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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) **CASE NO. 00-50369**
)
THE GIBSON-HOMANS COMPANY) **CHAPTER 11**
)
DEBTOR) **JUDGE MARILYN SHEA-STONUM**
)
) **ORDER DENYING MOTION TO**
) **DISMISS AND SCHEDULING**
) **STATUS CONFERENCE ON**
) **MOTION TO COMPEL**

This matter comes before the Court on Realtime Software Corporation's ("Realtime") "Motion for Order Compelling Gardner-Gibson and/or Debtor, as Their Obligations Appear, to Cure Defaults on Assigned Executory Contract and Pay Assignment Costs, or in the Alternative, Motion to Order Gardner-Gibson, Inc. to Immediately Relinquish Use of Software and Related Documentation; for Sanctions, Attorney Fees, Expenses and for Other Equitable Relief" (the "Motion to Compel") [docket #251], on Gardner-Gibson Inc.'s ("Gardner-Gibson") motion to dismiss the Motion to Compel (the "Motion to Dismiss") [docket #270] and on Realtime's opposition to the Motion to Dismiss (the "Response") [docket #277]. In its Motion to Dismiss, Gardner-Gibson contends that this Court is without subject matter jurisdiction to decide the Motion to Compel.

BACKGROUND

On February 15, 2000, The Gibson Homans Company ("debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On April 5, 2000, debtor filed a "Motion for Order (i) Approving the Sale of Substantially All of the Debtor's Assets, Free and Clear of Liens, Claims and Encumbrances, to Purchaser or Successful

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Competing Bidder, and (ii) Authorizing the Assumption and Assignment of Certain Executory Contracts and Leases in Connection Therewith" (the "Sale Motion") [docket #89]. Through the Sale Motion, debtor sought authority to sell substantially all of its assets to the Henry Company or to any other party who submitted a higher and better bid to purchase debtor's assets, in accordance with the terms and conditions of an April 3, 2000 Letter of Intent (the "Letter of Intent") and an April 13, 2000 Asset Purchase Agreement (the "Asset Purchase Agreement").¹

The Asset Purchase Agreement included the following provisions (capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Asset Purchase Agreement):

**ARTICLE 1
PURCHASE AND SALE**

* * *

1.3 Purchase Price. The purchase price for the Assets (the "Purchase Price") shall be the amount equal to the sum of:

- (a) Fifteen Million Dollars (\$15,000,000) . . . , subject to the possible adjustment set forth in Section 1.6 hereof, plus
- (b) Purchaser's assumption of the Assumed Liabilities described in Section 1.4(a) hereof.

Purchaser shall pay the Purchase Price by delivery of the Cash Portion of the Purchase Price as Provided in Section 1.2(c) and by the assumption of the Assumed Liabilities as described in Section 1.4(a) hereof.

¹ Pursuant to the "Order (i) Scheduling Hearing on and Prescribing Form and Manner of Notice and Hearing on Debtor's Motion to Sell Substantially all Assets and of Auction Sale in Connection Therewith, (ii) Approving Competitive Bidding Procedures and (iii) Approving Break-Up Fee in Favor of Proposed Purchaser" [docket #106], a qualified bidder was required to, *inter alia*, be prepared to execute an agreement containing similar terms to those set forth in the Asset Purchase Agreement.

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1.4 Assumption of Liabilities.

(a) Purchaser agrees that, at the time of the Closing, Purchaser shall assume and thereafter pay, perform or discharge, as the case may be, the following obligations and liabilities of Seller (the "Assumed Liabilities"):

(i) any cure payments required to be made in connection with the assumption of the Assigned Contracts and Leases up to a maximum of Seventy-Five Thousand Dollars (\$75,000) (the "Maximum Cure Amount");²

* * *

(iii) all obligations and liabilities arising after the Closing Date out of or in connection with the Assigned Contracts and Leases, it being understood that Purchaser is not liable for any liability arising prior to the Closing Date as to those Assigned Contracts and Leases designated on Schedule 1.1(b) except as set forth in Section 1.4(a)(i).

* * *

**ARTICLE 2
CLOSING**

* * *

2.2 Delivery of Schedules.

² The Purchase Price and Assumption of Liabilities section of the Letter of Intent set forth this same provision but also set forth that "[a]ny amounts necessary as a condition to the Company's assumption and assignment of the Assumed Contracts in excess of \$75,000 shall be a dollar for dollar reduction of the purchase price." *See* Exhibit A to the Sale Motion at page 3. In its Response, Realtim references this provision as being included in the Revised Asset Purchase Agreement but does not attach the referenced portion of that agreement to its pleading. Because the Court does not have a copy of the Revised Asset Purchase Agreement (*see* footnote 3, *infra*) it is unsure whether this dollar for dollar reduction provision is included therein.

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On or before 9:00 a.m., April 17, 2000, Seller shall deliver to Purchaser for attachment hereto Schedules . . . 1.1(b) (Assigned Contracts and Leases) (which Schedule shall be prepared by Seller in the first instance and list all contracts and leases to which Seller is a party) . . . (collectively, the "Post-Execution Schedules"). Purchaser shall have the right to approve or disapprove, or request modifications of, the Post-Execution Schedules in its sole and absolute discretion until 5:00 p.m., April 21, 2000 If Purchaser fails to deliver to Seller its written disapproval of any Post-Execution Schedule by 5:00 p.m., April 21, 2000, then Purchaser shall conclusively be deemed to have approved such Post-Execution Schedules.

* * *

Purchaser shall be responsible for any cure payments up to the Maximum Cure Amount, in the aggregate, which the Bankruptcy Court may require as a condition to the assumption and assignment of any Assigned Contract and Lease to be assigned to Purchaser in accordance with the terms and provision of this Agreement at the Closing. Seller shall be responsible for any amounts in excess of the Maximum Cure Amount, which excess amount shall be paid by the Escrow Trustee as provided in Section 2.1(c)(ii).

* * *

**ARTICLE 7
CONDITIONS TO OBLIGATIONS OF PURCHASER**

* * *

7.6 Assigned Contracts and Leases. Prior to and at the Closing, there shall have been no (a) defaults or breaches by any party under the Assigned Contracts and Leases between the date of this Agreement and the Closing Date (i) which have not been cured in accordance with the Bankruptcy Order prior to the Closing Date if the Bankruptcy Order requires Seller to cure by such date or (ii) for which Purchaser is responsible for cure payments, or (b) amendments, waivers, extensions or other modifications made to any Assigned Contracts and Leases, other than (i) such amendments, waivers, extensions or other modifications provided for in stipulations filed with the Bankruptcy Court on the date hereof as set forth on Schedule 7.10 hereto; or (ii) approved in writing by Purchaser, such approval not to be unreasonably withheld.

* * *

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**ARTICLE 9
MISCELLANEOUS**

* * *

9.11 Jurisdiction. The parties agree that the Bankruptcy Court shall have exclusive jurisdiction over all disputes relating to or arising under this Agreement and Purchaser and Seller hereby consent to such exclusive jurisdiction of the Bankruptcy Court over all such matters.

* * *

See Asset Purchase Agreement at pages 4-5, 11, 23, 27 [docket #117].

Gardner-Gibson submitted a competitive bid to purchase debtor's assets and such bid was accepted by debtor during an auction held on May 15, 2000. The consideration for the sale to Gardner-Gibson totaled \$15.4 million, subject to certain working capital adjustments. Gardner-Gibson also agreed to assume certain executory contracts and leases, including a software license agreement with Realtime (the "Software License Agreement"). Pursuant to a hearing on the Sale Motion, Gardner-Gibson's bid to purchase debtor's assets was approved and the Court entered an "Order Approving (i) The Sale of Substantially all of Debtor's Assets Pursuant to the Asset Purchase Agreement and in Accordance with Approved Auction Sale Procedures, Outside the Ordinary Course of Business, Free and Clear of Liens, Claims and Encumbrances and (ii) the Assumption and Assignment of Certain Executory Contracts and Leases in Connection Therewith" (the "Sale Order") [docket #146].³

³ The Sale Order makes reference to a Revised Asset Purchase Agreement to be entered into by debtor and Gardner-Gibson. It does not appear that a copy of the Revised Asset Purchase Agreement has been filed with the Court and, although both Realtime and Gardner-Gibson refer to it in their pleadings, neither included a complete copy of that

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Included in the Sale Order were the following provisions (capitalized terms otherwise defined in this Order shall have the meanings ascribed to them in the Sale Order):

* * *

T. No interested party has disputed that the Purchaser is able to provide adequate assurance of future performance as to the Assigned Contracts and Leases (as defined in the Revised Asset Purchase Agreement) and, pursuant to the terms of the Revised Asset Purchase Agreement, the Debtor and the Purchaser have provided adequate assurance that any outstanding defaults under the Assigned Contracts and Leases will be cured at or prior to the Closing. The assignment of the Assigned Contracts and Leases under the Revised Asset Purchase Agreement is conditioned upon closing of the contemplated transaction and the sale of the Sale Assets to the Purchaser is conditioned upon the assumption and assignment of the Assigned Contracts and Leases under the Revised Asset Purchase Agreement.

* * *

9. Pursuant to sections 365(b) and (f)(2) of the Bankruptcy Code, and consistent with the terms of the Revised Asset Purchase Agreement, the Debtor shall, upon the Closing, cure any existing defaults under the Assigned Contracts and Leases in accordance with the terms of the Revised Asset Purchase Agreement. If there is any dispute over the cure amount or related costs or the payment of any allowed assignment costs, the Debtor shall pay the undisputed cure amount and reserve from the Purchase Price the disputed amount (or such lesser amount as the Court may, after notice and a hearing, determine is appropriate). The balance of the cure amount owing, if any, shall be paid upon (a) determination by this Court as to the amount or (b) agreement of both the Debtor and the Purchaser with the other party to the contract of the cure amount payable. As a result of such cure, assumption and assignment, the Assigned Contracts and Leases will be valid and binding and in full force and effect and enforceable in

agreement. However, because any sale to a party other than the Henry Company was required to be on terms substantially similar to those set forth in the Asset Purchase Agreement (and because Gardner-Gibson has not argued to the contrary), the Court, for purposes of this Order, will rely on and make reference to the terms of the Asset Purchase Agreement.

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accordance with their terms and, pursuant to section 365(k) of the Bankruptcy Code, the Debtor and its estate are relieved from any further liability with respect of the Assigned Contracts and Leases after such assignment at Closing. The Purchaser shall perform all obligations of the Debtor under the Assigned Contracts and Leases accruing on and after the date of the Closing, and such performance shall constitute adequate assurance of future performance as required by section 365 of the Bankruptcy Code.

10. The assumption and assignment of the Assigned Contracts and Leases and the sale, conveyance, transfer and assignment of the Sale Assets pursuant to this Order and the Revised Asset Purchase Agreement shall be binding upon the Debtor, the Purchaser, all creditors and shareholders of the Debtor, all persons having or asserting a claim against or any Interest in the Debtor or any of the Sale Assets, all parties to the Assigned Contracts and Leases, and all parties to any actions or proceedings that directly or indirectly contest the power or authority of the Debtor to assume and assign the Assigned Contracts and Leases or to sell, assign and convey the Sale Assets pursuant to this Order and the Revised Asset Purchase Agreement, or that seek to enjoin any such assumption, sale assignment or conveyance.

* * *

18. No just reason exists for delay in the implementation of this Order. This Order is a final and appealable order . . . [t]his Court shall reserve and retain jurisdiction to enforce the terms hereof, including without limitation the terms of Paragraphs 1, 3, 4, 9 through 11 and 14 above.

* * *

See Sale Order at unnumbered pages 5, 10-11, 13 [docket #146]. Counsel for Gardner-Gibson-Gibson was one of the signatories to the Sale Order.

On May 26, 2000, debtor and Gardner-Gibson entered into an Assignment and Assumption Agreement (the "Assignment and Assumption Agreement") by which debtor assigned to Gardner-Gibson and Gardner-Gibson assumed from debtor certain executory contracts and leases, including the Software License Agreement (collectively, the "Assigned Contracts and Leases"). Included in that agreement were the following provisions (capitalized terms otherwise defined in this Order shall have the meanings

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ascribed to them in the Assignment and Assumption Agreement):

* * *

2. Assignment. Effective as the Closing Date, Seller hereby assigns to Purchaser all of Seller's right, title and interest in and to the Assigned Contracts and Leases . . . and options relating or pertaining to the Assigned Contracts or Leases or any of them.

3. Assumption of Liabilities. Pursuant to and subject to the limitations contained in Section 1.4(a) of the Purchase Agreement, effective as of the Closing, Purchaser hereby assumes and agrees to pay, perform and discharge all of the Assumed Liabilities.

* * *

6. Jurisdiction. The Bankruptcy Court shall have exclusive jurisdiction over all disputes relating to or arising under this Agreement, and Purchaser and Seller hereby consent to such exclusive jurisdiction of the Bankruptcy court over all such matters.

* * *

See Response, Exhibit A at unnumbered page 1.

THE PLEADINGS

In its Motion to Compel, Realtime requests, *inter alia*, that this Court enter an Order compelling debtor or Gardner-Gibson to cure all defaults and to pay all assignment costs pursuant to §365 of the Bankruptcy Code and the provisions of the Software

License Agreement. In support of the Motion to Compel, Realtime sets forth that:

At the time of the hearing on this Motion it will have been almost five (5) months since Closing and Gardner-Gibson has yet to address the payment of cure and assignment costs with Realtime Software, although numerous requests therefor had been made. Gardner-Gibson has been totally silent. It has neither acknowledged its obligation to Realtime nor has it indicated that it disputes any of Realtime's claims. It has not cured the current default or provided assurances of future performance as required by the Bankruptcy Code, the Asset Purchase Agreement and this Court's Sale Order.

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See Motion to Compel at page 3. In its Motion to Dismiss, Gardner-Gibson contends that this Court is without subject matter jurisdiction to decide the Motion to Compel because the matters raised therein are not related to debtor's bankruptcy.⁴

DISCUSSION

To fall within the jurisdiction of the bankruptcy court, a proceeding need only be "related to" a case under title 11. See 28 U.S.C. §1334(b).⁵ A matter is related to a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Wolverine Radio Co.*, 930 F.2d 1132, 1142 (6th Cir. 1991), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis omitted). As noted by the Sixth Circuit, the key word in the test for determining jurisdiction is "conceivable." Certainty, or even likelihood, is not a requirement: "Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankruptcy estate.'" *In re Dow Corning Corporation*, 86 F.3d 482, 491 (6th Cir. 1996). See also *In re Time Construction, Inc.*, 43 F.3d 1041, 1045 (6th Cir. 1995) (noting that to fall within the "related to" jurisdiction of the bankruptcy court, the proceeding need not be against the debtor or the debtor's property); *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986) (noting that "[a]lthough situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement, . . . a broader interpretation of the [jurisdiction] statute

⁴ Realtime does not contend that the issues raised in its Motion to Compel are core proceedings within the meaning of 28 U.S.C. §1334(b) and 28 U.S.C. §157(b).

⁵ That code provision sets forth that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11." 28 U.S.C. §1334(b) (emphasis added).

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more closely reflects the congressional intent in adopting the new bankruptcy laws").

Gardner-Gibson contends that the issues raised in the Motion to Compel are in no way "related to" this bankruptcy proceeding. To support that contention, Gardner-Gibson contends that "[u]pon assignment of the Software License Agreement to Gardner-Gibson, this Court lost jurisdiction over the Software License Agreement, since the Debtor or its estate no longer has any interest in the Agreement and does not allege any further equitable interest in it." *See* Motion to Dismiss at page 5, ¶17. Gardner-Gibson further contends that:

Even if this does not dispose of the matter, the language in the Software License Agreement does. The Software License Agreement was a prepaid contract. Realtime waived any objection to the transfer of that license. Further, the Agreement contains none of the alleged damages prayed for in Realtime's Motion. Indeed, Realtime's Motion does not support, nor can it support, its contention that Gardner-Gibson owes any assignment costs. The Software License Agreement is completely silent with respect to such assignment costs.

See Motion to Dismiss at page 5, ¶18 (citations omitted). These contentions ignore the issues raised in the Motion to Compel and the plain language in the Asset Purchase Agreement, the Sale Order and the Assignment and Assumption Agreement.

Through the Motion to Compel, Realtime contends that there exists an unpaid sum of \$22,780.00 for cure and assignment costs related to the Software License Agreement. The issue of Gardner-Gibson's obligation to make cure payments related to the Assigned Contracts and Leases was specifically provided for in the Asset Purchase Agreement, the Sale Order and the Assignment and Assumption Agreement. *See* Asset Purchase Agreement, §1.4(a)(i), §2.2, §7.6; Sale Order, ¶T, ¶9; Assignment and Assumption Agreement, ¶3. Although the issue of assignment costs was not also expressly addressed in those documents, it could "conceivably" be argued that such costs should be included in

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the cure payment that Gardner-Gibson allegedly owes to Realtime. *See, e.g., In re Westside Print Works, Inc.*, 180 B.R. 557, 560 (9th Cir. B.A.P. 1995) (noting that applicable state law governs the determination of how much is necessary under a lease to cure a default).⁶

Pursuant to the Asset Purchase Agreement, Gardner-Gibson's obligation for cure payments is capped at \$75,000.00. *See* Asset Purchase Agreement, §1.4(a)(i). There is no evidence before this Court regarding the total amount of cure payments that Gardner-Gibson has made pursuant to its purchase of debtor's assets and its assumption of the Assigned Contracts and Leases. Accordingly, the \$22,780.00 prayed for in Realtime's Motion to Compel could, if awarded, "conceivably" place Gardner-Gibson's obligation over the Maximum Cure Amount. If that is the case, then debtor would be liable for all or part of the damages prayed for in the Motion to Compel. *See* Asset Purchase Agreement, §2.2. Moreover, if this Court determines that Realtime should be compensated for assignment costs, Gardner-Gibson could "conceivably" argue that such obligation arose prior to the Closing and that pursuant to the Asset Purchase Agreement, debtor is liable for payment of those costs. *See* Asset Purchase Agreement, §1.4(a)(iii).

A bankruptcy court has jurisdiction to render final orders and judgments in core proceedings. *See* 28 U.S.C. §157(b). In otherwise related proceedings, the bankruptcy court instead submits proposed findings of fact and conclusions of law to the district court unless the parties to the otherwise related proceeding consent to the bankruptcy court's jurisdiction to enter final orders and judgments. *See* 28 U.S.C. §157(c)(1) and (2). Consent may be "express; it may be implied from a timely failure to object to the

⁶ Although the Asset Purchase Agreement, the Sale Order and the Assignment and Assumption Agreement specifically address Gardner-Gibson's obligation to make cure payments, none of those documents set forth a recitation of the cure amounts owed or an explanation of how the cure amounts will be calculated.

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Bankruptcy Court's jurisdiction; or it may be implied from any act which indicates a willingness to have the Bankruptcy Court determine a claim or interest." *In re Baldwin-United Corporation*, 48 B.R. 49, 54 (Bankr. S.D. Ohio 1985).

Pursuant to the Sale Order, it was "ordered, adjudged and decreed" that all existing defaults under the Assigned Contracts and Leases must be cured prior to the close of the sale of debtor's assets to Gardner-Gibson and that, after the close of that transaction, Gardner-Gibson would perform all obligations of debtor under the Assigned Contracts and Leases. *See* Sale Order at ¶9. Also pursuant to the Sale Order, this Court reserved and retained jurisdiction "to enforce the terms [of the Sale Order], including without limitation the terms of Paragraph[] . . . 9 *See* Sale Order at ¶18. The Asset Purchase Agreement and the Assignment and Assumption Agreement also provided for retention of "exclusive" jurisdiction in this Court for issues regarding, *inter alia*, Gardner-Gibson's assumption of and obligations under the Assigned Contracts and Leases. *See* Asset Purchase Agreement, §9.11 and Assignment and Assumption Agreement, §6.

By being a signatory to and allowing itself to be bound by the terms of the Sale Order, the Asset Purchase Agreement and the Assignment and Assumption Agreement, Gardner-Gibson expressly consented to the jurisdiction of this Court regarding Realtime's contention in the Motion to Compel that existing defaults under the Software License Agreement have not been paid. *See also Volvo White Truck Corp. v. Chambersburg Beverage (In re White Motor Credit Corp.)*, 75 B.R. 944, 947-48 (Bankr. N.D. Ohio 1987) (ancillary jurisdiction to interpret and enforce prior orders "may be exercised irrespective of an independent jurisdictional basis").

CONCLUSION

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Based upon the foregoing, this Court determines that the issues raised in Realtime's Motion to Compel are "related to" this bankruptcy proceeding and that, therefore, this Court has jurisdiction to decide that motion pursuant to 28 U.S.C. §1334(b). Moreover, this Court determines that pursuant to 28 U.S.C. §157(c)(1) and (2), Realtime and Gardner-Gibson have consented to this Court entering a final order and judgment in that "otherwise related proceeding."

THEREFORE, IT IS HEREBY ORDERED:

1. That the Motion to Dismiss is hereby DENIED;
2. That on December 19, 2000, at 3:30 p.m., the Court will hold a telephonic status and scheduling conference regarding the Motion to Compel; and
3. That during that telephonic status and scheduling conference, the Court may inquire as to why Gardner-Gibson should not be required to compensate Realtime for the attorney fees it incurred in filing the Response although nothing contained in this Order constitutes a finding that Gardner-Gibson should be made to compensate Realtime for such fees.

MARI
LYN SHEA-STONUM
Bankruptcy Judge

DATED: 12/6/00