IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
DOHRMAN MACHINE PRODUCTION,	)	
INC.,	)	CASE NO. BK93-82120
	)	
DEBTOR.	)	CH. 11

MEMORANDUM

Hearing was held on May 23, 1996, on Confirmation of Plan. Appearances: Sam Brower, Attorney for debtor; Jeffrey Wegner, Attorney for Creditors' Committee; Frederick Stehlik, David Crawford and Chris Curzon, Attorneys for Richard Dohrman; Richard Garden, Jr., Attorney for Farmers & Merchants National Bank; and Stephen Cramer, Attorney for USA/SBA. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

Background

This Chapter 11 case involves a manufacturing company that has not made an operating profit since 1991. There are two shareholders, each owning 50% of the shares. Although at one point one of the shareholders, Richard Dohrman, and the corporation each filed competing plans, Mr. Dohrman has withdrawn his proposed plan, and the plan that has gone to confirmation hearing is the plan of the debtor ("the Plan").

The Plan, which has obtained consent of all impaired classes of claims, provides that the shareholder interest of the two current shareholders, Mr. Dohrman and Robert Owen, will be completely canceled. Neither shareholder will retain an interest or obtain an interest in the reorganized debtor based upon their pre-confirmation interest.

Mr. Owen, however, has agreed to contribute $100,000 in capital and to guaranty a credit facility equal to at least $175,000. For such contribution and guaranty, Mr. Dohrman, according to the Plan, will obtain all of the new shares to be issued by the debtor. Upon reorganization and consummation of the confirmed Plan, Mr. Owen will be the sole owner of the business.

The non-contributing shareholder, Mr. Dohrman, has objected to that portion of the Plan which eliminates his shareholder interest. It is his position that the Bankruptcy Code does not permit the

interest of shareholders to be canceled unless the debtor and the reorganized debtor have no equity which could accrue to the benefit of the shareholders.

The only remaining legal or factual issue at this point is whether, upon reorganization, the debtor, as a going concern, will have sufficient net worth to give some value to the shareholder interest of Mr. Dohrman.

Decision

After considering all of the evidence presented by the debtor, the Committee of Unsecured Creditors ("the Committee"), and Mr. Dohrman, this court concludes that there is no value to Mr. Dohrman's shareholder interest on a liquidation basis or on a going concern basis after reorganization. Therefore, the objection is overruled and the Plan may be confirmed.

Findings of Fact, Conclusions of Law and Discussion

1. Compliance with 11 U.S.C. § 1129(a).

A. 11 U.S.C. § 1129(a)(1) and (2).

The requirements of confirmation set forth in Section 1129(a)(1) and (2) focus upon a plan's compliance with 11 U.S.C. §§ 1122, 1123 and 1125. 5 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 1129.02, at 1129-20 to 1129-25 (15th ed.) 1996). Section 1122 provides (i) that a plan may place a claim or an interest within a particular class only if such claim or interest is substantially similar to the other claims or interests of such class and (ii) that a plan may designate a separate class of claims consisting only of every unsecured claim that is less than a reasonable specified amount. 11 U.S.C. § 1122. The Plan separately classifies each secured claim and the undersecured claims of secured creditors. See Plan, Classes 1, 2, 3, 4(a) & 4(b). Only general unsecured claims are classified within Class 4(c). Only the equity interests of Robert Owen and Richard Dohrman, which are without value, are classified in Class 5 and only the contingent equity claim of Patricia Dohrman, the former spouse of Richard Dohrman, is classified in Class 6. The Plan complies with 11 U.S.C. § 1122.

Section 1123 requires that a plan include seven mandatory provisions. 11 U.S.C. § 1123(a)(1)-(7). The Plan meets each of these requirements.

Section 1129(a)(2) requires that acceptances to the Plan have

been properly solicited. Because no creditors or interest holders were provided with a ballot or otherwise solicited for a vote until they were provided with a copy of the court-approved disclosure statement, the debtor has complied with Section 1129(a)(2).

The Plan and the debtor have complied with Sections 1122 and 1123 of the Bankruptcy Code, and such compliance satisfies the requirements set forth in Sections 1129(a)(1) and (2). There is no objection to confirmation grounded in Sections 1129(a)(1) or (2),and the evidence establishes that the Plan complies with these sections.

B. 11 U.S.C. § 1129(a)(3).

The third requirement for confirmation is that the Plan must have been proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). Through the Plan, the debtors and the approving creditors hope and expect to achieve a result expressly provided for by Chapter 11 of the Bankruptcy Code: rehabilitation of the debtor's business operations and payment to creditors according to the requirements of the Code. Where a plan will achieve a result consistent with the Code, the good faith requirement of 11 U.S.C. § 1129(a)(3) will be met. See Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.), 764 F.2d 406, 408 (5th Cir. 1985).

Richard Dohrman's objection to confirmation alleges that the Plan was not proposed in good faith because certain post-petition transactions "increased the post-petition indebtedness to such an amount that no other competing Plan of Reorganization can afford to be confirmed." Richard Dohrman Objection, at ¶ 4. Richard Dohrman presented no evidence in support of this objection.

C. 11 U.S.C. § 1129(a)(4).

The fourth confirmation standard mandates that all payments made or promised by the debtor for services in connection with the case be disclosed and subject to court approval. 11 U.S.C. § 1129(a)(4). As evidenced by the debtor's representations made through its Second Amended Disclosure Statement, all payments made to professionals have and will be made only on application, notice and court approval. See Second Amended Disclosure Statement Of Dohrman Machine Production, Inc., Dated June 9, 1995 (the "Disclosure Statement"), at III(B), at 7. The Plan, therefore, complies with Section 1129(a)(4).

D. 11 U.S.C. § 1129(a)(5).

The fifth confirmation standard ensures that all parties and interests have knowledge of the identity and nature of future compensation of officers, directors and insiders. 11 U.S.C. § 1129(a)(5). Through the Plan and the Disclosure Statement, the debtor expressly has disclosed the identity of the officers, directors and insiders who will serve the reorganized debtor and the nature of the compensation provided to such persons. *See* Disclosure Statement, III(C)(1), at. 8; Plan Article, VII. The Plan and Disclosure Statement, therefore, fully inform all parties of the identity and compensation of officers, directors and insiders and is in compliance with Section 1129(a)(5).

E. 11 U.S.C. § 1129(a)(6).

Where a plan provides for a change in rates that are subject to governmental regulation, the agency with jurisdiction over such rates must approve the change. 11 U.S.C. § 1129(a)(6). The Plan does not provide for any rate change, thereby rendering Section 1129(a)(6) inapplicable to this case.

F. 11 U.S.C. § 1129(a)(7).

The "best interests" test of Section 1129(a)(7) requires that each holder of a claim or interest in an impaired class receive property having a present value of not less than what would be received if the debtors were liquidated under Chapter 7. 11 U.S.C. § 1129(a)(7). Article VII of the Disclosure Statement contains a hypothetical liquidation analysis of the debtors. That analysis and the evidence produced at the confirmation hearing show that the Plan will provide each creditor with not less than it would receive in a Chapter 7 liquidation. The Plan, therefore, satisfies §1129(a)(7) and is in the best interests of the creditors.

G. 11 U.S.C. § 1129(a)(8).

Section 1129(a)(8) of the code requires that each class either accept the Plan or be left unimpaired by the Plan. The Plan has been accepted by all classes except Class 5, the shareholder interests of Mr. Dohrman and Mr. Owens.

H. 11 U.S.C. § 1129(a)(9).

The ninth standard for confirmation sets guidelines for the payment of administrative and priority claims. *See* 11 U.S.C. § 1129(a)(9). In accordance with these guidelines, the Plan, as noted above, provides that administrative expenses payable pursuant to Sections 503(b) and 507(a)(1),(3) and (4) will be paid from available funds on the effective date of the Plan unless otherwise

agreed to by the holders of a claim. Article III of the Plan, therefore, fully complies with the guidelines set for the payment of administrative expenses and priority claims.

I. 11 U.S.C. § 1129(a)(10).

To be confirmable, a plan must be accepted by the actual consent of an impaired class. 11 U.S.C. § 1129(a)(10). Classes 1, 2, 3, 4(a), 4(b), and 4(c) are impaired by the Plan and have voted to accept the Plan. The Plan, therefore, complies with Section 1129(a)(10).

J. 11 U.S.C. § 119(a)(11).

The eleventh confirmation standard requires a showing that there is a likelihood that the Plan will be carried out without a need for further reorganization. 11 U.S.C. § 1129(a)(11). The evidence adduced at the confirmation hearing establishes that the Plan is feasible and Mr. Dohrman has agreed.

K. 11 U.S.C. § 1129(a)(12).

As required by Section 1129(a)(12), the Plan provides for the payment of all fees that may be owing under 28 U.S.C. § 1930. Plan Article I, § 1.2 & Article III, § 3.1. The Plan, therefore, complies with 11 U.S.C. § 1129(a)(12).

2. Compliance with 11 U.S.C. §1129(b).

This company has not made an operating profit since 1991. In 1993, it had insufficient cash available to continue operations, and its operating lender refused to advance any more funds. It filed a Chapter 11 bankruptcy and Mr. Owen agreed to guaranty a credit line which has permitted the debtor to continue in operation to this date.

During the two and one-half year period prior to the filing of bankruptcy, the debtor has lost $2,392,325. Pre-bankruptcy, there was a negative shareholder's equity account of $1,325,354. During the case, the debtor has cumulatively lost an additional amount in excess of $300,000.

On a liquidation basis, on the petition date and today, the debtor is insolvent, and there is no equity which would accrue to the shareholders. The secured debt exceeds $800,000, and the buildings and real estate are worth approximately $800,000. The unsecured debt is almost $1,300,000, and the equipment and inventory and work in process do not come near that amount.

Therefore, considering only the prepetition secured and unsecured debt and the value of the hard assets, the debtor is insolvent. Even the testimony of the expert witness for Mr. Dohrman admits as much.

Nonetheless, Mr. Dohrman asserts that the debtor must be valued on a going concern basis to determine whether it is appropriate to eliminate his shareholder rights. He has pre-Bankruptcy Code authority for such a position. Consolidate Rock Prods. Co. v. Du Bois, 312 U.S. 510, 526, 61 S. Ct. 675, 85 L.Ed. 982 (1941); Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 441-42, 88 S. Ct. 1157, 20 L. Ed. 2d 1, reh'g denied, 391 U.S. 909, 88 S. Ct. 1649, 20 L. Ed. 2d 425. (1968).

In this case, it seems to be an exercise in futility to estimate the going concern value of this business after reorganization for the purpose of determining whether Richard Dohrman's shareholder interest has any value. The reason for the futility is that the unsecured creditors who have agreed to accept payment of only 30% of their claims over time have done so only on the basis that neither Mr. Dohrman nor Mr. Owen retain any interest in the reorganized debtor on account of their prepetition shareholder interest. In other words, if Mr. Richard Dohrman is to receive value for his shares or to remain as a shareholder without contributing further value, like Mr. Owen has proposed, the Plan is not confirmable. The negotiated arrangements by which the creditors agreed to vote in favor of the Plan were based on the Plan's feasibility, the realization by representatives of the creditors that the Plan as proposed would give them at least as much and probably more than they would receive in liquidation and that the shareholder class would receive nothing for its interest.

Notwithstanding the futility of such a calculation, using the best evidence presented by Mr. Dohrman concerning the issue of the value of his equity, the court must conclude that the reorganized debtor does not have sufficient value to accrue to Mr. Dohrman. Mr. Dohrman's expert witness testified that the reorganized company had a net worth of approximately $325,000. This "net worth," at best, results from the continuing operation of the business and the reduction of the unsecured debt on confirmation in an amount in excess of $800,000. In order for Mr. Dohrman's shares to have any value, the going concern "net worth" must exceed the total discount accepted by the creditors. That is because in an insolvent business, the creditors have the right to ownership of the business and all going concern "net worth" accrues to the allowed claims of the creditors prior to it being distributed or allocated to the prepetition shareholders.

The formula for determining who is entitled to receive value or payments under a plan of reorganization is described in a leading treatise:

> Step one is to determine the amount of the allowed claims and interests of each class and the relative priority of such claims and interests. . . .
>
> Step two is establishing the value of the debtor as reorganized. . . .
>
> The third step in the application of the "fair and equitable" rule is the determination of which classes of claims or interests are entitled to participate given the priority of allowed claims and interests and the determination of the debtor's reorganization value as previously described.

5 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 1129.03, at 1129-110 to 1129-115 (15th ed. 1996).

As mentioned above, the allowed claims exceed the best estimate of the going concern value of the debtor by more than $800,000.

There is no indication from any of the evidence in this case that either under a liquidation scenario or under the reorganization as proposed by this Plan would the prepetition shareholder interest of Mr. Dohrman and/or Mr. Owen have any value.

The Plan complies with 11 U.S.C. § 1129(b)(1) because it does not discriminate unfairly against Mr. Dohrman and is fair and equitable to him. The Plan treats each class in the same manner as such class would be treated in liquidation, and all impaired classes with priority over Class 5 have accepted the Plan. Since the shares included in Class 5 have no fixed liquidation value or fixed redemption price, the Plan, although eliminating the shareholder interests, complies with Section 1129(b). See In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 151-53 (Bankr. S.D.N.Y. 1984).

The contribution of $100,000.00 and the guaranty of debt by Mr. Owens are both absolutely necessary for the business to continue as a going concern. Without either, or both, the debtor has insufficient cash flow.

The Plan is confirmable even though it eliminates the

shareholder interest of Mr. Dohrman.

A separate confirmation order will be entered.

DATED: August 6, 1996.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*BROWER, SAM R.	397-4633
WEGNER, JEFFREY	346-1148
STEHLIK, FREDERICK	493-7005
GARDEN, RICHARD JR.	402-474-5393
CRAMER STEPHEN	221-3680

Copies mailed by the Court to:
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
DOHRMAN MACHINE PRODUCTION,	)	
INC.,	)	CASE NO. BK93-82120
	)	CHAPTER 11
Debtor.	)	

AMENDED ORDER CONFIRMING PLAN

After review and consideration of the Plan, this Court does hereby find in this core proceeding that:

1. The plan has been properly distributed and, after hearing, all objections have been denied.

2. The Plan complies with the applicable provisions of Title 11 of the United States Code.

3. In order to effectively conclude the administration of the Debtor's estate, the court shall issue instructions to the Debtor pursuant to 11 U.S.C. §1142 and FED. R. BANKR. P. 3020(d), in addition to the Local Rules of this Court.

IT IS THEREFORE ORDERED that:

1. The Plan is hereby confirmed.

2. The debtor shall:

A. Carry out the confirmed Plan, by distribution and performance of all other necessary acts. 11 U.S.C. §1142 and FED. R. BANKR. P. 3021.

B. Effect substantial consummation of the Plan, not later than one hundred fifty (150) days after the date of this Order.

C. Within thirty (30) days after substantial consummation of the Plan, the debtor shall file a Final Accounting/Report and Application for Final Decree.

Dated this 6th day of August, 1996.

BY THE COURT:

/s/Timothy J. Mahoney
UNITED STATES BANKRUPTCY JUDGE

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Copies mailed by the Court to:
THE UNITED STATES TRUSTEE