

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 has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: October 23 2009

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 05-39734
	)	
The Wapakoneta Machine Company,	)	Chapter 11
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

**ORDER GRANTING AMENDED MOTION TO VACATE ORDER  
CONFIRMING SECOND AMENDED PLAN OF REORGANIZATION**

This case came before the court on October 22, 2009, for a hearing on a motion to enter a stipulated order vacating the order confirming the Second Amended Plan of Reorganization (“Plan”) that was entered on November 24, 2008. All interested parties were present either in person or by telephone. Notwithstanding the fact that all interested parties approved of entry of the stipulated order, the court denied the motion, finding no basis for vacating the Plan confirmation order in the procedural context in which the motion was presented. The court then granted an oral motion to amend an earlier motion to amend the Plan brought under 11 U.S.C. § 1127 [Doc. # 721] that had been filed by Debtor on February 24, 2009. After a brief recess, Debtor filed an amended motion to vacate the order confirming Debtor’s Chapter 11 Plan (“Amended Motion”) that is brought under 11 U.S.C. § 1144. [Doc. # 797]. As all interested parties were present, the court held a hearing, without objection, on the Amended Motion. For the reasons that follow, the court will grant the Amended Motion.

The court views Debtor's Amended Motion as a contested matter under Federal Rule of Bankruptcy Procedure 9014. Although a proceeding to revoke an order confirming a chapter 11 plan is generally brought as an adversary proceeding, *see* Fed. R. Bankr. P. 7001(5), there are no facts in dispute regarding Debtor's Amended Motion, no party has indicated the need for discovery, and the motion was duly served on all interested parties. The court afforded all interested parties the opportunity to object to proceeding on the motion. No party raised any objection or indicated it would be prejudiced by proceeding on the motion without further delay. The court, therefore, finds proceeding by filing an adversary complaint rather than as a contested matter under Rule 9014 to be a distinction without a difference under the circumstances of this case. *See Hines v. Hines (In re Hines)*, 193 Fed. Appx. 391, 397 (6<sup>th</sup> Cir. 2006) (finding no error resulting from the lack of a formal adversary proceeding in the absence of any demonstrable prejudice); *Tully Constr. Co. v. Cannonsburg Envtl. Assocs., Ltd. (In re Cannonsburg Envtl. Assocs., Ltd.)* 72 F.3d 1260, 1264-65 (6<sup>th</sup> Cir. 1996); *In re Zolner*, 249 B.R. 287, 292 (N.D. Ill. 2000) (citing *In re Pence*, 905 F.2d 1107, 1109 (7<sup>th</sup> Cir. 1990), and stating that the requirement to proceed by adversary complaint is not jurisdictional and may be waived).

In its Amended Motion, Debtor seeks an order vacating the order confirming its Chapter 11 Plan that was entered on November 24, 2008. Such a request is governed by § 1144, which provides that “[o]n request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.” Debtor has sufficiently alleged fraud in procuring the confirmation order based upon misrepresentations by the party that was to provide post-confirmation investment and funding, which were relied upon by Debtor in presenting the Plan for confirmation. As explained below, the court also finds Debtor's Amended Motion to be filed within the time constraints of § 1144.

Under Rule 9014(c), the court may “at any stage in a particular matter direct that one or more of the other rules in Part VII [of the Federal Rules of Bankruptcy Procedure] shall apply.” The court directed, without objection from any party, that Rule 7015 shall apply to Debtor's Amended Motion. Under Rule 7015(c), an amendment to a pleading relates back to the date of the original pleading when “the amendment asserts a claim or defense that arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading. . . .” Fed. R. Bankr. P. 7015(c)(1)(B). In this case, although the relief requested in Debtor's Amended Motion is different than that requested in its original motion, the Amended Motion is based upon the same facts as is set forth in Debtor's original motion, namely, the inability to substantially consummate the Plan due to misrepresentations by the party that was to provide post-

confirmation investment and funding, which were relied upon by Debtor. The court, therefore, finds that the Amended Motion relates back to February 24, 2009, the date on which Debtor's original motion was filed and a date within the 180 days of the order confirming Debtor's Chapter 11 Plan.

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that Debtor's Amended Motion for Order Vacating the Order Confirming Debtor's Second Amended Plan of Reorganization [Doc. # 797] be, and hereby is, **GRANTED**; and

**IT IS FURTHER ORDERED** that the Order Confirming Debtor's Second Amended Plan of Reorganization [Doc. # 667] be, and hereby is, **VACATED**.