ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
SWR, Inc.	)	ASBCA No. 56708
	)	
Under Contract No. W912CN-06-D-0013	)	

APPEARANCES FOR THE APPELLANT: Karl Dix, Jr., Esq.
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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ K.L. Grace Moseley, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant, SWR, Inc., seeks termination for convenience costs in connection with a contract awarded to it by the United States Army to store privately owned vehicles in Hawaii. The government moves to dismiss the appeal for lack of jurisdiction, contending that SWR failed to retain this claim in its Chapter 11 bankruptcy reorganization plan, depriving SWR of standing to continue to pursue it.[1] We find that SWR sufficiently retained the claim and therefore deny the government's motion.

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[1] After SWR's counsel disclosed to the Board in a conference call that it had filed for bankruptcy, the Board ordered SWR to provide a status report with additional information about the bankruptcy and to address its impact upon standing. In a response dated 3 November 2011, SWR provided additional information, and asserted that SWR retained standing to pursue the appeal. The government responded to that filing with its own, dated 30 November 2011, where it advanced its current contention that SWR lacks standing, and sought dismissal of the appeal. We deemed that filing a motion to dismiss (gov't mot.). SWR opposed in a filing dated 9 December 2011 (app. opp'n), and the government replied by a filing dated 26 December 2011 (gov't resp.). Additionally, we sought supplemental briefing addressing any implications arising from the language of the bankruptcy court's retention of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 6 April 2006, the Army awarded Contract No. W912CN-06-D-0013 to SWR to store privately owned vehicles at Fort Shafter, Hawaii. Shortly afterward, the Army terminated the contract for convenience, effective 1 July 2006. (Compl. ¶¶ 2, 4) On 29 June 2007, SWR submitted a termination settlement proposal to the contracting officer, which it converted to a certified claim through correspondence dated 13 November 2008 (R4, tabs 9, 17).

2. On 14 January 2009, SWR filed this appeal on a deemed denial basis, seeking termination for convenience costs that it quantified in a 27 April 2009 complaint in the amount of $3,905,742.12.

3. On 1 July 2009, SWR filed a voluntary petition in the United States Bankruptcy Court for the Middle District of Alabama under Chapter 11 of the bankruptcy code (Second Amended Disclosure Statement for Plan of Reorganization of SWR Office Equipment, Inc. aka SWR, Inc., dated May 6, 2010 (Disclosure Statement) at 4, *In re SWR Office Equip., Inc.,* No. 09-11310 (Bankr. M.D. Ala. May 6, 2010), ECF No. 185). SWR's 30 July 2009 schedule of assets includes a "CLAIM AGAINST THE DEPARTMENT OF DEFENSE (APPROX)" in the amount of "3,950,000.00" (SWR Office Equipment, Inc. Schedules of Property at 7, *In re SWR Office Equip., Inc.,* No. 09-11310, ECF No. 37). During the bankruptcy proceedings, SWR continued as the debtor in possession of its property (Disclosure Statement at 15).

4. SWR's bankruptcy disclosure statement explains that the government awarded this storage contract for Fort Shafter, and then terminated it for convenience shortly thereafter due to a protest of its award. According to the statement, SWR was continuing to negotiate a termination settlement proposal with the government. It notes that, after the contract was terminated, the government awarded SWR a temporary bridge contract for the storage services until a new contract could be solicited. The disclosure statement then identifies the amount of SWR's termination settlement proposal, which is the $3,905,742.12 sought in this appeal. The disclosure statement explains that the delays associated with this claim caused cash flow problems for SWR, leading it to file for Chapter 11 bankruptcy to restructure its debts. (*Id.* at 11-12)

5. SWR's disclosure statement also reveals that it retained counsel to pursue the appeal to this Board "for failure to pay under the Fort Shafter contract" (*id.* at 13).[2]

[2] The statement actually says that counsel was retained to pursue an appeal "against" this Board but we deem that a drafter's error. Neither party suggests that the statement actually expresses an intent to pursue an appeal against this Board rather than before this Board.

6. In its "Projection of Future Performance," SWR's disclosure statement predicts "recovery from the pending claim...for failure to pay under the Fort Shafter, Hawaii contract" (*id.* at 15).

7. Among the assets listed by SWR's disclosure statement is a "Claim against Dept of Defense" in the amount of "$3,950,000.00" (*id.* at 21).

8. In its "Funding of the Plan," SWR's disclosure statement repeats its expectation of "recovery from its administrative appeal of the Armed Services Board of Contract Appeals" (*id.* at 32). SWR's plan of reorganization expresses the same expectation (Amended Chapter 11 Plan of Reorganization of SWR Office Equipment, Inc., aka SWR, Inc., dated May 7, 2010 (Plan of Reorganization) at 20, *In re SWR Office Equip., Inc.,* No. 09-11310, ECF No. 188).

9. In their "Means of Execution of the Plan," both SWR's disclosure statement and its plan of reorganization provide that, "[a]s of the effective date, the property of the Estate shall vest in the Debtor free and clear of all Claims, except as provided in the Plan or the Confirmation Order" (Disclosure Statement at 33; Plan of Reorganization at 19).

10. Exhibit C to SWR's disclosure statement, entitled "EXHIBIT C - LIQUIDATION ANALYSIS," lists under the heading "Personal Property," a "Claim against Dept of Defense" in the amount of "$3,950,000.00" (Disclosure Statement, ex. C).

11. Article IV, Class 2, of SWR's plan of reorganization, "proposes to pay the final allowed priority claims in full from recoveries of [SWR's] Fort Shafter claim upon receipt or over a sixty (60) month period calculated from the date of filing of SWR's Chapter 11 Petition" (Plan of Reorganization at 12-13).

12. Article IV, Class 12 of SWR's plan of reorganization declares that the "IRS' final allowed claim shall be paid in full with statutory interest from the recovery of the Fort Shafter contract claim" (*id.* at 18).

13. SWR's plan of reorganization provides that the bankruptcy court retains jurisdiction "to ensure that the intent and the purpose of the Plan is carried out and given effect." The plan also states that the bankruptcy court retains jurisdiction:

> (b) To hear and to determine:
>
> > (i) all controversies, suits and disputes, if any, as may arise in connection with the interpretation or

> enforcement of the Plan, or any prior order of the Court in this Case....

(*Id.* at 30)

14. On 15 March 2011, the bankruptcy court issued its final decree, noting SWR's report that its plan of reorganization had been substantially consummated, and closing SWR's bankruptcy (Final Decree Closing Case, *In re SWR Office Equip., Inc.*, No. 09-11310, ECF No. 284).

DECISION

The government contends that SWR now lacks standing to pursue this claim, and that accordingly it must be dismissed for lack of jurisdiction. The government argues that the bankruptcy code deprives a Chapter 11 debtor of standing to pursue a cause of action following confirmation of its plan of reorganization unless the plan contains specific and unequivocal language retaining the cause of action. The government suggests that SWR's plan does not meet that standard. In response, SWR does not take issue with the government's basic position that it had to preserve this claim in its reorganization plan to pursue it. SWR simply maintains that its plan adequately does just that.

I. Basis of the Government's Motion

The government premises its motion upon 11 U.S.C. § 1123, which governs the contents of a Chapter 11 plan of reorganization. Subsection (b)(3) states the following:

> (b) Subject to subsection (a) of this section, a plan may—
>
> (3) provide for—
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest....

Thus, section 1123 permits a plan of reorganization to recognize the debtor's right to pursue claims belonging to it.

Emphasizing case law originating from the jurisdiction of the United States Court of Appeals for the Fifth Circuit, such as *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC),* 540 F.3d 351 (5th Cir. 2008), and *In re Crescent Resources, LLC,* 455 B.R. 115 (Bankr. W.D. Tex. 2011), the government contends that section 1123(b)(3)(B) denies a debtor standing to pursue a claim after its plan has been confirmed unless the plan of reorganization provides for the claim's retention and enforcement by the debtor. The government relies upon language from its cited decisions requiring the reservation of the claim to be "specific and unequivocal." (Gov't mot. at 2) It suggests that SWR's plan merely contains "tacit references to a 'Fort Shafter' or 'Department of Defense' claim" which "are ambiguous and certainly not specific enough to expressly reserve this post confirmation action," given that SWR had at least two contracts at Fort Shafter. Additionally, the government claims that "neither the cause of action nor legal basis for the suit is indicated," and that the references are equivocal because "[i]n one instance, [the plan] proposes to use claim proceeds or a sixty month payment plan." The government also complains that "since Appellant's bankruptcy has closed there is no mechanism for the Bankruptcy court to receive proceeds from such a claim and distribute to creditors," concluding that "[a]ppellant has positioned itself to receive a windfall...." (Gov't resp. at 2-3)

II. Standing and Jurisdiction

"Standing" is an inquiry into "whether the [claimant] constitutes the type of person or party that may submit the case or controversy proffered for consideration." *Maniere v. United States,* 31 Fed. Cl. 410, 420 (1994). Standing is one component among the broader justiciability or case or controversy requirements that are a condition of the exercise of judicial power under Article III of the Constitution. *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011) ("Standing is a threshold jurisdictional issue that implicates Article III of the Constitution."), *petition for cert. filed,* 60 U.S.L.W. 3447 (U.S. Jan. 17, 2012) (No. 11-912); *Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005) (Justiciability, which has both constitutional and prudential dimensions, encompasses a number of doctrines, including standing, mootness, ripeness, and political question); *Animal Legal Defense Fund v. Quigg,* 932 F.2d 920, 925 (Fed. Cir. 1991) ("Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue" (quoting *Sierra Club v. Morton,* 405 U.S. 727, 731-32 (1972))). Although this Board does not act under Article III, *RGW Commc'ns, Inc.,* ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972 at 163,333, it functions in a judicial capacity when considering claims such as this appeal. *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966). Accordingly, like the United States Court of Federal Claims, a non-Article III tribunal that applies case or controversy justiciability standards, *BLR Group of America, Inc. v. United States*, 94 Fed. Cl. 354, 361 n.4 (2010), we also recognize such conditions, including that standing is an element of our

jurisdiction that must be proven by appellant. *See Hackney Grp. & Credit Gen. Ins. Co.,* ASBCA No. 51453, 00-2 BCA ¶ 30,931 at 152,682 (citing *Maniere*).

The Court of Appeals has also said that:

> To establish standing to sue, as Article III § 2 has been interpreted, a party must, "at an irreducible minimum," show (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" (personal injury), (2) that "the injury 'fairly can be traced to the challenged action'" (causation), and (3) that the injury "is likely to be redressed by a favorable decision" (effective relief).

Animal Legal Defense Fund, 932 F.2d at 925. Thus, a condition of standing is to show injury. Actions having the legal effect of eliminating or abandoning the right to pursue an entitlement have been held to reflect the absence of an injury, and therefore standing to sue. *See Hoopa Valley Tribe v. United States,* 597 F.3d 1278, 1283-84 (Fed. Cir. 2010). Therefore, to the extent 11 U.S.C. § 1123(b)(3) eliminates or revokes SWR's right to pursue this claim, it potentially deprives SWR of standing. *See Broadway Consol. Companies,* ASBCA No. 56905, 11-2 BCA ¶ 34,884 at 171,567 (holding that a company liquidated under Chapter 7 of the bankruptcy code is deprived of standing to pursue a claim that had been abandoned by the trustee).

III. SWR's Bankruptcy and Chapter 11's Impact upon a Debtor's Standing to Pursue Post-Confirmation Claims

Upon the commencement of SWR's Chapter 11 bankruptcy, it was required to file a schedule of all of its assets, including potential claims, pursuant to 11 U.S.C. § 521. Additionally, all of SWR's property, including its claim here, became the property of the bankruptcy estate. 11 U.S.C. § 541. As the debtor in possession, SWR retained the power to pursue this claim on behalf of the estate. 11 U.S.C. § 1107(a); *United Operating,* 540 F.3d at 355. Once SWR's plan of reorganization was confirmed, all of the property of the estate vested back in SWR, except as provided in the plan or the order confirming it. 11 U.S.C. § 1141(b). Thus, by its express terms, unless SWR's plan or confirmation order provided otherwise, section 1141(b) appears to confirm SWR's right to pursue this claim. Nevertheless, the government correctly observes that some decisions also condition standing to pursue post-confirmation claims upon the provisions of section 1123(b)(3).

In *Harstad v. First American Bank,* 39 F.3d 898 (8th Cir. 1994), the court interpreted section 1123(b)(3) to only permit post-confirmation actions by a Chapter 11

debtor when its plan provided for "'the retention and enforcement [of that claim or interest] by the debtor....'" *Id.* at 902. *Harstad* held that permitting a debtor to pursue a claim without retaining it under section 1123(b)(3) would render that section a nullity. It held that "the affirmative course of action set forth in § 1123(b)(3), to be followed by the debtor who wishes to retain the right to bring...claims, preempts the general provision of § 1141 that dumps all remaining post-confirmation estate property into the lap of the debtor." *Id.* at 903. *Harstad* further explained that it viewed section 1123(b)(3) as a notice provision, stating "[c]reditors have the right to know of any potential causes of action that might enlarge the estate—and that could be used to increase payment to the creditors." *Id. United Operating*, relied upon here by the government, also held that a debtor has no standing to pursue post-confirmation claims unless the plan expressly retains it, and emphasized that the reservation must be specific and unequivocal. 540 F.3d at 355; *see also P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1117 (7th Cir. 1998) (ruling that section 1123 requires a debtor to specifically identify its post-confirmation claims in its reorganization plan).

Very little case law exists within this circuit considering section 1123(b)(3)'s implications upon standing to pursue claims. We have not found any decisions of our own upon the subject, and the parties have not cited any to us. In *Doninger Metal Products, Corp. v. United States*, 50 Fed. Cl. 110, 120-21 (2001), the Court of Federal Claims acknowledged that some courts have required the reservation of claims under section 1123(b)(3). The court concluded that sufficient notice had been provided in that case, but dismissed the case for other reasons.

In another case, *Phoenix Petroleum Co. v. United States,* 40 Fed. Cl. 862, 865-67 (1998), *rev'd,* 215 F.3d 1345 (Fed. Cir. 1999) (table), *available at* 1999 WL 521189, the Court of Federal Claims was presented with a post-confirmation claim by a Chapter 11 debtor that had failed to include the claim in both its initial schedule of assets required upon filing for bankruptcy by 11 U.S.C. § 521(1), as well as its plan of reorganization under section 1123(b)(3). The trial court found that, given both omissions, the plaintiff lacked standing to pursue the claim.

Significantly, the United States Court of Appeals for the Federal Circuit reversed *Phoenix Petroleum* in a nonprecedential opinion. Focusing primarily upon the disclosure requirement of section 521, the Court recognized that section's purposes are similar to those given by other courts regarding section 1123(b)(3), which is so that "creditors can vote intelligibly on the merits of the plan that disposes of the scheduled assets." 1999 WL 521189, at *4. If, after a plan of reorganization is approved, a debtor is permitted to pursue claims that were not disclosed to the creditors who approved the plan, the debtor could then retain recoveries that should be shared with creditors. However, the Court of Appeals also recognized that depriving a debtor standing to pursue a claim not disclosed in its reorganization plan potentially leads to a windfall for a defendant, which is not in

the interests of creditors either. *Id.* Furthermore, the Court noted that result would be in some tension with section 1141(b)'s recognition that, after a plan of reorganization is confirmed, all of the estate's property vests in the debtor. *Id.* at *5. Ultimately, the Court declined to rule that the debtor lacked standing to pursue the undisclosed claim simply because of its failure to comply with sections 521 and 1123(b), opting instead for a stay of proceedings to allow the plaintiff to reopen its bankruptcy case to ensure the proper administration of any recovery. Such an approach would avoid a windfall for the defendant, while still protecting creditors. *Id.* at *6.[3]

We are, therefore, confronted with case law in the Court of Federal Claims and other jurisdictions, concluding that failure to disclose an intent to pursue a claim post-confirmation under section 1123(b)(3) eliminates standing to pursue it. However, we also have the reasoning of a nonprecedential opinion of our own court of appeals, refusing to deny a claimant standing under similar circumstances, and expressing satisfaction that the interests addressed by the code's disclosure requirements would be better served by a stay to permit proper notice to be made in the bankruptcy proceedings. Ultimately, we decline to decide in this appeal which approach to take. Assuming, without deciding, that a failure to comply with section 1123(b)(3) deprives a party of standing to pursue a claim after its reorganization plan is confirmed, we are convinced that SWR has given sufficient notice of its intent to pursue this appeal to satisfy the requirement.

IV. SWR's Compliance with Section 1123(b)

As already observed, the primary policy concern behind the decisions barring standing for failing to comply with section 1123(b)(3) is the lack of notice to creditors. "Creditors have the right to know of any potential causes of action that might enlarge the estate" because "[o]nly then are creditors in a position to seek a share of any recoveries, contingent though they be...." *Harstad,* 39 F.3d at 903; *see also United Operating,* 540 F.3d at 356 (holding that the requirement to disclose an intention to bring a particular

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[3] In *USCS Chemical Chartering LLC v. Agency for International Development,* CBCA No. 2058, 12-1 BCA ¶ 34,915, the Civilian Board of Contract Appeals recently considered a matter similar to that in *Phoenix Petroleum,* an attempt by a reorganized version of a Chapter 11 debtor to assert a claim that had arisen pre-bankruptcy, and which had not been included in the debtor's schedule of assets. There is no indication that it was retained in the plan of reorganization under section 1123(b) either. Because the claim had not been listed, the board ruled as the trial court did in *Phoenix Petroleum* and dismissed for lack of standing. The board contemplated the possibility of the reorganized debtor returning to the bankruptcy court to cure the omission and gain the right to pursue the claim.

claim in the plan of reorganization is so that creditors can review the impact of such litigation on their claims before voting on the plan). Thus, the degree to which a disclosure must be specific and unequivocal is driven by the need to notify creditors of the intent to pursue the claim. *Crescent Res.*, 455 B.R. at 129 (concluding that the test for determining whether the disclosure in the plan is sufficiently specific and unequivocal is whether it puts the creditors on notice that the debtor intends to pursue the claim after confirmation); *Rifkin v. CapitalSource Fin., LLC (In re Felt Mfg. Co).*, 402 B.R. 502, 516-17 (Bankr. D.N.H. 2009) (noting that the plan should contain "some description of the types of claims the debtor...may later bring" to allow "affected parties to weigh the risks and benefits beforehand"); *Doninger*, 50 Fed. Cl. at 120-21 (explaining that section 1123(b)(3) requires disclosure of adequate information to permit creditors to make an informed judgment about causes of action that could enlarge the estate). Typically, notice of intent to retain claims of a particular type is sufficient. The plan does not need to list individual claims or identify individual defendants. *P.A. Bergner,* 140 F.3d at 1117 (finding that the plan must retain claims of a specific type, not individual claims); *see also Spicer v. Laguna Madre Oil & Gas II, L.L.C. (In re Tex. Wyo. Drilling, Inc.),* 647 F.3d 547, 551-52 (5th Cir. 2011) (suggesting that retention of a claim category is sufficient and that identification of specific defendants is not required); *Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.),* 375 F.3d 51, 58-60 (1st Cir. 2004) (citing cases requiring retention of specific types of claims, not that each claim be listed). Additionally, a determination as to whether such notice was provided may be based upon a review of both the debtor's plan of reorganization and its bankruptcy disclosure statement issued pursuant to 11 U.S.C. § 1125, which also provides information to creditors about the plan. *Tex. Wyo. Drilling*, 647 F.3d at 550-51.

Given the purposes behind section 1123(b)(3)'s disclosure provision, it is clear that SWR's creditors were provided adequate notice of the existence of this claim to comply with the requirement.[4] By the time SWR filed its petition in bankruptcy it had

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[4] SWR's plan of reorganization provides that the bankruptcy court retains jurisdiction "to ensure that the intent and the purpose of the Plan is carried out and given effect." It also states that the bankruptcy court retains jurisdiction "[t]o hear and to determine...all controversies, suits and disputes, if any, as may arise in connection with the interpretation...of the Plan." (SOF ¶ 13) We requested supplemental briefing from the parties addressing whether this language limits our ability to review the plan for the purpose of deciding this motion to dismiss. Both parties responded in the negative, opining that there are no impediments to our consideration of the plan for this purpose. We agree. The inquiry here is not related to enforcing the terms of SWR's plan of reorganization; it is about whether certain potentially necessary requirements of our jurisdiction have been satisfied. To the extent section 1123(b)(3) mandates that certain objective

already commenced this appeal, seeking $3,905,742.12. Accordingly, its initial bankruptcy schedule lists a "CLAIM AGAINST THE DEPARTMENT OF DEFENSE (APPROX)" with a value of $3,950,000 (SOF ¶ 3). SWR's subsequent bankruptcy disclosure statement then describes the Fort Shafter contract at issue here and its termination by the government. It notes SWR's termination settlement proposal was for the $3,905,742.12 sought in this appeal. SWR contends in that statement that the government's failure to pay that alleged debt upon this contract is what required it to declare bankruptcy. (SOF ¶ 4) It reveals that SWR retained counsel to pursue an appeal here "for failure to pay under the Fort Shafter contract," and, along with its plan of reorganization, predicts recovering upon that claim (SOF ¶¶ 5-6, 8). Like its initial schedule of assets, SWR's disclosure statement lists its "Claim against Dept of Defense" for $3,950,000 as an asset and personal property (SOF ¶¶ 7, 10). SWR's plan of reorganization also provides notice of its intent to pay a final IRS claim against it from its recoveries upon its Fort Shafter contract, and to possibly pay allowed priority claims from those recoveries too (SOF ¶¶ 11-12).

The government contends that SWR's references to "Fort Shafter" or the "Department of Defense" in its plan and disclosure statement are ambiguous, especially given that this claim is not against the Department of Defense, but instead the Department of the Army (gov't resp. at 2; gov't supp. br. at 1). Because SWR has at least two contracts involving Fort Shafter, the government suggests that reference to it does not identify the specific contract at issue here. Similarly, merely referring to Fort Shafter fails to identify a cause of action or its legal basis. The government also complains that SWR is unclear about whether it will pay certain claims against it from its recovery or not, and suggests there must be a mechanism for the bankruptcy court to distribute any recovery to SWR's creditors. (Gov't resp. at 2-3)

The government's quibbles are out of context and unpersuasive. The disclosure statement describes the award of this contract at Fort Shafter, its termination, SWR's claim regarding it and the amount at issue, and its retention of counsel to pursue it (SOF ¶¶ 4-5). Its subsequent references to a "failure to pay under the Fort Shafter contract," prediction of "recovery...for failure to pay under the Fort Shafter, Hawaii contract," and proposals to pay creditor claims from the recoveries upon its "Fort Shafter claim," are consistent with that expression of intent, regardless of how many other

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information be contained in SWR's plan of reorganization as a condition of SWR's standing to pursue an appeal here, it is for us, at least in the first instance, to decide whether that condition has been satisfied. *See Hydaburg Coop. Ass'n v. United States,* 667 F.2d 64, 66 (Ct. Cl. 1981) (ruling that a forum may evaluate its jurisdiction for itself, regardless of what another forum may have suggested about it).

contracts SWR had been awarded for Fort Shafter (SOF ¶¶ 5-6, 8, 11-12). Similarly, SWR's additional references in its schedules of assets to a claim against the Department of Defense that is roughly for the amount of this claim are also consistent with its expression of intent to pursue it (SOF ¶¶ 3, 7, 10). Nothing about this conclusion is altered to the extent SWR has mistakenly characterized the claim as being against the Department of Defense rather than its component, the Department of the Army. Additionally, the applicable case law does not require identification of the specific claim or the party it is against. A description of the type of claim is sufficient. Finally, the government cites no authority supporting its suggestion that any recovery in this appeal must be received and distributed by the bankruptcy court. Certainly, section 1123(b)(3) contains no such requirement.

Taken together, SWR's disclosure statement and plan of reorganization reveal its intent to pursue this claim for its termination costs and to pay certain creditor claims against it from any recovery. Given these representations, as the court observed in *Crescent Resources,* "it seems far-fetched to believe that a creditor would not be on notice that [SWR] anticipated pursuing [this claim] after confirmation." 455 B.R. at 129-30. Nothing in the plan or disclosure statement equivocates about that intent. Granting the government's motion here would produce the opposite effect from what the cases it relies upon seek to achieve. Instead of barring SWR from attempting to obtain a windfall at its creditors' expense, it would prevent SWR from pursuing a claim for their benefit. That is not the purpose of section 1123(b)(3).

CONCLUSION

Because SWR complied with 11 U.S.C. § 1123(b)(3), we deny the government's motion to dismiss.

Dated: 19 March 2012

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56708, Appeal of SWR, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals