution of the Plan. The Fifth Circuit focused on three factors in arriving at this conclusion. First, the court noted that the debtor's claim dealt with post-confirmation relations between the debtor and the bank. *Id.* at 391. Second, the court noted that there was no antagonism or claim pending between the parties as of the date of the reorganization (i.e. the date of the confirmation of the plan). *Id.* Finally, the court noted that the causes of action asserted by the debtor did not bear on the interpretation or execution of the confirmed plan. *Id.*

In *U.S. Brass*, the Fifth Circuit once again examined whether a suit filed post-confirmation came within the jurisdiction of the bankruptcy court. Applying the more exacting *Craig's Stores* test for jurisdiction over suits filed post-confirmation, the Fifth Circuit held that the bankruptcy court did have jurisdiction because:

> the [parties opposing jurisdiction] rely on the Bankruptcy Code's prohibition on the modification of a substantially consummated plan of reorganization. The [debtor and other parties supporting jurisdiction] contend, on the other hand, that their proposed agreement—including the arbitration provision—is fully consistent with the plan. Bankruptcy law will ultimately determine this dispute and the outcome could affect the parties' post-confirmation rights and responsibilities. Furthermore, this proceeding will certainly impact compliance with or completion of the reorganization plan.

In re U.S. Brass, 301 F.3d at 305.

In the wake of the holdings in *Craig's Stores* and *U.S. Brass*, the Veldekens strenuously insist that the Fifth Circuit's more exacting definition of "related to" applies to the Adversary Proceeding at bar, and that its application must lead to the conclusion that this Court does not have

subject matter jurisdiction. This Court disagrees that the *Craig's Stores* definition of "related to" applies because, unlike the facts in that case, where the debtor's suit was filed well after confirmation of the plan, here the suit was filed several months before the Plan's confirmation; and, therefore, the *Wood* definition of "related to" applies instead of the *Craig's Store* definition.[20] Nevertheless, even if the Veldekens are correct and this Court applies the more exacting *Craig's Stores* test to the Adversary Proceeding, this Court still concludes that it has jurisdiction over this dispute.

2. The more exacting test articulated in *Craig's Stores*, when applied to this Adversary Proceeding, nevertheless leads to the conclusion that this Court has subject matter jurisdiction over this dispute.

In *In re Encompass Services Corp.*, 337 B.R. 864 (Bankr. S.D. Tex. 2006), this Court reviewed six pertinent factors, based on the Fifth Circuit's decisions in *Craig's Stores* and *U.S. Brass,* and the case law applying those holdings,[21] that are relevant to a subject matter jurisdictional inquiry concerning post-confirmation suits. These factors are as follows:

> (1) when the claim at issue arose; (2) what provisions in the confirmed plan exist for resolving disputes and whether there are provisions in the plan retaining jurisdiction for trying suits; (3) whether the plan has been substantially consummated; (4) the nature of the parties involved; (5) whether state law or bankruptcy law applies; and (6) indices of forum shopping.

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[20] There is a noteworthy factual difference between *Craig's Stores* and *U.S. Brass*. The dispute in *U.S. Brass* arose from action that occurred pre-petition and claims were filed in the bankruptcy case. The confirmed plan resolved these claims by requiring that they "be asserted 'by institution of litigation in a court of competent jurisdiction.'" *In re U.S. Brass*, 301 F.3d at 300. After confirmation of the plan, state court suits were filed. *Id.* at 302. Despite the occurrence giving rise to the dispute occurring pre-petition, and the claim being specifically addressed in the plan, the Fifth Circuit still applied the *Craig's Stores* test for post-petition filed suits. *Id.* at 304-05. Whether the Fifth Circuit did so because the suit in *U.S. Brass* was not actually filed until after plan confirmation is unclear. While one could logically conclude that this is the reason, the Fifth Circuit has simply not yet ruled on this specific issue.

[21] *See Coho Oil & Gas, Inc. v. Finley Res., Inc.* (*In re Coho Energy, Inc.*), 309 B.R. 217, 220-221 (Bankr. N.D. Tex. 2004), in which the Honorable Barbara J. Houser, United States Bankruptcy for the Northern District of Texas, provides an excellent synthesis of the holdings in *U.S. Brass* and *Craig's Stores*.

In re Encompass, 337 B.R. at 873.

Applying these factors to the instant Adversary Proceeding produces the following conclusions:

a. When the claim at issue arose

Unlike the plaintiffs in *Craig's Stores*, the Veldekens filed their lawsuit pre-confirmation. Exercising jurisdiction over a lawsuit filed pre-confirmation does not implicate the Fifth Circuit's concern in *Craig's Stores* that parties will attempt to come running back into bankruptcy court every time a problem arises. In fact, "adopting a rule that would divest federal courts of subject matter jurisdiction over actions 'related to' a bankruptcy estate as the confirmation of the reorganization plan grew near would create perverse incentives for the parties to engage in delay and gamesmanship in both the bankruptcy reorganization and the related litigation." *In re Worldcom, Inc. Secs. Lit.*, 294 B.R. 553, 557 (S.D.N.Y. 2003).

The advisory committee notes to Bankruptcy Rule 3020 also support a finding that a bankruptcy court should retain jurisdiction over lawsuits that were filed pre-confirmation. The notes to Rule 3020(d) provide that after confirmation, the court's jurisdiction encompasses "*matters pending before it prior to confirmation* and to continue to administer the estate as necessary." Advisory Committee Notes to Bankr. R. 3020(d) (emphasis added).[22] Because the Veldekens' suit was "pending before [this Court] prior to confirmation," this Court's retention of jurisdiction over the claims seems appropriate. *Id.*; *Cf. In re Reliant Exploration Ltd.*, 336 B.R. 286, 291 (Bankr. S.D.

[22] Rule 3020 itself states that "[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." Bankr. R. 3020(d). In the case at bar, because the Debtor's estate no longer exists, there is no estate left to administer. However, the committee notes make clear that no estate is necessary for jurisdiction to exist as long as the matter was pending before the court "prior to confirmation." Advisory Committee Notes to Bankr. R. 3020(d).

Tex. 2005) (finding that "the Court did not retain power to indefinitely oversee" the parties' performance under the ORRI Conveyance because "the interpretation of and the parties performance under the ORRI Conveyance were *not* matters pending 'prior to confirmation.'") (emphasis added). In sum, this first factor weighs in favor of a finding that this Court has jurisdiction over the Adversary Proceeding.

b. Provisions in the confirmed plan

i. Retention of jurisdiction

The Plan specifically provides for the retention of jurisdiction. [Main Case No. 05-35291; Docket No. 621, at Article 11.] Some courts emphasize the importance of having a jurisdiction-retention provision in the plan when considering a bankruptcy court's post-confirmation jurisdiction. *See Enron Corp. v. Credit Suisse First Boston, Inc.* (*In re Enron Corp. Sec. & ERISA Litig.*), No. G-05-0012, H-01-3624, 2005 WL 1745471, at *5 (S.D. Tex. July 25, 2005) (noting that "[t]he Second Circuit is among courts that require such a jurisdiction retention clause be included in the plan as a prerequisite for post-confirmation assertion of jurisdiction by the bankruptcy court.") (citations omitted). The Fifth Circuit, however, has made clear that jurisdiction-retention provisions are not controlling. *See In re U.S. Brass*, 301 F.3d at 303 ("[T]he source of the bankruptcy court's subject matter jurisdiction is neither the Bankruptcy Code nor the express terms of the Plan. The source of the bankruptcy court's jurisdiction is 28 U.S.C. §§ 1334 and 157.") (quoting *United States Tr. v. Gryphon at the Stone Mansion, Inc.*, 216 B.R. 764, 769 (W.D. Pa. 1997), aff'd, 166 F.3d 552 (3d Cir. 1999)). While this Court acknowledges that the retention of jurisdiction provision in the Plan does not create jurisdiction, the presence of the provision at least ensures that jurisdiction cannot be lacking based on an absence of the provision. *See In re Coho Energy, Inc.*, 309 B.R. at 219 n.4

(Bankr. N.D. Tex. 2004) ("[A] plan which fails to retain subject matter jurisdiction may leave it lacking, but a plan cannot create jurisdiction where it does not otherwise exist."). Accordingly, this factor weighs in favor of a finding that this Court has jurisdiction over the Adversary Proceeding.

ii. Language in the plan

The Adversary Proceeding implicates the implementation of the Plan because the Plan expressly provides that GE's exit financing is a means for implementation of the Plan. [*See* Main Case No. 05-35291; Docket No. 619, at Article 8.1 (Under the heading "Means for Implementation of the Plan," the Plan states that: "Funding for the Reorganized Debtor's continuing operations of the hospitals will be provided by, and under the terms of, the GE Exit Financing.")]. As discussed above in Section III.B., the outcome of this proceeding could jeopardize GE's exit financing. Therefore, this Adversary Proceeding directly relates to effectuating the Plan. Thus, the language of the Plan favors a holding that this Court has jurisdiction over the Adversary Proceeding.

iii. Facts and law arising from the plan

As noted above, the language of the Plan expressly provides for GE's exit financing and resolution of the claims in this Adversary Proceeding could jeopardize the Debtor's continued financing from GE. "[T]he prosecution of the claims in this proceeding will thus impact compliance with, or completion of, the Plan." *See In re Coho Energy*, 309 B.R. at 221 (applying the principles for post-confirmation jurisdiction established in *Craig's Stores* and finding that post-confirmation jurisdiction existed).

Thus, the provisions in the Plan weigh heavily in favor of a finding that this Court has jurisdiction over the Adversary Proceeding.

c. Whether substantial consummation has occurred

"An action impacting a confirmed, but not substantially consummated plan would have an impact on the debtor-creditor relationship, a factor which favors continuing jurisdiction." *In re Encompass Servs. Corp.*, 337 B.R. at 875 (citing *In re Craig's Stores*, 266 F.3d at 391). In the present case, the Plan was confirmed on May 8, 2006 and became effective on June 30, 2006. [Main Case No. 05-35291; Docket No. 663.] The lawsuit filed by the Veldekens was commenced much earlier, April 19, 2005, in state court. [Docket No. 71, Exhibit 4.] Considering that the Effective Date occurred only recently, substantial consummation of the Plan has likely not occurred or has just recently occurred. Moreover, as noted above in Section III.B., the outcome of this Adversary Proceeding will affect the continued viability of the Plan. These circumstances weigh in favor of this Court's continuing jurisdiction.

d. Parties involved

Independently viewed, the fact that this Adversary Proceeding involves only non-debtors supports a finding of no jurisdiction. Nevertheless, while the parties in the instant suit are non-debtors, the outcome of this litigation, as discussed in Section III.B. above, could substantially affect the Debtor and the implementation of the Plan. A court may still maintain jurisdiction over non-debtor adversary proceedings, especially when "the claims at issue . . . deal with the parties' pre-petition relationship with the Debtor . . . . [and] prosecution of the claims asserted . . . is integral to implementation of the Plan." *Pam Capital Funding, L.P. v. New NGC, Inc.* (*In re KEVCO, Inc.*), 309 B.R. 458, 468 (Bankr. N.D. Tex. 2004) (finding post-confirmation jurisdiction existed in a non-debtor action where "the *Craig's Stores* test for post-confirmation jurisdiction was satisfied."). For these reasons, this fourth factor, on balance, slightly weighs in favor of this Court not having jurisdiction over the Adversary Proceeding.

e. Whether state law or bankruptcy law applies

The claims at issue are governed by Texas law. Therefore, this factor arguably weighs more in favor of a finding of no jurisdiction. It is nevertheless the case that a bankruptcy court may have jurisdiction over a proceeding in which only state law issues are present. *See Enron Corp. v. J.P. Morgan Chase & Co. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 314 B.R. 354, 355-357 (Bankr. S.D. Tex. 2004) (finding that despite the presence of "only state-law claims," bankruptcy jurisdiction existed and remand was not proper because the "claims [were] related to the bankruptcy proceeding with intertwined factual and legal issues."). Moreover, while the issues themselves do not implicate bankruptcy law, the outcome of this proceeding could significantly affect the Plan, as discussed in Section III.B. This Court has already devoted substantial time to this Adversary Proceeding, including full day hearings on the Veldekens' Application for Temporary Restraining Order and the Defendants' Motions for Summary Judgment. This Court is therefore familiar with the state law that applies in this dispute. Judicial efficiency and economy would be enhanced if this Court adjudicates this suit to conclusion. For all of these reasons, this fifth factor, on balance, argues in favor of this Court's continuing jurisdiction.

f. Indices of forum shopping

The Veldekens compare the lawsuit at bar to the suit in *Encompass* and conclude that "[n]one of the [six] factors support post-confirmation jurisdiction." [Docket No. 61, at 7.] While this Court strongly disagrees with the Veldekens' contention that none of the *Encompass* factors support jurisdiction, this Court does find that the Veldekens' comparison to *Encompass* is especially pertinent on the issue of forum shopping; just as the plaintiff in *Encompass* attempted to engage in egregious forum shopping, so have the Veldekens. When the Veldekens joined GE in filing the

Agreed Motion for Referral in the District Court, they agreed that this Bankruptcy Court "may hear and determine this action, and may enter appropriate final orders or judgment." [Docket No. 13, Exhibit 14.] After this Court confirmed the Plan on May 8, 2006, the Veldekens, without contesting jurisdiction, filed a motion for a Scheduling Conference and for Entry of a Pretrial Scheduling Order. [Docket No. 80.] Only after the Defendants had filed Motions for Summary Judgment, and only four days before the summary judgment hearing, did the Veldekens decide to try their luck in a different forum by filing their initial Motion to Abstain and to Remand.[23] The Veldekens now wish to litigate in state court apparently because they now believe that they will lose in this Court on the merits of the summary judgment motions. The judicial system should not tolerate such "illegitimate gamesmanship." *See In re Encompass*, 337 B.R. at 876 ("All courts should attempt to protect both the state and federal court systems from the illegitimate gamesmanship involved in forum shopping.") (quoting *In re Republic Reader's Serv. Inc.*, 81 B.R. 422, 428 (Bankr. S.D. Tex. 1987)). Therefore, this Court believes that although the Fifth Circuit has not expressly identified forum shopping as a factor in determining post-confirmation jurisdiction, and although parties may generally challenge subject matter jurisdiction at any time, courts should be weary of parties that attempt to play fast and loose with the courts by forum shopping. *See In re Republic Reader's Serv. Inc.*, 81 B.R. at 428.

Here, the Veldekens have played as fast and loose as their counterparts did in *Encompass*. The only difference is that in *Encompass*, the forum-shopping plaintiff wanted *this Court* to adjudicate the dispute after a California state court had issued a judgment against it; whereas, here,

[23] The Veldekens subsequently amended their initial Motion to Abstain and Remand by filing the Amended Motion on June 23, 2006. [Finding of Fact 49.]

the Veldekens want any court *other than this Court* to adjudicate the dispute because this Court has already denied their Application for a Preliminary Injunction. Now, on the eve of a hearing on the Defendants' Motions for Summary Judgment, the Veldekens are fearful of this Court granting these motions. In both instances, the forum shopping was blatant and contrary to promoting fairness and judicial efficiency and economy. Parties who forum shop in an effort to get a second bite at the litigation apple must be stopped in their scheming tracks. The sixth factor here unequivocally favors this Court's continuing jurisdiction.

In sum, four of the six factors, in various degrees, weigh in favor of a holding that this Court has subject matter jurisdiction. With respect to the two other factors, at first blush, the fact that the parties involved are non-debtors and that Texas law governs the dispute weigh in favor of this Court not retaining jurisdiction. However, these two factors cannot be viewed independently. These factors must be viewed in light of the Adversary Proceeding's potential effect on the implementation of the Plan. *See In re Craig's Stores*, 266 F.3d at 390 (After plan confirmation, "bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan."). When viewed in this light, the post-confirmation test in *Craig's Stores* is satisfied. The fact that the claims arose pre-petition, that the lawsuit itself was filed many months prior to confirmation of the Plan, that this Court has spent substantial time on the substantive issues of the Adversary Proceeding, that the Plan contains express jurisdictional provisions, and that the effect of the suit could greatly affect the Plan support this conclusion. *See Id.* at 391. The Veldekens' flagrant forum-shopping at the eleventh hour further supports such a ruling. In sum, the six factors combined lead to the conclusion that this Court has jurisdiction over the Adversary Proceeding under the more exacting test initially articulated in *Craig's Stores*.

IV. CONCLUSIONS OF LAW REGARDING PERMISSIVE AND MANDATORY ABSTENTION

Even if this Court does have subject matter jurisdiction over the Adversary Proceeding, the Veldekens, in their Motion to Abstain, assert that this Court should mandatorily abstain under 28 U.S.C. § 1334(c)(2).[24] Alternatively, the Veldekens ask this Court to permissively abstain from hearing this proceeding under 28 U.S.C. § 1334(c)(1). The Court now addresses these issues in turn. It is worth noting that unlike the analysis of subject matter jurisdiction–which required this Court to test jurisdiction in the past, i.e. as of October 19, 2005–the analysis for abstention is done as of the date of the filing of the Motion to Abstain.[25]

A. Mandatory abstention under 28 U.S.C. § 1334(c)(2) is not appropriate.

28 U.S.C. § 1334(c)(2) provides that:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, 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.

Accordingly, under this statute, a bankruptcy court must abstain from hearing a state law claim or cause of action if the following requirements are satisfied: (1) a motion has been timely filed requesting abstention; (2) the cause of action or claim is essentially one that is premised on state law; (3) the claim is a non-core proceeding, i.e., it is "related to" a case under title 11 but does not

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[24] Hereinafter, reference to the phrase "Motion to Abstain" refers to that part of the Amended Motion requesting this Court to abstain.

[25] Therefore, the "live" pleading for the Veldekens under this analysis is their First Amended Complaint, which was filed on November 4, 2005. [Finding of Fact 25.] The First Amended Complaint contains the same causes set forth in the Original Petition filed in state court, plus several additional causes of action.

arise under or in a case under Title 11; (4) the proceeding could not otherwise have been commenced in federal court absent federal jurisdiction under 28 U.S.C. § 1334(b); (5) an action has been commenced in state court; and (6) the action could be adjudicated timely in state court. *Broyles v. U.S. Gypsum Co.*, 266 B.R. 778, 782-83 (E.D. Tex 2001) (In analyzing a law suit filed pre-petition that was still pending prior to plan confirmation, the court found that all elements of mandatory abstention were met and therefore remanded the suit to state court); *see also J.T. Thorpe Co. v. Am. Motorists*, 2003 WL 23323005, No. Civ.A. H-02-4598 (S.D. Tex. June 9, 2003).

Application of the six factor test described above leads this Court to conclude that mandatory abstention is inappropriate because at least three of the six requirements are not satisfied.

1. The Veldekens' Motion to Abstain is not timely.

In *Broyles*, the movant filed a motion to abstain on the twenty-first day following the removal of the state court suit. *Broyles*, 266 B.R. at 783. In *Thorpe*, the movant sought abstention and remand less than 30 days after the opposing party had removed the suit to federal court. *Thorpe*, 2003 WL 23323005, at*1. In the case at bar, the Veldekens did not request this Court to abstain until more than eight months after GE removed the suit. Indeed, upon removal, the Veldekens expressly requested the District Court to refer the suit to this Court for adjudication. The Veldekens only requested abstention after this Court had, at their request, held a lengthy, full day hearing on their Application for a Preliminary Injunction–which resulted in a ruling against them–and after all three Defendants had filed Motions for Summary Judgment. These circumstances underscore the untimeliness of the Veldekens' Motion to Abstain. *Vig v. Indianapolis Life Insurance Co.*, 336 B.R. 279, 285 (S.D. Miss. 2005) ("The court agrees that mandatory abstention does not apply, but only for one of the reasons submitted by defendants, which is, the plaintiffs did not file a timely request

for abstention, for more than ten months passed between the date of removal and the date plaintiffs finally moved to remand.").

Even if timeliness should be analyzed from the date of confirmation of the Plan as opposed to the date of removal–and this Court does not believe such analysis is appropriate–the Veldekens' Motion is still untimely. If the Veldekens really believed that confirmation of the Plan deprived this Court of jurisdiction, then one would think that they would have filed their Motion to Abstain immediately after May 8, 2006 (i.e. the Plan confirmation date). Yet, they did not do so. Rather, two weeks after the Plan was confirmed, they filed a Motion for a Rule 7016 Scheduling Conference and for Entry of a Pre-trial Scheduling Order. Hence, as of May 23, 2006, not only did the Veldekens *not* want this Court to abstain; they wanted this Court to go forward and adjudicate the dispute. It was only after Thomason filed his answer and his Motion for Summary Judgment that the Veldekens, no doubt mindful that this Court denied their Application for Preliminary Injunction, decided to seek abstention. Apparently, the Veldekens concluded that because this Court had confirmed the Plan, they could rely on *Craig's Stores* to argue that this Court no longer has subject matter jurisdiction. They therefore filed the Motion to Abstain on June 16, 2006, more than a month after confirmation of the Plan. Under these circumstances, the Veldekens' Motion to Abstain is untimely.

In sum, the Veldekens fail to satisfy this first requirement of timeliness.

2. State law causes of action

The causes of action asserted by the Veldekens are premised on state law. This second requirement is therefore met.

3. Is the Adversary Proceeding core or non-core?