



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
December 28, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 13-10499-MKN
)	Chapter 11
CHARLESTON ASSOCIATES, LLC,)	
)	Date: November 7, 2018
Debtor.)	Time: 3:00 p.m.
)	

**ORDER REGARDING MOTION TO ENFORCE SUMMARY JUDGMENT AGAINST
NEW BOCA SYNDICATIONS GROUP LLC¹**

On November 7, 2018, the court heard the Motion to Enforce Summary Judgment Against New Boca Syndications Group LLC (“Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On June 17, 2010, a voluntary Chapter 11 petition was filed by Charleston Associates, LLC (“Debtor”), in the United States Bankruptcy Court for the District of Delaware (“Delaware Bankruptcy Court”). (ECF No. 1).

On November 24, 2010, Debtor commenced an adversary proceeding against RA Southeast Land Company, LLC (“RAS”) and City National Bank (“CNB”) by filing a “Complaint for Declaratory Judgment” in the Delaware Bankruptcy Court. The focal point of the dispute (“RAS Adversary”) between the Debtor, its previous lender (CNB), and the

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

1 purchaser from the previous lender (RAS) is the rights with respect to the undeveloped portions
2 of land in a shopping center located in Las Vegas, Nevada (“Undeveloped Land”).

3 On December 29, 2010, the Delaware Bankruptcy Court entered an order transferring
4 venue of the RAS Adversary to Nevada, where it was assigned Adversary No. 10-01452-LBR.²

5 On February 25, 2011, Debtor filed an amended complaint (“Complaint”) in the RAS
6 Adversary. (AECF No. 37).

7 On October 5, 2011, this bankruptcy court entered an order in the RAS Adversary
8 granting partial summary judgment in favor of the Debtor and against CNB and RAS (“Prior PSJ
9 Order”). (AECF No. 120). The order was appealed to the United States District Court for the
10 District of Nevada (“USDC”), and ultimately assigned Case No. 2:11-cv-02023-MMD-PAL.
11 (AECF Nos. 151, 153 and 156).

12 On August 3, 2012, Debtor filed a proposed First Amended Plan of Reorganization under
13 Chapter 11 of the Bankruptcy Code (“Plan”) in the Delaware Bankruptcy Court. (ECF No. 725).

14 On September 18, 2012, Debtor filed a variety of exhibits in support of its proposed Plan,
15 including a copy of the Operating Agreement of New Boca Syndications Group, LLC, a
16 Delaware Limited Liability Company (“New Boca Operating Agreement”). (ECF No. 790).
17 Under Article 2, Section 2.3 of the New Boca Operating Agreement, the principal place of
18 business of New Boca is at 9440 West Sahara Avenue, Suite 240, Las Vegas, Nevada 89117.
19 Under Article 2, Section 2.4 of the New Boca Operating Agreement, the name and address of the
20 registered agent for New Boca is International Property Syndications, Ltd., located at the same
21 address as the principal place of business.

22 On September 26, 2012, Debtor filed a Declaration of Jeffrey P. Dragovich in Support of
23 Confirmation of First Amended Plan of Reorganization of Charleston Associates, LLC
24 (“Dragovich Declaration”). (ECF No. 802).

25 On September 28, 2012, an order was entered by the Delaware Bankruptcy Court
26 confirming the Plan (“Plan Confirmation Order”). (ECF No. 809). Pursuant to the confirmed
27

28 ² All references to “AECF No.” are to the documents filed in the RAS Adversary.

1 plan, New Boca Syndications Group, LLC (“New Boca”) is defined to be the “Reorganized
2 Entity.” See Plan, Art. II., A., 38 and 52. Under the confirmed plan, New Boca acquired “Boca
3 Fashion Village” that is a portion of a shopping center located in Southern Nevada, as well as all
4 existing assets of the Debtor. See Plan, Art. II., A., 8; Plan, Art. VII., C.; and Plan, Art. VIII.,
5 (e). Under the confirmed Plan, all estate property is vested in New Boca on the effective date,
6 see Plan, Art. IX., A. and Plan Confirmation Order at II, 6., and New Boca is required to timely
7 make all payments required under the Plan. See Plan, Art. IX., I. Under the Plan, the “RAS
8 Litigation” is defined as being the RAS Adversary. See Plan, Art. II., A., 50. In addition to
9 acquiring the shopping center, New Boca also acquired all of the Debtor’s claims in the RAS
10 Litigation, see Plan, Art. V., B., and also assumed liability for any claims asserted against the
11 Debtor by CNB and RAS. See Plan, Art. VII., C.³

12 Under the confirmed Plan, the Debtor’s pre-confirmation debts were discharged upon
13 confirmation of the Plan. See Plan, Art. X., A. The claims of CNB, however, were specifically
14 excepted from discharge. See Plan, Art. IV., B., 4. The Delaware Bankruptcy Court also
15 specifically ordered that “Confirmation shall not operate as a discharge of the Debtor or the New
16 Entity with respect to the CNB Claims...and nothing in the Plan, [or] the Confirmation
17 Order...shall prevent CNB or RAS from obtaining or taking any steps necessary to obtain
18 unencumbered title to the Declarant Rights or any other relief sought in the RAS/CNB Litigation
19 should CNB or RAS be entitled to such relief based on a ruling after Confirmation in the
20 RAS/CNB Litigation, by the Bankruptcy Court or otherwise.” Plan Confirmation Order at II.,
21 21.

22 On January 15, 2013, the Delaware Bankruptcy Court entered an order transferring venue
23 of the Chapter 11 proceeding to Nevada, where it was assigned Case No. 13-10499-LBR.⁴

24 ³ The specific treatment of CNB under the confirmed Plan is for New Boca to assume
25 joint liability with the Debtor for any claims of CNB. See Plan, Art. III., B., 4.

26 ⁴ On August 27, 2012, the Delaware Bankruptcy Court entered an order scheduling a
27 hearing on whether to transfer venue to the Nevada Bankruptcy Court. (ECF No. 769). As
28 permitted by the order, responses were filed by a variety of parties in interest, including the
CNB, the unsecured creditors’ committee, and the Debtor. (ECF Nos. 764, 766, 767). No party in
interest, not even the Debtor as plan proponent, objected to the transfer of venue to Nevada.

1 On July 25, 2013, the USDC entered an order reversing the Prior PSJ Order that had been
2 entered by the Nevada bankruptcy court in the RAS Adversary (“Reversal Order”). (2011
3 USECF No. 70;⁵ AECF No. 207). The USDC instructed the bankruptcy court to enter summary
4 judgment in favor of CNB and RAS, instead of the Debtor.

5 On August 23, 2013, Debtor filed a notice appealing the Reversal Order to the United
6 States Court of Appeals for the Ninth Circuit (“Ninth Circuit”).⁶ (2011 USECF No. 78).

7 On December 19, 2013, an order was entered by the bankruptcy court in the RAS
8 Adversary granting RAS’s motion for an award of \$376,078.35 in attorney’s fees and costs
9 against the Debtor. (AECF No. 240).

10 On January 6, 2014, because of the Reversal Order, CNB filed a motion for an award of
11 \$880,822.04 in attorney’s fees and costs incurred in connection with the RAS Adversary (“CNB
12 Fee Motion”). (AECF No. 257).

13 On February 26, 2014, Debtor filed a response to the CNB Fee Motion. (AECF No.
14 274).

15 _____
16 After the Plan was confirmed and became effective (ECF No. 809), and all applications for
17 professional compensation were decided, the order transferring venue was entered. Notice of
18 entry of the venue transfer order was given to all parties in interest (ECF No. 878), and no appeal
19 was taken.

20 On December 29, 2014, both the Chapter 11 proceeding and the RAS Adversary were
21 reassigned to this court upon the retirement of the previously assigned bankruptcy judge.

22 ⁵ All references to “2011 USECF No.” are to the documents filed in this USDC appeal.
23 This court may take judicial notice under FRE 201 of the materials appearing on the docket of
24 the USDC. See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg.,
25 LLC, 223 F.Sup.3d 949, 970 n.9 (N.D. Cal. 2017); Gree v. Williams, 2012 WL 3962458, at 1 n.1
26 (D. Nev. Sep. 7, 2012).

27 ⁶ On August 26, 2013, the bankruptcy court entered summary judgment in the RAS
28 Adversary in favor of CNB and RAS pursuant to the Reversal Order. (AECF No. 210). On or
about November 5, 2013, however, the USDC granted the Debtor’s motion for an order directing
the bankruptcy court to vacate the summary judgment order because it had been entered
prematurely while the Debtor’s motion to stay the Reversal Order was pending before the
USDC. (USECF No. 99; AECF No. 226). In the same order, the USDC denied the Debtor’s
motion to stay the Reversal Order pending appeal. Absent a stay from the USDC or the Ninth
Circuit, the bankruptcy court proceeded in compliance with the Reversal Order.

1 On March 5, 2014, CNB filed a reply. (AECF No. 275).

2 On August 13, 2014, an order was entered granting the CNB Fee Motion. (AECF No.
3 332). That order (“CNB Fee Order”) awarded attorney’s fees and costs in connection with the
4 RAS Adversary in the total amount of \$835,523.15, and also directed that judgment be entered
5 against New Boca for the full amount. On the same date, a judgment (“CNB Fee Judgment”)
6 was entered in the RAS Adversary against New Boca. (AECF No. 333).

7 On September 22, 2014, New Boca filed a motion for leave to intervene in the RAS
8 Adversary for the limited purpose of seeking to vacate the CNB Fee Order and CNB Fee
9 Judgment pursuant to FRCP 60(b) (“New Boca Intervention Motion”). (AECF No. 363).⁷

10 On September 24, 2014, CNB along with the Debtor and New Boca, entered into a
11 stipulation (“Payment Stipulation”) providing for New Boca to pay \$875,000 in full satisfaction
12 of the CNB Fee Judgment, subject to the outcome of the Ninth Circuit Appeal. (AECF No. 368).
13 Among other things, the Payment Stipulation required CNB to return at least a portion of the
14 payment to New Boca in the event the Ninth Circuit reversed the USDC’s Reversal Order. In the
15 event that the Ninth Circuit affirmed the USDC’s Reversal Order, the New Boca Intervention
16 Motion was to be withdrawn by New Boca with prejudice. The Payment Stipulation also
17 provided that its terms would not prevent CNB from seeking an award of additional attorney’s
18 fees and costs incurred after December 1, 2013, including the right to obtain a new judgment for
19 such additional amounts.

20 On September 29, 2014, the bankruptcy court entered judgment in the RAS Adversary in
21 favor of RAS and against the Debtor and its successor, New Boca, awarding attorney’s fees and
22 costs in the total amount of \$376,078.35 (“RAS Fee Judgment”). (AECF No. 370).

23 On October 16, 2014, the bankruptcy court entered an order approving the Payment
24 Stipulation. (AECF No. 392).

25 On October 24, 2014, the Debtor and New Boca appealed the RAS Fee Judgment to the
26 USDC, which was assigned Case No. 2:14-cv-01766-MMD. (AECF No. 402).

27 ⁷ Counsel who appeared on behalf of New Boca are the same counsel who represent the
28 Debtor. Compare Local Rule 7007.1 Statement of New Boca Syndications Group, LLC. (ECF
No. 362) with Stipulation to Continue Status Hearing Time. (ECF No. 660).

1 On January 25, 2016, the Ninth Circuit affirmed the USDC's Reversal Order ("Circuit
2 Order"). 632 Fed.Appx. 362 (9th Cir. 2016). (2011 USECF No. 106). On February 24, 2016,
3 the Ninth Circuit entered a separate order directing to the USDC all requests by CNB and RAS
4 for an award of legal fees and costs in connection with the appeals. (2011 USECF No. 110).

5 On April 19, 2017, the USDC entered an order against the Debtor awarding \$540,088.55
6 in attorney's fees and costs in favor of CNB in connection with the RAS Adversary appeal
7 ("USDC CNB Fee Order"). (2011 USECF No. 138). The USDC denied without prejudice
8 CNB's request, under the Plan, to enforce against New Boca the Debtor's liability for the
9 amounts awarded.

10 On April 26, 2017, the USDC entered an order against the Debtor awarding \$370,330.99
11 in attorney's fees and costs in favor of RAS in connection with the RAS Adversary appeal
12 ("USDC RAS Fee Order"). (2011 USECF No. 140). The USDC also denied without prejudice
13 RAS's request, under the Plan, to enforce against New Boca the Debtor's liability for the
14 amounts awarded.

15 On May 19, 2017, First American Title Insurance Company ("FATCO"), as assignee of
16 RAS, filed a motion in the Debtor's bankruptcy case to enforce the Plan ("FATCO Enforcement
17 Motion") by requiring New Boca to pay the \$370,330.99 in attorney's fees and costs that had
18 been awarded under the USDC RAS Fee Order. (ECF No. 932). Opposition was filed by the
19 Debtor. (ECF No. 943). A joinder in the FATCO Enforcement Motion was filed by CNB.
20 (ECF No. 945). A reply to the Debtor's opposition was filed by FATCO. (ECF No. 946). A
21 joinder in FATCO's reply was filed by CNB. (ECF No. 947).

22 On May 24, 2017, CNB filed a motion in the Chapter 11 case and in the RAS Adversary
23 ("CNB Enforcement Motion") to join New Boca as a party to the RAS Adversary, and to award
24 judgment against New Boca on the attorney's fees and costs that had been awarded by the USDC
25 CNB Fee Order. (ECF No. 936; AECF No. 466).

26 On June 20, 2017, the FATCO Enforcement Motion was heard and granted by this court.
27 On July 7, 2017, a written order was entered granting the FATCO Enforcement Motion. (ECF
28 No. 954).

1 On June 21, 2017, the CNB Enforcement Motion was heard and granted by this court.

2 On July 7, 2017, a written order was entered granting in part and denying in part the CNB
3 Enforcement Motion (“CNB Enforcement Order”). (ECF No. 953; AECF No. 494).⁸ The CNB
4 Enforcement Order granted CNB’s request for entry of a judgment against New Boca in the
5 amount of \$540,088.55 that had been awarded under the USDC CNB Fee Order, but denied
6 without prejudice CNB’s request to join New Boca as a party to the RAS Adversary.

7 On July 18, 2017, a judgment in favor of CNB and against New Boca was entered in the
8 Debtor’s bankruptcy case and in the RAS Adversary in the amount of \$540,088.55 in attorney’s
9 fees and costs, plus interest at the federal judgment rate from April 19, 2017 (“CNB Fee
10 Judgment”). (ECF No. 958;⁹ AECF No. 496).¹⁰

11 On July 24, 2017, a judgment in favor of FATCO and against New Boca was entered in
12 the Debtor’s bankruptcy case in the amount of \$370,330.99 in attorney’s fees and costs, plus
13 interest at the federal judgment rate from April 27, 2017 (“FATCO Fee Judgment”). (ECF No.
14 960).¹¹

15 On September 27, 2017, CNB filed a satisfaction stating that New Boca had satisfied the
16 CNB Fee Judgment. (AECF No. 510).

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19 _____
20 ⁸ The order denied without prejudice CNB’s request to join New Boca as a party to the
21 RAS Adversary.

22 ⁹ The time to appeal the CNB Fee Judgment expired on or about August 1, 2017. See
23 FED.R.BANKR.P. 8002(a)(1).

24 ¹⁰ Based on the CNB Fee Judgment, CNB garnished certain Rents that had been
25 deposited into certain accounts maintained by New Boca at Wells Fargo Bank (“Wells Fargo”).
26 Thereafter, U.S. Bank, N.A. (“US Bank”) filed a Petition for Return of Improperly Garnished
27 Property that was opposed by CNB. (AECF No. 531). On December 12, 2017, this court
28 entered an order denying the Petition (“Deposit Account Order”). (AECF No. 539). US Bank
appealed that order to the USDC. (AECF No. 548).

¹¹ The time to appeal the FATCO Fee Judgment expired on or about August 7, 2017. See
FED.R.BANKR.P. 8002(a)(1).

1 On March 1, 2018, the USDC entered an order affirming the RAS Fee Judgment with
2 respect to the award against the Debtor but reversing the RAS Fee Judgment with respect to New
3 Boca (“USDC Order”). (2014 USECF No. 29).¹²

4 On March 26, 2018, in the RAS Adversary, CNB filed a motion for partial summary
5 judgment on the merits of various claims in light of the Reversal Order and Circuit Order (“CNB
6 PSJ Motion”). (AECF No. 580). As part of its motion, CNB sought to have judgment entered
7 on the merits in the RAS Adversary against New Boca, in addition to the Debtor.

8 On April 13, 2018, FATCO filed a motion to enforce the confirmed Plan, or, in the
9 alternative, to convert the case to Chapter 7 liquidation (“FATCO Conversion Motion”). (ECF
10 No. 998 and 1000). FATCO sought an order to enforce the confirmed Plan by requiring New
11 Boca to satisfy the Debtor’s obligations to FATCO’s predecessor in interest, RAS. In the
12 alternative, FATCO sought to convert the Chapter 11 proceeding to Chapter 7.

13 On May 2, 2018 and May 7, 2018, an opposition to the FATCO Conversion Motion was
14 filed by creditor The Black Mailbox, LLC (“TBM”), along with a corrected supporting
15 declaration of James W. Pengilly (“Pengilly Declaration”). (ECF Nos. 1007 and 1010).¹³

16 On May 14, 2018, Debtor filed its opposition to the CNB PSJ Motion. (AECF No. 593).

17 On May 24, 2018, CNB filed its reply in support of the CNB PSJ Motion. (AECF No.
18 599).

19 On May 31, 2018, an opposition to the FATCO Conversion Motion was filed on behalf
20 of the Debtor. (ECF No. 1016).

21
22 ¹² All references to “2014 USECF No.” are to the documents filed in that USDC appeal.
23 The USDC Order refers to the RAS Adversary as the “Real Property Proceeding.”

24 ¹³ TBM apparently is a post-confirmation creditor of both the Debtor and New Boca. In
25 2016, TBM commenced a civil action against the Debtor in the Eighth Judicial District Court,
26 Clark County, Nevada (“State Court”), denominated Case No. A-16-732661-B. In November
27 2016, New Boca was added as a defendant by stipulation of the parties. On or about December
28 22, 2017, the parties entered into a stipulated judgment against the Debtor and New Boca in the
amount of \$429,058.91. On or about March 1, 2018, a further order was entered by the State
Court awarding attorney’s fees, costs, and prejudgment interest to TBM in the total amount of
\$167,096.14. See Exhibits “A” and “B” to Pengilly Declaration.

1 On June 5, 2018, a hearing was conducted on the CNB PSJ Motion, and the matter was
2 taken under submission.

3 On June 7, 2018, a reply was filed by FATCO in support of the FATCO Conversion
4 Motion. (ECF No. 1017).

5 On June 8, 2018, a joinder in the FATCO Conversion Motion was filed by American
6 Contractors Indemnity Company (“ACIC”). (ECF No. 1019).¹⁴

7 On June 8, 2018, New Boca filed a joinder in the Debtor’s opposition to the FATCO
8 Conversion Motion. (ECF No. 1023).

9 On June 13, 2018, an initial hearing was held on the FATCO Conversion Motion. The
10 hearing was continued to July 19, 2018, however, on the suggestion from counsel representing
11 both the Debtor and New Boca that funds to satisfy the judgments in favor of FATCO might be
12 raised.

13 On July 19, 2018, oral arguments on the FATCO Conversion Motion were presented, and
14 the matter was taken under submission.

15 On July 24, 2018, an order was entered denying the FATCO Conversion Motion
16 (“FATCO Conversion Order”). (ECF No. 1028).

17 On July 24, 2018, an order was entered granting in part and denying in part, the CNB PSJ
18 Motion, that was accompanied by a memorandum decision (“CNB PSJ Memorandum”). (AECF
19 Nos. 618 and 617).¹⁵ The order (“CNB PSJ Order”) awarded damages in favor of CNB against
20 the Debtor in the amount of \$6,851,030.98.

21 On July 30, 2018, CNB filed a motion under FRCP 54(b) for certification with respect to
22 the CNB PSJ Order and for dismissal of its remaining claims in the RAS Adversary (“CNB 54(b)
23 Motion”). (AECF No. 629).

24
25 ¹⁴ On June 13, 2018, in the RAS Adversary, FATCO filed a notice stating that its rights
26 under the RAS Fee Judgment had been assigned to ACIC. (AECF No. 612).

27 ¹⁵ The court denied CNB’s request to enter a judgment against New Boca in the RAS
28 Adversary because it was not a party, but without prejudice to seeking enforcement of New
Boca’s obligations arising out of the confirmed Plan. See CNB PSJ Memorandum at 23 n.34.

1 On August 23, 2018, Debtor filed an opposition to the CNB 54(b) Motion. (AECF No.
2 635).

3 On August 29, 2018, CNB filed a reply in support of the CNB 54(b) Motion. (AECF No.
4 636).

5 On September 5, 2018, the CNB 54(b) Motion was heard and taken under submission.

6 On September 27, 2018, an order was entered granting the CNB 54(b) Motion. (AECF
7 No. 651).

8 On October 5, 2018, a judgment in the RAS Adversary was entered in favor of CNB and
9 against the Debtor in the amount of \$6,851,030.98 (“CNB Judgment”). (AECF No. 656).¹⁶

10 On October 5, 2018, CNB filed in the Chapter 11 proceeding the instant Motion seeking
11 to enforce the CNB Judgment against New Boca, and a copy was served electronically on
12 counsel for both the Debtor and New Boca. (ECF No. 1034).¹⁷

13 On October 24, 2018, New Boca filed an objection to the instant Motion (“Objection”).
14 (ECF No. 1045).

15 On October 31, 2018, CNB filed a reply in support of the Motion (“Reply”). (ECF No.
16 1047).

17 On November 7, 2018, the Motion was heard, and the matter was taken under
18 submission. At the hearing, counsel for the Debtor and RAS informed the court that a settlement
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21 ¹⁶ The time to appeal the CNB Judgment expired on or about October 19, 2018. See
22 FED.R.BANKR.P. 8002(a)(1).

23 ¹⁷ CNB filed an *ex parte* motion to have the matter heard on an expedited basis. (ECF
24 No. 1035). According to the Attorney Information Sheet accompanying the *ex parte* motion,
25 counsel representing both the Debtor and New Boca was contacted and agreed to have the
26 Motion heard on shortened time. (ECF No. 1037). On October 9, 2018, an order was entered
27 shortening time (“OST”) so that the Motion could be heard on October 24, 2018, with notice of
28 the OST being given electronically to counsel for both the Debtor and New Boca. (ECF No.
1038). By stipulation of the parties, however, the hearing on the Motion was continued to
November 7, 2018, and the deadline to file opposition was extended to October 24, 2018. (ECF
No. 1041).

1 had been reached between those parties, and the RAS Adversary would be dismissed as to all
2 other claims between them.¹⁸

3 DISCUSSION

4 By its current Motion, CNB seeks to enforce the CNB Judgment against New Boca
5 pursuant to the terms of Article IV, Section B(4) and Article VII, Section C of the confirmed
6 Plan. See Motion at 5:10-20. Based on the CNB PSJ Order, CNB argues that it is entitled to a
7 judgment against New Boca in the Debtor's bankruptcy proceeding under the law of the case
8 doctrine. Id. at 6:6-27. Because the CNB Fee Judgment against New Boca previously was
9 entered in the bankruptcy proceeding, CNB maintains that a similar judgment should be entered
10 with respect to New Boca's liability under the confirmed Plan for the full amount of the CNB
11 Judgment. Id. at 7:1-6.

12 In response, New Boca argues that the CNB Judgment cannot be enforced against it
13 because the Motion has not been properly served. It argues that service of the Motion was
14 improper for two reasons: (1) that New Boca is not the debtor in the bankruptcy case, and (2)
15 that New Boca is not a party to the RAS Adversary. For those reasons, New Boca argues that
16 enforcement of the CNB Judgment would violate due process. See Objection at 2:5 to 8:28.¹⁹
17 Additionally, New Boca argues that the FATCO Conversion Order denied enforcement of the
18 Plan with respect to attorney's fees that had been awarded in favor of RAS in connection with
19 the RAS Adversary. As a result, New Boca maintains that under the law of the case doctrine, the
20 same result should follow with respect to CNB. Id. at 9:2-20.

21 In reply, CNB maintains that New Boca has voluntarily assumed its liabilities under the
22 confirmed Plan and has actively participated in the bankruptcy proceeding. See Reply at 4:4-7.
23 Moreover, CNB argues that the FATCO Conversion Order is distinguishable. Id. at 4:10-19.

24 ¹⁸ True to their word, counsel filed a stipulation on December 14, 2018, providing for the
25 dismissal with prejudice of all claims asserted in the RAS Adversary between the Debtor and
26 RAS. (AECF No. 663). On December 17, 2018, an order was entered by the bankruptcy court,
approving the stipulation. (AECF No. 664).

27 ¹⁹ New Boca's argument essentially duplicates the position it took in the New Boca
28 Intervention Motion. Those arguments were never resolved because of the Payment Stipulation
reached between CNB and New Boca in connection with the CNB Fee Judgment.

1 The court having considered the written and oral arguments of counsel, together with the
2 record in this proceeding, concludes that the Motion must be denied without prejudice.

3 On its face, the relief requested by CNB is supported by the provisions of the Debtor's
4 confirmed Plan. Article IV, Section B(4) specifically provides that "Any Claims of CNB,
5 contingent or otherwise, are unimpaired under the Plan. CNB shall retain, unaltered, all the
6 legal, equitable and contractual rights it may have against the Debtor. In addition, New Boca
7 shall assume joint liability for any such Claims as of the Effective Date and any such Claims
8 shall not be discharged or otherwise impaired as a result of Confirmation." (Emphasis added.)

9 Additionally, Article VII, Section C of the confirmed Plan specifically provides in
10 pertinent part that "As of the Effective Date, the Reorganized Entity, New Boca, shall be in
11 existence and organized as a single purpose entity for the purpose of owning Boca Fashion
12 Village and...all existing assets of the Debtor shall be transferred and assigned to New
13 Boca...The liabilities assumed by the Reorganized Entity shall include any claims asserted by
14 CNB or RAS against the Debtor, and the transfer and assignment shall include all claims, causes
15 of action, defenses, counterclaims and other rights of setoff and recoupment the Debtor has
16 against CNB or RAS." (Emphasis added.)

17 Moreover, Article XII of the confirmed Plan specifically provides for the bankruptcy
18 court to retain jurisdiction for the purpose of, *inter alia*, "Issuing any order necessary to
19 implement the Plan or Confirmation Order," as well as "Hearing and determining any dispute
20 relating to the terms or implementation of the Plan, the Confirmation Order, the Term Sheet, the
21 Restructured Loan Documents, the Asset Purchase Agreement, the New Boca Organizational
22 Documents or any other agreement, instrument or other documents ancillary to the Plan, or to the
23 rights or obligations of any parties in interest with respect thereto..." (Emphasis added.)

24 It is clear from these provisions of the confirmed Plan that New Boca is liable for the full
25 amount of the CNB Judgment.

26 This conclusion is not inconsistent with the ruling on the FATCO Conversion Motion. In
27 that matter, FATCO sought relief based on provisions of the confirmed Plan that were simply
28 inapplicable. In its motion, FATCO sought to recover from New Boca the attorney's fees

1 awarded in connection with the RAS Adversary, by relying solely on Article V, Section C of the
2 confirmed Plan. That Plan provision, however, addresses only distributions in connection with
3 “Disputed Claims.” Because RAS could not be, and was not, the holder of a Disputed Claim as
4 defined by the confirmed Plan, the language of Article V, Section C simply did not apply. See
5 FATCO Conversion Order at 9:22 to 10:15. As a result, nothing in the FATCO Conversion
6 Order is law of the case with respect to CNB’s request to enforce the provisions of Article IV
7 and Article VII of the confirmed Plan.²⁰

8 More important, this conclusion is consistent with the language of the USDC’s decision
9 on appeal in connection with the RAS Fee Judgment. See discussion at 7 & n. 12, supra. As the
10 USDC concluded:

11 The question here is not whether New Boca is liable for RAS’s attorney fees and
12 costs – the Plan makes clear that it is – rather the question is whether the
13 Bankruptcy Court had jurisdiction over New Boca in the [RAS Adversary] such
14 that it could enter a judgment against New Boca. [FATCO] acknowledges that
15 the Confirmation Plan and Order are what makes New Boca liable for the attorney
16 fees and costs. (See ECF No. 26 at 7 (arguing that New Boca is bound by the
17 Confirmation Order and that it was “specifically created for the purpose [of]
18 carrying the provisions of the Plan including all the financial obligations of
19 Charleston to RAS”).) Moreover, because the [RAS Adversary] was a dispute
20 about which entity – as between Charleston and CNB/RAS – possessed the
21 declarant’s rights, the judgment in that action could not be entered against New
22 Boca. Instead, the Confirmation Plan and Order could be used against New Boca
23 to make it pay for attorney fees and costs attributed to Charleston in the [RAS
24 Adversary]. Thus, judgment in that action would not apply to New Boca as it was
25 not a proper party to the [RAS Adversary] and there was no dispute about whether
26 New Boca held the declarant’s rights. Similarly, this Court pointed out in its
27 order awarding attorney fees after resolution of the Ninth Circuit Appeal of the
28 [RAS Adversary] that New Boca was not a party to that action. Therefore, based

23 ²⁰ Unlike RAS, CNB did file a proof of claim in the Debtor’s Chapter 11 proceeding on
24 June 14, 2011, in the amount of \$25,000,000, based on a breach of a pre-bankruptcy settlement
25 agreement. As a result, it was the holder of a “Disputed Claim” as defined by Article II, Section
26 A(21) of the confirmed Plan. Article V, Section C of the confirmed Plan, therefore, is applicable
27 to CNB, but not RAS. Thus, CNB also could seek to enforce Article V, Section C, which
28 provides in pertinent part that “Upon the allowance of any Disputed Claim, the holder shall be
paid the amount that such holder would have received had its Claim been an Allowed Claim on
the Effective Date.” Having obtained the CNB Judgment, which has not been appealed, CNB
has an Allowed Claim under Article II, Section A(3)(a), of the confirmed Plan, that is now
subject to being paid.

1 on the record before this Court, it was inappropriate to enter judgment against
2 them in the [RAS Adversary].

3 USDC Order at 5-8 (emphasis added).

4 Exercise of personal jurisdiction over New Boca is appropriate for a variety of reasons.
5 Although New Boca is a limited liability company formed under Delaware law, its principal
6 place of business is in Las Vegas, Nevada, and its registered agent at the same address is
7 International Property Syndications, Ltd. See discussion at 2, supra.²¹ Under the terms of the
8 confirmed Plan, the same registered agent was tasked to manage New Boca as well as the day-to-
9 day operations of the shopping center. See Dragovich Declaration at ¶ 9. In conducting its
10 business in Nevada, New Boca maintains bank accounts in Nevada,²² owned real property in
11 Nevada, and has consented to entry of judgments and orders by courts in Nevada.²³ Under these
12 circumstances, the exercise of personal jurisdiction over New Boca is not only permissible, but
13 clearly warranted.

14 Subject matter jurisdiction of the bankruptcy proceeding exists under 28 U.S.C. § 1334 as
15 was previously determined by the Delaware Bankruptcy Court. See Plan Confirmation Order at
16 Part I(F). Proceedings to enforce the provisions of a particular confirmed Chapter 11 plan arise
17 in the subject bankruptcy case and are core matters under 28 U.S.C. § 157(b)(2)(A), (N) and (O).
18 See Maitland v. Mitchell (In re Harris Pine Mills), 44 F.3d 1431, 1435 (9th Cir. 1995)
19 (“...’arising in’ proceedings are those that are not based on any right expressly created by title
20 11, but nonetheless, would have no existence outside of the bankruptcy.”).

21 Venue was determined to be proper in the Delaware Bankruptcy Court, see Plan
22 Confirmation Order at Part I(F), and the order transferring venue is final. See note 4, supra.

23 ²¹ According to the records of the Nevada Secretary of State, New Boca Syndications
24 Group, LLC, is a foreign limited liability company active in the State of Nevada, with a business
25 license that expires on August 31, 2019. The registered agent is International Property
26 Syndications, Ltd., with an address of 9440 W. Sahara Avenue, Suite 240, Las Vegas, Nevada
27 89117. The manager is listed as Jeffrey Dragovich. See www.nvsos.gov/sosentitysearch.

28 ²² See discussion at note 10, supra.

²³ See discussion at note 13, supra.

1 Thus, personal jurisdiction, subject matter jurisdiction, and venue are proper in this bankruptcy
2 court.

3 It appears, however, that the instant Motion was not properly served on New Boca. As a
4 contested matter under 9014(a), the Motion must be served in the manner provided for service of
5 a summons and complaint under FRBP 7004. See Fed.R.Bankr.P. 9014(b). FRBP 7004(a)(1)
6 allows for personal service under FRCP 4(e) -(j). Under FRCP 4(h), service on a corporation
7 may be achieved through compliance with state law for service of an individual under FRCP
8 4(e), or, by delivery of a copy of the summons and complaint to an officer, managing agent,
9 general agent, or other authorized agent. Under Nevada law, individuals may be served by
10 service of the summons and complaint on the defendant personally, or by leaving copies with a
11 suitable person at the defendant's dwelling, or by delivery to an agent authorized to receive
12 service of process. See Nev.R.Civ. P. 4(d)(6). Alternatively, FRBP 7004(b)(3) allows for
13 service of a corporation or unincorporated association by first class mail addressed to the
14 attention of an officer, managing agent, general agent, or other authorized agent. Under FRBP
15 7004(f), service in compliance with FRBP 7004 is effective to establish personal jurisdiction
16 over the defendant with respect to a civil proceeding arising in a bankruptcy case, "[i]f the
17 exercise of jurisdiction is consistent with the Constitution and laws of the United States."²⁴

18 There is no evidence in the record that New Boca was personally served with the Motion
19 at its principal place of business, nor was its registered agent served at the registered address.
20 Nor is there evidence that New Boca was served by first class mail to the attention of a member,
21 manager, general agent, or authorized agent. There is evidence in the record that New Boca's
22
23

24 ²⁴ Notice must be given in the manner reasonably calculated to apprise the parties of the
25 relief requested and an opportunity to object. See Mullane v. Cent. Hanover Bank & Tr. Co.,
26 339 U.S. 306, 314 (1950); Low v. Trump Univ., LLC, 881 F.3d 1111, 1120 (9th Cir. 2018)
27 (notice need not be "perfect" but must "reasonably convey the required information"); Nationstar
28 Mort., LLC v. Springs Prop. Owners Ass'n., 2018 WL 894615, at *6 (D. Nev. Feb. 13, 2018)
("Due process does not require actual notice...Rather, it requires notice 'reasonably calculated,
under all of the circumstances, to apprise interested parties of the pendency of the action and
afford them an opportunity to present their objections.'").

1 local counsel was given electronic notice of the Motion.²⁵ Under Local Rule 5005(c)(4),
2 however, electronic service of notice to an attorney does not constitute service on the client
3 unless the attorney is authorized to accept service by the client. There is no evidence in the
4 record that New Boca has authorized its attorneys, rather than the registered agent, to accept
5 service. Likewise, under Local Rule 5005(e)(4), an attorney's waiver of any right to receive
6 notice by first class mail or personal service does not constitute an agreement to accept service or
7 notice on behalf of a client. Thus, even if New Boca's local counsel was given electronic notice
8 of the Motion, it is not sufficient to constitute service on New Boca. Compare In re Leeds, 589
9 B.R. 186, 199 (Bankr. D. Nev. 2018).

10 Under these circumstances, the Motion will be denied for lack of proper service. Because
11 the Motion otherwise is properly brought before this court, however, denial will be without
12 prejudice.

13 **IT IS THEREFORE ORDERED** that the Motion to Enforce Summary Judgment
14 Against New Boca Syndications Group LLC, Docket No. 1034, be, and the same hereby is,
15 **DENIED WITHOUT PREJUDICE.**

16 Copies sent via CM/ECF ELECTRONIC FILING

17 Copies sent via BNC to:

18 New Boca Syndications Group, LLC
19 9440 West Sahara Avenue, Suite 240
20 Las Vegas, Nevada 89117

21 International Property Syndications, Ltd.
22 Registered Agent for New Boca Syndications Group, LLC
23 9440 West Sahara Avenue, Suite 240
24 Las Vegas, Nevada 89117

25 # # #

25 ²⁵ The court's records indicate that on October 5, 2018, Notice of Electronic Filing of the
26 instant Motion was electronically mailed to Robert M. Charles, Jr. on behalf of New Boca
27 Syndications Group, LLC. The court's records also indicate that on October 9, 2018, Notice of
28 Electronic Filing was electronically mailed to Robert M. Charles, Jr. on behalf of New Boca
Syndications Group, LLC, with respect to entry of the OST. By stipulation, counsel for the
parties, including New Boca, continued the hearing on the Motion. See discussion at note 17,
supra.