The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on February 05, 2008, which may be different from its entry on the record.

IT IS SO ORDERED.

Arthur I. Harris
United States Bankruptcy Judge

Dated: February 05, 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 91-13435
	)	
ENTIRE SUPPLY, INC.,	)	Chapter 11
	)	
Debtor.	)	Judge Arthur I. Harris

MEMORANDUM OF OPINION[1]

Before the Court is the petition of John G. Panutsos, as president for the debtor corporation, for turnover of all remaining unclaimed funds currently held in the court registry pursuant to 11 U.S.C. § 347(b) (Docket ## 408 & 410). For the reasons that follow, the petition is denied.

FACTS

This case began with the filing of an involuntary petition on June 14, 1991. On July 11, 1991, an order for relief was entered under Chapter 11, and Robert Balantzow was appointed Chapter 11 trustee. A modified liquidating plan

[1] This memorandum of opinion is not intended for official publication.

of reorganization was confirmed without objection on May 6, 1993.

Under the terms of the confirmed plan, the trustee was to continue to liquidate all remaining assets and deposit the proceeds into the "Liquidation Account." Final distribution was to be made after all assets were liquidated and the proceeds were deposited into the Liquidation Account. The plan made no provisions for distribution of unclaimed funds. The plan did specifically state that the debtor's shareholders would receive nothing under the plan and their interests in the debtor would be extinguished. The plan further provided that the debtor would not retain any employees, officers, or directors. *See* Order Confirming Plan as Modified (Docket #326).

The trustee completed the liquidation of assets and distribution of proceeds in 1995 and deposited approximately $35,000 of unclaimed funds into the Court's registry. A final decree was issued on July 5, 1995, and the estate was closed. According to the Ohio Secretary of State's website, Entire Supply, Inc., ceased to exist as of February 20, 1999. *See* Notification of Cancellation by Tax Department (Feb. 20, 1999), http://www2.sos.state.oh.us/pls/portal/PORTAL_BS.BS_QRY_BUS_FILING_DET.SHOW?p_arg_names=charter_num&p_arg_values=680212 (then select document #199905102023), last visited Feb. 1, 2008 (letter to John G. Panutsos

indicating that the articles of incorporation for Entire Supply, Inc., were canceled and continued operation as a corporation is in violation of the law).

On June 8, 2007, John G. Panutsos, as president of the debtor, Entire Supply, Inc., through counsel, filed a petition and motion seeking turnover to the debtor of all remaining unclaimed funds. (Docket ## 408 & 410). The Court records indicate that the current total of unclaimed funds is $24,731.87. Attached to the petition was an affidavit from Panutsos stating he has authority to act and sign on behalf of Entire Supply, Inc. The petitioner asserted entitlement to the unclaimed funds under 11 U.S.C. §§ 347(b) and 1143. No party filed a response to the request. On August 21, 2007, the Court issued an order requiring a supplemental brief in support of the request establishing that the petitioner is entitled to the unclaimed funds distributed pursuant to a liquidating plan of reorganization. On September 21, 2007, the petitioner filed a supplemental brief in support. Again, no other party filed a response to the supplemental brief.

DISCUSSION

In order to rule on the petition for unclaimed funds, the Court is asked to determine whether 11 U.S.C. § 347(b) permits Panutsos, the former president of the debtor corporation to receive unclaimed funds held in the Court's registry following a liquidating plan of reorganization, which specifically provided that the

debtor would retain no shareholders, employees, officers, or directors. For the reasons that follow, the Court determines that subsection 347(b) does not entitle the petitioner to receive the unclaimed funds in this case.

Subsection 347(b) of the Bankruptcy Code, which governs the distribution of property remaining unclaimed following distribution pursuant to a confirmed Chapter 11 plan, provides in pertinent part:

> Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under chapter 9, 11, or 12 of this title for the presentation of a security or the performance of any other act as a condition to participation in the distribution under any plan confirmed under section 943(b), 1129, 1173, or 1225 of this title, as the case may be, becomes the property of the debtor or the entity acquiring the assets of the debtor under the plan, as the case may be.

Subsection "347(b) . . . furthers the very important Congressional goals of ensuring finality, judicial economy and the avoidance of disruptive, wasteful litigation over funds which remain unclaimed." *In re Goldblatt Bros., Inc*., 132 B.R. 736, 738 (Bankr. N.D. Ill. 1991), *quoting* 2 COLLIER ON BANKRUPTCY ¶ 347.02 (15th ed. 1991). It creates a "means for dealing with unclaimed property which does not allow for any alternative scheme." *In re George Rodman, Inc.*, 50 B.R. 313, 314 (Bankr. W.D. Okla. 1985); *accord Fed. Deposit Ins. Corp. v. Hollingsworth* (*In re Hollingsworth*), 35 Fed. Appx. 201, 202 (6th Cir. May 15, 2002). Any party entitled to unclaimed funds pursuant to 11 U.S.C. § 347(b) "may, on petition to the

court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him." 28 U.S.C. § 2042.

Subsection 347(b) clearly provides that if a debtor continues to operate following a confirmed plan of reorganization, the unclaimed distributions become the debtor's property. *See In re IBIS Corp*., 272 B.R. 883, 897 (Bankr. E.D. Va. 2001) (reorganized debtor entitled to unclaimed funds); *Goldblatt Bros.*, 132 B.R. at 741 (unclaimed funds revert to reorganized debtor); *See also In re Georgian Villa, Inc*., 55 F.3d 1561, 1563 (11th Cir. 1995) (in case governed by Bankruptcy Act of 1898, dormant, but surviving, corporation is entitled to surplus funds remaining after distribution). Similarly, when a Chapter 11 plan provides for a separate entity to acquire the assets of the debtor, subsection 347(b) clearly provides that the unclaimed funds must be distributed to that entity. *See Rodman*, 50 B.R. at 314.

Subsection 347(b) is less clear when it comes to determining who is entitled to unclaimed funds remaining after a *liquidating* Chapter 11 plan. The Court is aware of only two written opinions discussing distribution of unclaimed funds following such a plan. *See TLI, Inc. v. Lynn (In re TLI, Inc*.), 213 B.R. 946 (N.D. Tex. 1997); *In re Future Trust, Inc*., Ch. 11 Case No. 85-03386, 2007 WL 4178602 (Bankr. W.D. Mo. Nov. 16, 2007). In *TLI*, TLI, Inc. and five related

entities filed for Chapter 11 protection. *See TLI*, 213 B.R. at 948. A joint confirmed plan of reorganization provided for the "liquidation of all six debtors and their ultimate merger into 'Reorganized TLI' for the purpose of creating a single entity to dispose of the debtors' assets." *TLI*, 213 B.R. at 948. Following disposition of all remaining assets, TLI was to cease to exist.

The TLI plan created a "Claims Fund" from which distributions to creditors would be made. All remaining assets were paid into the "Claims Fund," and following three interim and one final distribution, the trustee deposited the remaining funds from the "Claims Fund" into the court's registry. TLI later filed a petition seeking an award of the unclaimed funds. The bankruptcy court denied TLI's request because "the [p]lan specifically provided that under no circumstances could TLI obtain funds from the Claims Fund. *TLI*, 213 B.R. at 950. The bankruptcy court further reasoned that its interpretation of subsection 347(b) was that the code intended for unclaimed property to "revest only in a debtor who continued with ongoing business operations." *TLI*, 213 B.R. at 949.

The district court, in reversing the bankruptcy court's decision, held that TLI was "at least an 'entity acquiring the assets of the debtor' " and therefore TLI was entitled to the unclaimed funds. *TLI*, 213 B.R. at 955. The district court reasoned

that the remaining funds did not retain their character as "Claims Funds" money, but were rather unclaimed funds governed by the Bankruptcy Code and not the plan provisions. *TLI*., 213 B.R. at 951. After determining that the provision in the plan regarding Claims Funds did not apply, the district court again looked to the plan in order to apply subsection 347(b). Because the plan provided that the " 'property of [the] [d]ebtors shall be vested in Reorganized TLI,' " the court concluded that TLI was the entity acquiring the assets of the debtor, and therefore TLI was entitled to the unclaimed funds. *TLI*, 213 B.R. at 955, *quoting* the confirmed plan. By holding that TLI was the entity acquiring the assets of the debtor, the court did not have to determine whether TLI was the debtor for purposes of 347(b). *See TLI*, 213 B.R. at 955.

In *Future Trust*, the involuntary debtor's confirmed plan of reorganization provided that "the plan is a plan of liquidation and there shall be no successors, officers or directors, of the debtor." *Future Trust*, 2007 WL 4178602 at *2. Omega Consulting, Inc., acting on behalf of the debtor's alleged sole shareholder, Table Rock Business Services, Inc., filed a motion for disbursement of the unclaimed funds remaining in the court's registry following liquidation. In denying the motion, the court stated that "the plan is not irrelevant – more than likely, it's controlling." *Future Trust*, 2007 WL 4178602 at *2. The court

concluded that under the terms of the confirmed plan, Omega could not claim the unclaimed funds on behalf of the debtor, because the plan explicitly provided that there would be no successor to the debtor, and it provided that the liquidating trustee was the entity acquiring the assets of the debtor. *Future Trust*, 2007 WL 4178602 at *2. The court stated that the claimant had produced no evidence that the debtor's assets were ever returned to the original shareholders, or that the original directors and officers ever regained control of those entities. *Future Trust*, 2007 WL 4178602 at *3. Therefore, because no debtor continued to exist to receive the funds, and because the liquidating trustee was the party acquiring the assets of the debtor, the court denied Omega's motion and ordered the Chapter 11 trustee to explore an appropriate and feasible disposition of the unclaimed funds.

While *TLI* and *Future Trust* appear to be the only cases directly on point, a case addressing who was entitled to *surplus* funds remaining after a liquidating Chapter 11 plan, *In re Xpedior Inc*., 354 B.R. 210 (Bankr. N.D. Ill. 2006), offers additional guidance. In *Xpedior*, eight related corporations filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The debtors filed a joint plan of liquidation which consolidated the estates and created a liquidation trust into which the proceeds of the sale of the debtors' assets were deposited. *See Xpedior*, 354 B.R. at 216. The plan further provided that the debtors' common

stock would be cancelled and shareholders waived any distribution. *See Xpedior*, 354 B.R. at 218. Following liquidation, the trustee paid all allowed claims in full with interest and all administrative claims in full. *See Xpedior*, 354 B.R. at 215. Approximately eight-hundred thousand dollars remained after final distribution. Although the court ultimately applied the *cy pres* doctrine and directed the money to charity, the court did address the right of the debtors, directors, officers, and/or shareholders to recover the unclaimed funds. In determining that the parties were not entitled to the funds, the court reasoned that the debtors had been dissolved by the terms of the plan and no directors or officers remained. *Xpedior*, 354 B.R. at 228-30. And, although shareholders may have an interest under state law in the assets of a dissolved corporation, the shareholders' rights in Xpedior were extinguished by the plan. *Xpedior*, 354 B.R. at 228-29.

In this case, the petitioner, Panutsos, as president for the debtor corporation, has the burden of proving entitlement to the unclaimed funds in the Court's registry. *See* 28 U.S.C. § 2042. According to the case law regarding distribution of unclaimed funds remaining following a liquidating Chapter 11 plan, in order to prove his entitlement, the petition must establish that he is either the "debtor" or the "entity acquiring the assets of the debtor," as required by 11 U.S.C. § 347(b).

The petitioner is not the "debtor"

In his supplemental brief, the petitioner asserts that 11 U.S.C. § 347(b) mandates return of unclaimed funds to the debtor, regardless of whether the debtor exists following a liquidating plan of reorganization or a confirmed plan of reorganization. The petitioner relies solely upon *TLI* for this assertion. Unfortunately, the petitioner's reliance upon *TLI* appears to be based upon a misunderstanding of the court's holding in that case. In *TLI*, the district court specifically avoided determining whether TLI was in fact the debtor. *See TLI*, 213 B.R. at 955. It is unclear whether the district court would have determined that TLI was the debtor; however, this Court notes that the debtors in *TLI* were TLI, Inc., and five related entities who were merged into "Reorganized TLI" for liquidation purposes, and the district court concluded that Reorganized TLI was the entity acquiring the assets of the debtors under the plan.

Certainly if Entire Supply continued to exist as a corporation, and if there were no other entity acquiring the assets of the debtor under the plan, the petitioner would be correct in his assertion that the unclaimed funds must be returned to the debtor corporation pursuant to 11 U.S.C. § 347(b). However, in this case, under the terms of the confirmed plan, Entire Supply's shareholders' interests were extinguished, and no employees, officers, or directors of the debtor corporation

remained. According to the Ohio Secretary of State's website, Entire Supply's articles of incorporation have been canceled. Contrary to the affidavit attached to the petition, it appears that John G. Panutsos has no authority to act on behalf of the now nonexistent corporation. The facts in this case are nearly identical to those in *Future Trust* and *Xpedior*, both holding that there was no debtor to whom funds should be returned. Accordingly, because Entire Supply, Inc., no longer exists and because John G. Panutsos has no authority to act on behalf of Entire Supply, the Court holds that the petitioner is not the "debtor" under 11 U.S.C. § 347(b).

The petitioner is not the "entity acquiring the assets of the debtor"

While the petitioner suggests in his supplemental brief that the Bankruptcy Code, rather than the plan, governs the rights of claimants to unclaimed funds, the courts in both *TLI* and *Future Trust* looked to the plan provisions in applying 11 U.S.C. § 347(b). *See TLI*, 213 B.R. at 955 (looking to plan to determine who is entity acquiring assets of debtor); *Future Trust*, 2007 WL 4178602 at *3 (looking to terms of plan to determine debtor no longer exists and liquidating trustee is party acquiring assets of debtor); *see also Xpedior*, 354 B.R. 210 (looking to terms of plan to determine who is entitled to surplus funds). According to the confirmed plans in both *TLI* and *Future Trust*, the "entit[ies] acquiring the assets of the debtor[s]" were the "entities" created to collect proceeds of the debtors' liquidated

assets for distribution. *See TLI*, 213 B.R. at 955; *Future Trust*, 2007 WL 4178602 at *3. In the current case, the plan provisions created a "Liquidation Account" into which all proceeds from the debtor's liquidated assets were deposited. Claims were then paid from the liquidation account. The liquidation account in this case provides the same function as did "Reorganized TLI" in *TLI* and the liquidation trustee in *Future Trust*; it was created for the purpose of gathering and distributing assets in the bankruptcy case. Therefore, it appears that the liquidation account, and not the petitioner, is the entity acquiring the assets of the debtor.

It may seem odd to conclude that the liquidation account in this case is the entity acquiring the assets of the debtor under the plan pursuant to 11 U.S.C. § 347(b). Nevertheless, from a policy standpoint, this result is presumably preferable to the alternative of giving the unclaimed funds to an officer of a corporation, which no longer exists, which received no discharge, and whose creditors were never paid in full. *See Kesselring Ford, Inc. v. Cann*, 427 N.E.2d 785, 787 (Ohio Ct. App. 1980) (under Ohio Law, "assets of a dissolved corporation are regarded as a trust fund from which claims against the corporation must be satisfied."); *See also* 12 Ohio Jur. 3d *Business Relationships* § 985. Whether it is appropriate for the Chapter 11 trustee to seek to reopen this case to request a supplemental distribution to creditors from the liquidation account is a question

which remains to be seen and for which the Court will not venture an answer at this time.

CONCLUSION

For the reasons stated above, the petition of John G. Panutsos, as president for the debtor corporation, for turnover of all remaining unclaimed funds currently held in the court registry pursuant to 11 U.S.C. § 347(b) is denied.

IT IS SO ORDERED.