

1 case law, for the reasons explained below, the Court grants the
2 motion to dismiss for lack of subject matter jurisdiction.

3
4 **I. FACTS**

5 Debtor's Chapter 11 Plan (the "Plan") was confirmed on
6 February 4, 2014. Prior to confirmation, the Debtor sold the real
7 property at 2585 El Camino Real, Santa Clara, CA (the "Property")
8 and paid off the Bank's filed claim (\$3,108,731.73) in full. The
9 Bank's escrow demand of \$3,380,105 included approximately \$250,000
10 in default interest charged between November 2009 and August 2011.
11 Debtor disputed the default interest but agreed to pay the entire
12 amount so the sale could close, reserving its right to challenge
13 the additional amounts after the sale, post-confirmation. Debtor
14 reserved \$25,000 of sale proceeds as an estimate of attorney's fees
15 and costs the Bank might incur in litigating the dispute regarding
16 the escrow demand. The Plan was confirmed over the Bank's objection
17 on the basis that:

18 Cathay Bank's claim in this bankruptcy was paid in full
19 from the proceeds of the sale of the Property. Cathay
20 Bank does not set forth any basis for why the \$25,000
21 that was set aside by the Debtor is subject to the Bank's
22 security interest. There is nothing in the order
23 approving the sale that specifically provides for a lien
24 to attach to any funds in excess of the Bank's claim.
25 Nor has the Bank stated any basis for why Debtor cannot
26 pursue recovery of any overpayment post-confirmation.
27 Confirmation of the plan will not prevent the Bank from
28 pursuing recovery of fees if the Reorganized Debtor
litigates the question of the Bank's escrow demand.

(Oral ruling, 1/27/14).

26 **A. The Plan**

27 The Plan expressly reserves Debtor's "right to dispute the
28 amount paid and seek a refund of any excess payment, and object to

1 any amended Proof of Claim filed by CATHAY BANK." (¶ 4.4). The Plan
2 further provides a deadline for objections to claims of 30 days
3 after the Effective Date or 30 days after a proof of claim has been
4 filed and served (¶ 6.3).

5 Article VIII of the Plan further provides that all causes of
6 action held by Debtor and/or the estate on the petition date shall
7 be transferred to the Reorganized Debtor, including "all claims
8 against Creditors of the Debtor, including claims for overpayment
9 from the sale of the 2585 Property The Reorganized Debtor
10 shall have all rights to commence and pursue any and all Causes of
11 Action, . . . in any court or other tribunal, including without
12 limitation, in an adversary proceeding filed in the Bankruptcy
13 Court."

14 Article IX, Retention of Jurisdiction, provides:

15 9.0 The Bankruptcy Court shall retain exclusive
16 jurisdiction of the Proceedings pursuant to the
17 provisions of the Code until the Proceedings are closed
18 and further with respect to the following matters:

19 9.1. To classify, allow or disallow Claims, direct
20 distributions under the Plan and adjudicate all
21 controversies concerning classification or allowance of
22 any Claim.

23

24 9.4. To liquidate damages or estimate Claims in
25 connection with any disputed, contingent or unliquidated
26 Claim.

27

28 9.6. To adjudicate all Claims or controversies
arising out of any purchase, sale or contract made or
undertaken by the Debtor and/or the Reorganized Debtor
during the pendency of the Proceedings.

. . . .

9.16. Hear and finally adjudicate proceedings
initiated before or after the Confirmation Date and/or
the Effective Date regarding the prosecution of any

1 rights, Claims, Causes of Action or claims for relief
2 held by the Debtor and/or Reorganized Debtor against any
3 party, including but not limited to the recovery of funds
4 paid to Cathay Bank, BBCN Bank and/or the Santa Clara
5 County Tax Collector from the sale of the 2585 Property,
6 and subordination of Claims and Interests.

7 As set forth above, the Plan clearly envisions that the Debtor
8 and the Bank will litigate the Debtor's claims to the disputed
9 funds in the bankruptcy court. The Bank did not object to any of
10 these Plan provisions. It did not raise any of the current
11 jurisdictional arguments until after the Plan had been confirmed.

12 The Bank did not file an amended proof of claim. Nevertheless,
13 the parties stipulated to extend the deadline for Debtor to object
14 to the Bank's claim to May 21, 2014. On May 20, 2014, Debtor filed
15 an objection to the Bank's claim. A hearing was scheduled for July
16 10, 2014, and then continued to September 4, 2014. Prior to the
17 continued hearing, on August 28, 2014, the parties filed a joint
18 status conference statement indicating that Debtor would be filing
19 an adversary proceeding within the next 10 days. The matter was
20 taken off calendar. This adversary proceeding was filed October 2,
21 2014, approximately one month later.

22 On August 28, 2014, Debtor's counsel filed a letter in the
23 main case (docket no. 335) stating that the Plan had been
24 substantially consummated and that Debtor had paid \$1,520,755 to
25 allowed claims under the Plan. The letter further states: "All
26 administrative, priority, and unsecured claims have been paid under
27 the Plan, and Class 7 Investor Claims have been paid a dividend of
28 approximately 80%." The letter also states that there are two
unresolved matters concerning secured creditors, including the
dispute with the Bank. At the December 11, 2014 hearing, Debtor's

1 counsel stated that claims in subordinate classes (i.e., insiders)
2 had not yet been paid.

3
4 **B. The Complaint**

5 The complaint contains three claims: breach of contract,
6 declaratory relief, and objection to claim based on the Bank's
7 charging of approximately \$250,000 of default interest on the debt
8 owed to it from November 2009 and August 2011, after the loan had
9 matured and the Property had been placed into receivership, and
10 before the Bank had obtained an order in this case granting relief
11 from stay.

12 The Complaint alleges:

13 4. In January, 2007 Nobel acquired an undeveloped
14 parcel of real estate located at 2585 El Camino Real in
15 Santa Clara, California (the "Property") to develop as a
16 residential and commercial project. The acquisition was
17 partially financed by a loan from Cathay in the amount of
18 \$3.0M dollars secured by the Property (the "Cathay Loan")
19 pursuant to a Business Loan Agreement dated January 12th,
20 2007 ("Loan Agreement").

21 5. In accordance with the Loan Agreement, Nobel
22 executed a Promissory Note in the sum of \$3,000,000
23 ("Note"). Pursuant to the terms of the Note, Nobel was
24 required to make regular monthly payments of all accrued
25 interest beginning on February 20, 2007 until January 20,
26 2009, when the entire unpaid balance of principal and
27 interest would become due and owing.

28 6. As security for the Note, Nobel executed and
delivered a Deed of Trust dated January 12, 2007 ("Deed
of Trust") to Cathay whereby Nobel granted all of its
right, title and interest in the Property to Cathay.

7. On or about January 27, 2009, Cathay and Nobel
entered into a Loan Extension Agreement and Modification
of Note ("Extension Agreement"), pursuant to which, among
other things, the Parties extended the maturity date of
the Note until March 31, 2009.

8. On or about May 19, 2009, Cathay and Nobel
entered into a Change in Terms Agreement ("Change in
Terms Agreement") that: (1) extended the Maturity Date of
the Note to July 31, 2009; (2) changed the interest rate

1 to be applied to the unpaid principal on the Note to
2 .750% over the Bank's Index Rate; and (3) changed the
3 interest rate floor under the Note. The Loan Agreement,
4 Deed of Trust, Extension Agreement and Change in Terms
5 Agreement are collectively referred to as the "Cathay
6 Loan Documents".

7 9. The Cathay Loan matured on July 31, 2009 and
8 Cathay refused to either refinance or further extend the
9 maturity date, instead choosing to file Santa Clara
10 Superior Court Action No. 109-CV157962 titled Cathay Bank
11 v. Nobel Group, Inc. (the "Cathay Bank Action"). Cathay
12 requested and obtained a receiver in the Cathay Bank
13 Action to collect the rents and manage the Property.
14 Cathay also commenced a non-judicial foreclosure sale
15 against the Property, and the sale date was scheduled for
16 June 8, 2010. Nobel's Chapter 11 filing on the Petition
17 Date stayed the Cathay Bank Action and prevented the
18 Property from being lost to foreclosure.

19 10. Cathay filed a Proof of Claim in the Nobel
20 bankruptcy case in the amount of \$3,108,731.73 designated
21 as Claim No. 19 (the "Cathay Claim").

22 11. Cathay moved for relief from stay to allow it to
23 pursue the Cathay Bank Action and foreclose on the
24 Property. The matter was settled during trial and Nobel
25 and Cathay (referred to as the "Parties") worked out a
26 modified loan calling for monthly payments of \$14,502 for
27 the first six (6) months, and escalating to \$18,432 for
28 the remainder. Interest was to continue at the
"non-default rate", and the Parties were to bear their
own costs and attorneys' fees incurred after the Petition
Date. The Order on Cathay Bank's Motion for Relief from
the Automatic Stay Pursuant to 11 U.S.C §362(d)(2) was
entered on October 31, 2011. Nobel is informed and
believes that Cathay never advised Nobel it was accruing
default interest at any time prior to the entry of that
Order.

12 12. Nobel sold the Property to Silicon Sage
13 Builders, LLC ("SSB") (formerly known as "Silicon Valley
14 Builders") for \$6.1M, free and clear of liens and claims,
15 which were to be paid through escrow. The Purchase and
16 Sale Agreement ("PSA") called for an initial
17 non-refundable deposit of \$1.0M, a portion of which was
18 used to bring all payments to Cathay current. Escrow was
19 to close upon the earlier of 30 days from final approval
20 of the Tentative Map, or one year from the Sale Order.
21 The Sale Order was entered on November 16, 2012.

22 13. Escrow closed on October 8, 2013 upon SSB
23 obtaining the requisite entitlements for the Property.
24 Cathay made a \$3,380,105 escrow demand, a copy of which
25 is attached as Ex. 1. Nobel disputed the amount of
26 Cathay's demand to the extent it included approximately

1 \$250,000 in default interest between November, 2009 and
2 August, 2011, however Cathay refused to reduce its
3 demand. Rather than jeopardize the sale of the 2585
4 Property, Nobel agreed Cathay could be paid the full
5 amount it demanded from sale, and reserved the right to:
6 (1) dispute the amount paid; (2) seek a refund of any
7 excess payment once the Plan was confirmed; and (3)
8 object to any amended Proof of Claim filed by Cathay.

9
10 14. Cathay was paid the full amount [of] its demand
11 through escrow. A copy of the Closing Statement is
12 attached as Ex. 2. Nobel segregated and reserved \$25,000
13 from the proceeds of the sale of the 2585 Property, which
14 sum represents an estimate of attorneys' fees and costs
15 Cathay may be entitled to as a result of this dispute, in
16 the event Nobel is unsuccessful and Cathay is entitled to
17 attorneys' fees.

18
19 With respect to the First Claim for Relief for Breach of
20 Contract, the Complaint further alleges:

21 16. The Note states the following with respect to
22 default interest:

23 *"Upon default, the interest rate on this Note shall,
24 if permitted under applicable law, immediately increase
25 by adding a 5.000 percentage point margin (Default Rate
26 Margin). The Default Rate Margin shall also apply to each
27 succeeding interest rate charge that would have applied
28 had there been no default."*

17 17. The Change in Terms Agreement states the
18 following with respect to interest:

19 *"2. The interest rate to be applied to the unpaid
20 principal balance of the Note will be at a rate of 0.7500
21 percentage points over the index effective upon the
22 completion of this transaction."*

23 18. Cathay breached the Note by charging the Default
24 Rate Margin because:

25 • The Change in Terms Agreement waived the Default
26 Margin Rate. Nobel did not agree or consent to the
27 payment of the Default Rate Margin in addition to .7500
28 percentage points over the index.

• Nobel was not aware that Cathay secretly intended
to collect interest at the Default Rate Margin in
addition to .7500 percentage points over the index.
Cathay's misconduct precludes it from recovering default
interest at the Default Margin Rate.

1 •Cathay was not entitled to charge the Default
2 Margin Rate on the fully matured Note under California
3 law.

4 • Cathay was not entitled to collect default
5 interest under Bankruptcy Code § 506(b) because it was
6 undersecured at all times during which the default
7 interest was imposed.

8 • Imposition of the Default Margin Rate would harm
9 the unsecured creditors.

10 19. Cathay breached the Note by charging Nobel
11 default interest.

12 20. Nobel has fully performed all of its obligations
13 under the Note.

14 21. Nobel has been damaged as result of Cathay's
15 breach of the Note in the amount of the default interest
16 paid through the escrow of the sale of the Property.

17 22. Nobel has further been damaged to the extent it
18 paid Cathay's attorneys' fees and costs through the
19 escrow of the sale of the Property to which Cathay was
20 not entitled.

21 The Complaint prays for the following relief: (1) judgment in
22 an amount to be proven at trial for the default interest and
23 attorneys' fees paid to Cathay in connection with its escrow
24 demand; (2) a declaration that Cathay was not entitled to default
25 interest or attorneys' fees and an order of restitution of the
26 amounts overpaid; (3) an order sustaining Nobel's objection
27 Cathay's claim; and (4) costs and attorneys' fees.

28 **C. Motion to Dismiss**

The Bank moves to dismiss the Complaint in its entirety for
lack of subject matter jurisdiction. Alternatively, the Bank asks
the Court to abstain from hearing the claims. The Bank also seeks
dismissal of the second and third claims (for declaratory relief
and objection to claim) on the grounds that those claims are
duplicative of the breach of contract claim. With respect to the

1 claim for declaratory relief, the Bank also asserts that Debtor may
2 not seek restitution where a valid express contract covers the
3 subject matter of the dispute. Regarding the third claim for
4 objection to claim, the Bank asserts that the claim is time-barred.

5 The Bank also contends that the Court should decline to
6 exercise supplemental jurisdiction over the first and second claims
7 for relief, and should permissively abstain from hearing the entire
8 case.

10 II. ANALYSIS

11 Post-confirmation bankruptcy court jurisdiction is limited to
12 matters that affect the interpretation, implementation,
13 consummation, execution, or administration of the confirmed plan.
14 In re Resorts Int'l, Inc., 372 F.3d 154, 168-69 (3d Cir. 2004).
15 This so-called "close nexus" test has been adopted and applied in
16 the Ninth Circuit. In re Pegasus Gold Corporation, 394 F.3d 1189,
17 1194 (9th Cir. 2005); In re Wilshire Courtyard, 729 F.3d 1279, 1287
18 (9th Cir. 2013). "The close nexus test recognizes the limited nature
19 of post-confirmation jurisdiction but retains a certain
20 flexibility." Pegasus Gold, 394 F.3d at 1194. The close nexus test
21 requires "particularized consideration of the facts and posture of
22 the each case, as the test contemplates a broad set of sufficient
23 conditions and retains a certain flexibility." Wilshire Courtyard,
24 729 F.3d at 1289.

25 In Resorts Int'l, the Court of Appeals for the Third Circuit
26 examined the extent of a bankruptcy court's post-confirmation
27 jurisdiction. The court noted that after confirmation of a
28 reorganization plan, retention of bankruptcy court jurisdiction may

1 be problematic. This is because once a plan is confirmed, the
2 debtor-in-possession becomes the reorganized debtor, and, as a
3 general rule, the bankruptcy estate ceases to exist. Therefore, the
4 traditional test for "related to" jurisdiction - whether the
5 outcome of the proceeding could conceivably have any effect on the
6 estate being administered in bankruptcy - could not be met. Resorts
7 Int'l, 372 F.3d at 164-65 (citing Pacor, Inc. v. Higgins, 743 F.2d
8 984, 994 (3d Cir. 1984)).

9 But courts do not usually apply Pacor's "effect on
10 the bankruptcy estate" test so literally as to entirely
11 bar post-confirmation bankruptcy jurisdiction. As the
12 District Court correctly noted, though the scope of
13 bankruptcy court jurisdiction diminishes with plan
14 confirmation, bankruptcy court jurisdiction does not
15 disappear entirely. Post-confirmation jurisdiction is
16 assumed by statute and rule: 11 U.S.C. § 1142(b)
17 authorizes the bankruptcy court to "direct the debtor and
18 any other necessary party ... to perform any other act
19 ... that is necessary for the consummation of the plan,"
20 and Fed. R. Bankr.P. 3020(d) provides that
21 "[n]otwithstanding the entry of the order of
22 confirmation, the court may issue any other order
23 necessary to administer the estate." Although § 1142(b)
24 assumes that post-confirmation jurisdiction exists for
25 disputes concerning the consummation of a confirmed plan,
26 28 U.S.C. § 1334 remains the source of this jurisdiction.

27 Resorts Int'l, 372 F.3d at 165 (citations omitted).

28 Because bankruptcy court jurisdiction is conferred by statute,
parties to litigation cannot confer subject matter jurisdiction
where none exists.

Retention of jurisdiction provisions will be given
effect, assuming there is bankruptcy court jurisdiction.
But neither the bankruptcy court nor the parties can
write their own jurisdictional ticket. Subject matter
jurisdiction "cannot be conferred by consent" of the
parties. Where a court lacks subject matter jurisdiction
over a dispute, the parties cannot create it by
agreement, even in a plan of reorganization. Similarly,
if a court lacks jurisdiction over a dispute, it cannot
create that jurisdiction by simply stating it has
jurisdiction in a confirmation or other order. Bankruptcy
courts can only act in proceedings within their
jurisdiction. If there is no jurisdiction under 28 U.S.C.

1 § 1334 or 28 U.S.C. § 157, retention of jurisdiction
2 provisions in a plan of reorganization or trust agreement
3 are fundamentally irrelevant. But if there is
jurisdiction, we will give effect to retention of
jurisdiction provisions.

4 Resorts Int'l, 372 F.3d at 161 (citations omitted). See also In re
5 Captain Blythers, Inc., 311 B.R. 530, 538 (9th Cir. BAP 2004),
6 aff'd, 182 Fed. Appx. 708 (9th Cir. 2006); In re 350 Encinitas
7 Investments, LLC, 2007 WL 2669546, at *6 (S.D. Cal. Sept. 6, 2007),
8 aff'd, 313 Fed. Appx. 70 (9th Cir. 2009); United States v. Bond, 762
9 F.3d 255, 261 (2d Cir. 2014); In re Washington Mutual, Inc., 2012
10 WL 4755209 (Bankr. D. Del. Oct. 4, 2012) (citing Resorts Int'l, 372
11 F.3d at 169; In re BWI Liquidating Corp., 437 B.R. 160, 166 (Bankr.
12 D. Del. 2010); In re The Fairchild Corp., 452 B.R. 525, 532 (Bankr.
13 D. Del. 2011)); Quincy Medical Center v. Gupta, 2015 WL 58633, at
14 *4 (D. Mass. Jan. 5, 2015); In re Angel Fire Corp., 2012 WL
15 5880675, at *4-5 (Bankr. D.N.M. Nov. 20, 2012) (citing Insurance
16 Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456
17 U.S. 694, 702 (1982) (holding that no action of the parties can
18 confer subject matter jurisdiction upon a federal court, thus the
19 consent of the parties is irrelevant)).

20 Although the question of subject matter jurisdiction is to be
21 decided on the basis of the facts and circumstances of each case,
22 Wilshire Courtyard, 729 F.3d at 1289, it is helpful to examine the
23 cases to get a sense of the circumstances under which courts have
24 analyzed whether a bankruptcy court had post-confirmation
25 jurisdiction. The Court has reviewed a number of these cases. As a
26 general rule, the cases where a close nexus was found involved a
27 situation where resolution of the dispute would require the
28 bankruptcy court to interpret or enforce a provision of the

1 confirmed plan. See, e.g., Pegasus Gold, 394 F.3d at 1194
2 ("Resolution of these claims will likely require interpretation of
3 the Zortman Agreement and the Plan."); Wilshire Courtyard, 729
4 F.3d at 1289 ("the ultimate merits question depends in part on the
5 interpretation of the confirmed Plan."). Additionally, in Wilshire
6 Courtyard, the resolution of the claims required application of a
7 federal bankruptcy statute, 11 U.S.C. § 346. Id. at 1290-91.

8 Cases where courts found that the close nexus test was not met
9 include Resorts Int'l. There, nearly seven years after confirmation
10 of the plan, the trustee of a litigation trust formed pursuant to
11 the confirmed plan filed a malpractice claim against the
12 accountants for the litigation trust. In determining that the
13 bankruptcy court lacked subject matter jurisdiction over the
14 dispute, the Third Circuit Court of Appeals held that

15 the resolution of these malpractice claims will not
16 affect the estate; it will have only incidental effect on
17 the reorganized debtor; it will not interfere with the
18 implementation of the Reorganization Plan; though it will
19 affect the former creditors as Litigation Trust
20 beneficiaries, they no longer have a close nexus to
21 bankruptcy plan or proceeding because they exchanged
22 their creditor status to attain rights to the litigation
23 claims; and as stated, the jurisdictional retention plans
24 cannot confer jurisdiction greater than that granted
25 under 28 U.S.C. § 1334 or 28 U.S.C. § 157.

26 Resorts Int'l, 372 F.3d at 169.

27 In In re Valdez Fisheries Dev. Ass'n, Inc., 439 F.3d 545 (9th
28 Cir. 2006), the Court of Appeals found that the close nexus test
was not met where the post-dismissal determination of liability
between a creditor and the state of Alaska "could not conceivably
alter the debtor's rights, liabilities, options, or freedom of
action or in any way impact upon the handling and administration of
the bankrupt estate." Id. at 547-48.

1 The retention of jurisdiction provisions in the Plan clearly
2 indicate that the parties intend and agree to resolve the instant
3 dispute in this Court. Additionally, the Plan expressly provides
4 for recovery of the alleged overpayment to the Bank and provides
5 that the Plan will be funded in part through recoveries on "Causes
6 of Action," which includes the instant claims. However, under the
7 authorities cited above, these provisions do not confer
8 jurisdiction over this dispute in the bankruptcy court. Indeed,
9 they can be given little weight, as they are only effective if the
10 bankruptcy court has jurisdiction in the first instance.

11 The Court finds that the resolution of this dispute does not
12 affect the interpretation, implementation, consummation, execution,
13 or administration of the confirmed plan. First, the issues in the
14 adversary proceeding do not require the Court to interpret the
15 plan. Second, by the Debtor's own admission, the Plan has been
16 substantially consummated, notwithstanding the fact that
17 subordinated classes have yet to be paid. Third, the issues in the
18 adversary proceeding arise solely under state law. Despite Debtor's
19 characterization of its third claim for relief as an objection to
20 claim, there is no claim to object to. The Bank's filed claim has
21 been paid in full; the Bank never amended its claim. As far as the
22 bankruptcy estate is concerned, the Bank's claim no longer exists.

23 The Debtor's Plan has not been fully consummated. This Court
24 has found no cases that illuminate exactly what level of
25 "consummation" or "execution" would suffice to confer subject
26 matter jurisdiction. The only way the Court could find a close
27 nexus exists in this case is through a broad interpretation of
28 those terms, which is not supported in the existing case law.

1 Because the Plan provides for partial funding via any funds
2 recovered from the lawsuit between Debtor and the Bank, this
3 reasonably could be construed as part of the consummation or
4 execution of the Plan. However, the recovery of overpayment to the
5 Bank is not a primary or major component of the Plan. Additionally
6 and importantly, the Ninth Circuit has made clear that even if a
7 dispute could potentially increase recovery to creditors, that is
8 not a basis for finding that this Court has subject matter
9 jurisdiction. Pegasus Gold, 394 F.3d at 1194 n.1 (“[W]e are not
10 persuaded . . . that jurisdiction lies because the action could
11 conceivably increase the recovery to creditors. . . . such a
12 rationale could endlessly stretch a bankruptcy court’s
13 jurisdiction.”) (citing Resorts Int’l, 372 F.3d at 170; In re
14 Craig’s Stores of Texas, Inc., 266 F.3d 388, 391 (5th Cir. 2001)).

15 For these reasons, the Court finds that under the close nexus
16 test, this Court lacks jurisdiction over the claims in this
17 adversary proceeding. This is not a situation where this Court has
18 any discretion in the matter. Therefore, the Court need not address
19 the Bank’s remaining arguments.

20 Counsel for the Bank may submit a proposed form of order
21 dismissing the adversary proceeding.

22
23 *** END OF MEMORANDUM DECISION ***
24
25
26
27
28

Court Service List

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Parties to be served electronically.