IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
LAND PAVING COMPANY,	)	CASE NO. BK87-82050
	)	CH. 11
DEBTOR	)	Filings 307, 329, 346

MEMORANDUM

Hearing was held on August 6, 1998, on the request for confirmation of Second Amended Plan and recent modification filed by Bruce Schreiner and Objection by Bryan Behrens, Agent for the Holders of Certain Allowed Unsecured Claims. Appearances: William Biggs for the debtor; Jeffrey Wegner for Schreiner; Janice Woolley for Bryan Behrens; Albert Kerkove for the IRS; and Jerry Jensen for the United States Trustee. 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 corporate debtor filed a Chapter 11 bankruptcy case in 1987. The only significant asset of the debtor is a 23.67% interest in four different, but related, patents in what the parties have referred to as a "driver alerting device." That property interest will hereafter be referred to as the "patent rights." A party in interest, Bruce Schreiner, has filed a plan of reorganization, referred to as the Second Amended Plan of Reorganization, dated March 6, 1998, and modified by the filing of a modification, Filing No. 346, on July 31, 1998. That plan proposes full payment of administrative claims, taxes, and the claim of a bank; full payment, with post-confirmation interest, to the unsecured creditor class; the issuance of stock in the reorganized debtor to a class consisting of "future interest holders"; and payment of $15,000.00 as satisfaction in full of the Class 6, Jean DeHart, interests.

The disclosure statement was approved in May of 1998 and the plan, disclosure statement, notice of objection date and balloting bar date, and the ballot were properly served on each party in interest and each member of each class. The bar date for delivering a ballot to counsel for the proponent and

the bar date for objecting to the plan were both set as July 24, 1998.

Numerous ballots were received by counsel for the proponent on a timely basis and there is no question that several impaired classes have accepted the plan. Class 3 is a class of unsecured claims and in that class eleven ballots were received which accepted the plan. The dollar amount of the claims represented by those eleven ballots is $581,605.08. Two ballots were received which rejected the plan. Those ballots represented dollar claims in the amount of $36,400.00.

In addition to the above-described ballots, nine ballots from holders of unsecured Class 3 claims were delivered to counsel for the proponent on July 27, 1998, three days after the bar date. Those nine ballots unanimously rejected the plan. The dollar amount of the claims which were included in the rejecting ballots which were received on July 27, 1998, is $835,604.93. However, that total included two ballots in a total amount of $36,400.00 which had already been counted in the ballots which were delivered in compliance with the bar date order.

The ballots that were received on July 27, 1998, were submitted by Bryan Behrens as agent for each of the persons or entities that rejected the plan. It does not appear from the evidence that Mr. Behrens, personally, is the holder of a claim against the bankruptcy estate, nor does it appear that he is an interest holder. He is, however, the husband of a personal representative of the estate of Anthony Dombrowski, decedent. Anthony Dombrowski was the majority shareholder in Land Paving Co. and also had related interests in Nebraska Asphalt Paving Co. and Nebraska Aggregates, Inc., which are claimholders in the case. Anthony Dombrowski was also the father of Michael Dombrowski, another claimholder in the case.

Michael Dombrowski appears to be the control person of Nebraska Asphalt Paving Co. and Nebraska Aggregates, Inc. On behalf of himself and Nebraska Asphalt Paving Co. and Nebraska Aggregates, Inc., Michael Dombrowski executed a settlement agreement in January of 1998 with the proponent of the plan and others. In that settlement agreement, Mr. Dombrowski agreed that he had no objections to a plan that would provide for full payment of the unsecured creditors before a class identified as “Future Interest Holders” received any payment. Mr. Dombrowski specifically agreed that he would not take any

actions to frustrate confirmation of such a plan. Mr. Dombrowski also represented and warranted that he controlled both Nebraska Asphalt Paving and Nebraska Aggregates, and he agreed that neither he nor the Dombrowski corporations would take any action to impair or impede the proponent's efforts to confirm such a plan. Notwithstanding such assurances, Mr. Dombrowski, Nebraska Asphalt Paving Co., and Nebraska Aggregates, Inc., filed ballots rejecting the plan.

Mr. Behrens, in addition to submitting the ballots rejecting the plan, has, on behalf of the rejecting parties, filed an objection to this plan. The objection asserts that the proponent has not complied with the applicable provisions of Title 11 because the proponent, according to the objector, sold the patent rights owned by the debtor without permission of the court. The objection further states that the appointment of the plan proponent as a director, officer or a voting trustee is not consistent with the interests of creditors of the estate; that the plan is not proposed in good faith because there is no requirement that the holders of unsecured claims receive any payment at any time after confirmation of the plan; that the plan does not comply with the statute because it does not provide that each holder of an unsecured claim receive, as of the effective date, property of a value equal to the allowed amount of the claim; and the plan impermissibly provides that a holder of a claim or interest junior to the unsecured class will retain an interest in the debtor.

Decision

This plan meets all of the confirmation standards of the Bankruptcy Code and shall be confirmed by separate order. The objection is overruled in its entirety.

Findings of Fact, Conclusions of Law and Discussion

A. General

This plan is a "cash flow plan." It provides, as of the effective date, for specific payments to certain classes of creditors. With regard to the unsecured class of claims, it provides for payment in full, with interest from the effective date. The source of such payment includes cash on hand on the confirmation date; all net cash proceeds; and funds contributed by or on behalf of the plan proponent.

"Net Cash Proceeds" is defined in the plan, at Article 1, page 7, as "gross cash proceeds received by the Debtor from Patent Transactions or other revenue sources less all expenses incurred in connection with such gross cash proceeds including, but not limited to, state and federal tax liabilities attributable to Debtor's taxable income."

All funds received by the reorganized debtor are to be used to create a creditor payment fund which will first pay allowed administrative expense claims, then the allowed IRS claim, ordinary operating expenses, the allowed U.S. Bank claim, the allowed unsecured claims and, last, distributions or dividends to the allowed future interests. The plan's purpose, as stated at Section 6.1, is to "realize the maximum value of the Patent Rights and any other assets" and further provides for distribution as set forth in Section 6.2, the creditor payment fund, and Section 3, the provision for payment of claims.

It is clear that the class of unsecured claims will receive payment if and when the business succeeds, that is, if and when revenues are received from licensing the patent rights or from other marketing ventures with regard to the patent rights. The business of the reorganized debtor is to maximize revenue from the patent rights and, as in any other operating business, the creditors will be paid when the Board of Directors is successful in marketing the "product," the patent rights, at a profit.

In his objection, Mr. Behrens alleges in part that the plan proponent has sold or otherwise transferred from the debtor the debtor's interest in the patent rights. Mr. Behrens is simply incorrect. The debtor still owns the patent rights and those interest holders who are identified as Future Interest Holders, who arguably own some type of future interest rights, have voted in favor of this plan and have agreed to surrender their future interest rights for stock in the reorganized company. They have also agreed, pursuant to the terms of the plan, that they will not receive any distributions as a result of their stock holdings, until, and unless, the class of unsecured claims is paid in full, with interest.

B. Confirmation Requirements

B(1) 11 U.S.C. § 1129(a)

The Bankruptcy Code, at 11 U.S.C. § 1129(a) provides that the court shall confirm a plan only if certain requirements are met.

The plan meets all of the confirmation requirements of 11 U.S.C. § 1129(a), and specifically meets the feasibility requirement and the requirement in Section 1129(a)(7) that each holder of a claim has accepted the plan or will receive property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive if the debtor were liquidated under chapter 7. This plan provides for payment in full to each holder of a claim in Class 3 and, therefore, complies with Section 1129(a)(7)(A)(ii).

For purposes of this case, the most significant confirmation requirement is found in Section 1129(a)(8) which provides, regarding confirmability:

> (8) With respect to each class of claims or interests--
>
> (A) such class has accepted the plan; or
>
> (B) such class is not impaired under the plan.

Because Class 3 is impaired, the inquiry must begin with whether Class 3 has accepted the plan. To determine if Class 3 has accepted the plan, it first must be determined which claims are eligible to vote. Concerning the nine ballots which were received late, five are disqualified from the outset. The two ballots received from Vercoe and Zeller in the amount of $11,900.00 and $24,500.00, respectively, are disqualified because they had previously, and timely, filed ballots rejecting the plan and those ballots may not be counted twice.

The three ballots received from Nebraska Asphalt Paving Co., Michael Dombrowski, and Nebraska Aggregates, Inc., must likewise be disqualified because Mr. Dombrowski has, on his own behalf and on behalf of the two corporate entities, entered into a settlement agreement whereby he agreed not to interfere with confirmation of a full payment plan. This plan is a full payment plan with regard to the class of unsecured claims and his actions in rejecting the plan on behalf of

those interests that he controls are, therefore, taken in bad faith and shall not be counted.

Counting only the remaining, qualified ballots, both timely filed and late, it appears that eleven ballots, representing $581,605.08, have voted in favor of the plan. Six ballots, representing $204,700.44, have rejected the plan.

The Bankruptcy Code at Section 1126(c) provides that a class of claims has accepted the plan if it has been accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims held by such creditors that have accepted or rejected the plan. In this case, counting all seventeen qualified ballots, eleven have accepted and six have rejected. The dollar amount of acceptances is $581,605.08 and the dollar amount of the rejecting ballots is $204,700.44. Claims representing more than one-half of the ballots have accepted the plan, and claims representing more than two-thirds of the total dollar amount of voting claims have accepted the plan. (The total amount represented by all of the claims which filed qualifying ballots is $786,305.00. Two-thirds of that amount is $524,465.00. The amount represented by the accepting ballots is $581,605.00.)

Therefore, Class 3, when counting only qualified ballots, has accepted the plan and it can be confirmed.

B(2) 1129(b)

Even if it is appropriate to find that all of the late received ballots should be fully counted and that, therefore, Class 3, the class of unsecured claims, has rejected the plan, the plan can still be confirmed under 11 U.S.C. § 1129(b)(2)(B). That statutory section provides that a plan is fair and equitable with respect to a class if each member of the class either receives payment in full, including interest from the effective date, or if each holder receives at least what it would receive in a Chapter 7 liquidation and no member of a class junior gets anything. This requirement is generally referred to as the “absolute priority” provision of the code.

There is another class of impaired claims that has accepted the plan and this plan provides that each holder of an unsecured claim in Class 3 will be paid in full with

interest. Such a plan provision meets the requirement that each holder, as of the effective date of the plan, receive an amount equal to the allowed amount of the claim. Because the plan does so provide, the statute does not prohibit holders of claims from a junior class receiving or retaining an interest in the debtor. In other words, the fact that the "Future Interest Holders" will receive stock on the effective date in consideration for surrendering their future interest claims, does not violate the "absolute priority rule."

C. Ballots Received After Bar Date

The proponent was directed, by court order, to provide notice to all interested parties that the bar date for balloting and the bar date for objecting to the plan was July 24, 1998. Both the notice and the ballot which were sent to each interested party contained the bar date. In addition, the ballot and the notice of the deadline for voting on the plan and for filing objections to the plan both specifically informed the interested parties that the ballots were required to be returned to counsel for the proponent at a specific address in Omaha, Nebraska. Those requirements were ignored by Mr. Behrens, as agent for the rejecting claimholders. Neither Mr. Behrens nor any of the objecting parties provided counsel for Mr. Behrens with the package which had been served upon interested parties by the proponent. That package included the Second Amended Plan of Reorganization (the plan), the disclosure statement with attachment, a copy of the journal entry approving the disclosure statement, the ballot and the notice of the deadline for voting on the plan and for filing objections, and finally, an amended order which set the objection deadline as July 24, 1998.

Mr. Behrens has not presented any evidence from which it could be concluded that there is a good reason, or excusable neglect, for the failure to timely deliver the ballots to the appropriate person. The bar date for delivering the ballots to counsel for the proponent was known by each claimholder and shall be honored in this case.

As a result of the failure of Mr. Behrens, as agent for the rejecting claimholders, to comply with the requirements of the court order and the terms of the ballot and the notice concerning the last date for objecting and the bar date for balloting, all of the ballots presented by Mr. Behrens are disqualified.

Conclusion

The plan meets all confirmation requirements under 11 U.S.C. § 1129(a) and 11 U.S.C. § 1129(b) and shall be confirmed by a separate order.

DATED: September 29, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
BIGGS, WILLIAM (64)
WEGNER, JEFFREY (13)
WOOLLEY, JANICE (36)

Copies mailed by the Court to:
Albert Kerkove, Attorney
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:	)	
	)	
LAND PAVING COMPANY,	)	CASE NO. BK87-82050
	)	CH. 11
Debtor	)	

ORDER CONFIRMING PLAN

After review and consideration of the Second Amended Plan and Modification filed by Bruce Schreiner, "the Plan," it is:

ORDERED:

1. All Objections that have been filed in opposition to the confirmation of said Plan, are overruled.

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

3. The Plan is hereby confirmed.

4. In order to effectively conclude the administration of the Debtor's estate, and, pursuant to 11 U.S.C. § 1142, Fed. R. Bankr. P. 3020(d) and 3021, and the Local Rules of this Court, the proponent shall:

A. Carry out the confirmed Plan, by distribution and performance of all other necessary acts.

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

C. File a Final Accounting/Report and Application for Final Decree within thirty (30) days after substantial consummation of the Plan.

DATED: September 29, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
UNITED STATES BANKRUPTCY JUDGE

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