UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
LOCKWOOD CORPORATION,	)	CASE NO. BK93-80133
	)	CHAPTER 11
DEBTOR(S)	)	
	)	Filing No. 701
	)	
Plaintiff(s)	)	
vs.	)	
	)	DATE: December 12, 1995
	)	HEARING DATE: December 11, 1995
	)	at 1:30
Defendant(s)	)	OBJ. DEADLINE: December 4, 1995

MEMORANDUM OPINION

Hearing was held on Motion for Authority to Sell Assets of the Estate other than in the Ordinary Course of Business, Free and Clear of Liens, Claims and Encumbrances. 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)(N).

Background

On December 11, 1995, a hearing was held on the Motion by the Debtor to Authorize the Sale of Certain Assets of the Debtor to Agromac International, Inc. (Agromac). This Court has previously approved a procedure by which the offer to purchase submitted by Agromac was to be used as a base bid and the Debtor, through a bidding advisor, was to advertise that the assets were available for sale, provide information requested by potential bidders, receive bids and make a recommendation to the Court with regard to the "best bid." Since the Agromac bid was presented by an entity that has been involved in the operation of the Debtor for several years, and since certain interested parties, including the United States of America on behalf of the Internal Revenue Service, the Pension Benefit Guaranty Corporation and the Official Committee of Unsecured Creditors objected to the process, the Court, in one of its previous orders, stated:

> [I]f the winning bid under the Debtor-in-Possession's proposed sale is Agromac, this Court will examine the transaction very closely to determine that no self-dealing took place between the Debtor and Agromac and that Agromac did in fact make the best bid. Interested parties may challenge whether the winning purchase offer is truly in the

> best interest of the estate. The Debtor-in-Possession will not be permitted to sell the estate assets to Agromac, or any other party, unless proper disclosures have been made to all legitimate potential buyers. . . .

(Memorandum of November 16, 1995, Filing No. 738)

Pursuant to the procedure approved by the Court, a bidding advisor was appointed. The advisor advertised the Debtor's potato equipment manufacturing division assets for sale and did receive inquiries from several interested parties. After obtaining confidentiality agreements from three entities, the bidding advisor provided several items of written information to the potential bidders. The information provided included material generated initially by the Debtor and included material provided by the Debtor in response to specific requests for information from the interested bidders.

When the process was completed and the deadline for submitting bids had passed, the only bid that had been received by the bidding advisor was that of Agromac.

After the deadline for filing objections to the sale had passed, the Court received a written objection from one of the potential bidders. That written objection requested additional time to investigate the assets, requested certain requirements be removed from the bidding process, and requested that the Debtor be specifically directed to provide the bidding advisor all information reasonably requested with regard to the assets of the Debtor and the operations of the Debtor. That objection also asserted that specific financial information had been requested and had not been provided, thereby causing the potential bidder to be unable to evaluate the assets and make a determination of whether they were worth bidding at a price similar to or higher than the Agromac bid.

The Court scheduled the hearing for December 11 to permit the Debtor and the bidding advisor to present evidence concerning the process used and to permit the objecting potential bidder to testify with regard to what information had been requested, but not provided by the Debtor. The intention of the Court when scheduling the hearing was to permit a record to be made concerning the fairness of the process and to enable the Court to determine if the Agromac bid, being the only bid received, was in the best interest of the estate.

Decision

The sale to Agromac is not approved.

Applicable Law

The Debtor is proposing to sell the potato division pursuant to Section 363(b)(1) of the Bankruptcy Code, which provides:

> The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(b)(1). In a Chapter 11 bankruptcy case, selling substantially all of a debtor's assets under Section 363(b), instead of through a plan of reorganization, is permissible so long as the sale of the assets does not determine issues which are more appropriately decided in a plan of reorganization. LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 363,03[2], at 363-23 to 363-24 and accompanying footnotes (15th ed. 1995).

Since there is no case authority by the Eighth Circuit Court of Appeals or the United States District Court for the District of Nebraska on the standards which must be met by debtors in order for a bankruptcy court to approve a sale of substantially all of the assets pursuant to Section 363(b), this Court shall follow the standards which have developed in other circuit courts and have been adopted by bankruptcy courts in the Eighth Circuit.

The Second Circuit in Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), noted that under the prior Bankruptcy Act, significant assets of the estate were permitted to be sold prior to the approval of a plan only in emergencies, but that later case law under the Bankruptcy Act permitted such sales in situations where the bankruptcy court found that the sale of the assets was "in the best interest of the estate." 722 F.2d 1063, 1067-68 (2d Cir. 1983). The court opined that when Congress chose to drop the "for cause shown" language from Section 116(3) of the Bankruptcy Act when writing its counterpart at Section 363(b) of the Bankruptcy Code, Congress intended for bankruptcy judges to have even more flexibility to sell assets of the estate to respond to differing circumstances arising in each case. Id. at 1069.

While Lionel found that the Bankruptcy Code did not adopt the prior statute's requirement that only an emergency permits the use of § 363(b) to sell significant assets of the estate, the court did not go so far to grant bankruptcy judges "*carte blanche*" under Section 363(b). 722 F.2d at 1069. The court held that a bankruptcy court must establish an "articulated business justification" for a sale of significant assets pursuant

to Section 363(b) and established the following guidelines to aid the bankruptcy court in its decision:

> [The bankruptcy judge] should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. [The bankruptcy judge] might, for example, look to such relevant factors as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.

Id. at 1070-71. The Court concluded that the burden of proof began with the debtor but shifted to the objecting party:

> While a debtor applying under § 363(b) carries the burden of demonstrating that a use, sale or lease out of the ordinary course of business will aid the debtor's reorganization, an objectant, ..., is required to produce some evidence respecting its objections.

Id. at 1071.

The Sixth Circuit adopted the reasoning set forth in Lionel and therefore, has also concluded that bankruptcy courts can approve the sale of substantially all of a debtor's assets pursuant to § 363(b) without a confirmed plan of reorganization. Stephens Indus., Inc. v. McClung, 789 F.2d 386, 389-90 (6th Cir. 1986). In Stephens Indus., the circuit court found that the bankruptcy court established an articulated business justification and a substantial asset of the estate could be sold because the asset, a radio station, could not be operated at a profit, payroll and operating expenses could not be met, and if the debtor ceased operations while a plan was being prepared, it would risk losing its broadcast licenses. 789 F.2d at 390.

The Unsecured Creditors Committee (the Committee) at the present hearing and at the prior hearing approving the sale

procedures for collecting bids, has taken the position that a sale of substantially all of the estate's assets pursuant to Section 363(b) prior to a confirming a plan of reorganization is not permitted under the bankruptcy code. However, this position is not well supported under current case law.

The Committee relies primarily on Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways), 700 F.2d 935 (5th Cir. 1983). Braniff found that the proposed sale of substantially all of the debtor's assets was beyond the scope of a Section 363(b) sale and attempted, instead, to dictate the terms of the reorganization of the debtor. 700 F.2d at 939-40. The court specifically discussed the argument that Section 363(b) did not apply to sales of substantially all of the assets of the debtor, to which the court replied, "We need not express an opinion on this controversy because we are convinced that the [proposed transaction] is much more than the "use, sale or lease' of [the debtor's] property authorized by § 363(b). Id. at 939. Thus, Braniff declined to rule on the issue and does not stand for the proposition that Section 363(b) sales of substantially all of the estate's assets are prohibited. See also Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223 (5th Cir. 1986) (holding that the Lionel "articulated business justification" test applied to sales of assets, but under Braniff, debtors cannot short circuit the requirements of a Chapter 11 plan of reorganization); In re Property Co. of Am. Joint Venture, 110 B.R. 244, 246-47 (Bankr. N.D. Tex. 1990) (stating that motion to sell substantially all of the debtors assets outside of a plan was rejected because of deficiencies in proof of service and concern for creditors in the case).

Bankruptcy Courts in the Eighth Circuit which have addressed proposals to sell substantially all of the debtor's assets pursuant to § 363(b) have overwhelmingly concluded that such a proposal is permissible. In re Equity Management Sys., 149 B.R. 120 (Bankr. S.D. Iowa 1993); In re George Walsh Chevrolet, Inc., 118 B.R. 99 (Bankr. E.D. Mo. 1990); In re Channel One Communications, Inc., 117 B.R. 493 (Bankr. E.D. Mo. 1990); In re Apex Oil Co., 92 B.R. 847 (Bankr. E.D. Mo. 1988).

In Equity Management Systems, the bankruptcy court framed the factors to consider when deciding whether to approve the sale of substantially all of the debtor's assets pursuant to Section 363(b) as follows:

> (1) Whether accurate and reasonable notice has been given to all creditors and parties in interest;
>
> (2) Whether there is a sound business reason for the sale without a disclosure statement and plan;
>
> (3) Whether the purchase price is fair and reasonable;
>
> (4) Whether the proposed sale does not unfairly benefit insiders or proprietary purchasers, or unfairly favor a creditor or class of creditors.

149 B.R. at 124 (citing Titusville Country Club v. Pennbank (In re Titusville Country Club), 128 B.R. 396 (Bankr. W.D. Pa. 1991); George Walsh Chevrolet, 118 B.R. at 101-02).

This Court will adopt the test set forth in Equity Management Servs. to evaluate the Debtor's proposed sale of the potato division. Equity Management Servs. is based upon the opinion of the bankruptcy court in Titusville which adeptly combined the opinions expressed in Lionel and Stephens Indus., as well as other cases, into a coherent and flexible standard which causes bankruptcy courts to establish that the debtor has articulated a business justification for the sale of substantially all of the estate's assets. Titusville, 128 B.R. at 399. In addition to adopting the test proposed in Titusville, Equity Management also adopts a standard which addresses the stricter amount of scrutiny the present transaction must be subject to because of the insider relationship between the Debtor and Agromac.

Findings of Fact and Discussion

The operative language in the Agromac bid is the following:

> 1. Business Assets:
>
> The assets to be sold by Lockwood to AGROMAC will include all of the assets, properties, and rights of any kind (collectively, the "Potato Equipment Assets") directly or indirectly owned by Lockwood and used or intended to be used in connection with the design, manufacturing, marketing, and distribution of the potato planters, harvesters, and warehouse products,

and subcontracted agricultural equipment products (the "Potato Equipment Business"). The Potato Equipment Assets will include:

a) all fixed assets including the real property, plant and equipment and fully facilitated administrative offices known as Plant 1 and Plant 2, of the Gering Works, including the Resource Conservation Recovery Act ("RCRA") closed hazardous waste facility, and the AGROMAC Retail Division stores ("Retail Stores") located in Rexberg, Blackfoot and Paul, Idaho;

b) the total inventory and supplies, including finished goods, raw materials and work in process related to the Potato Equipment Business existing on the date hereof, except items used in the ordinary course of business, and including the proceeds thereof;

c) all furniture, telephones, computers, fixtures, and other tangible personal property located on or around or about the Potato Equipment Business and Potato Equipment Assets locations of a) above;

d) all equipment, machinery, tools, tooling, molds, and other fixed assets used or to be used in connection with the Potato Equipment Business and Potato Equipment Assets;

e) all accounts receivable of Lockwood's Potato Equipment Business, except those related to pivot irrigation business which have been committed to Powerhorse Corporation;

f) all purchase orders related to Potato Equipment Business customers, customer commitments, bids, and work in process;

g) all leases for autos, trucks, machine tools, forklifts, and the three Retail Stores in Idaho, related to the Potato Equipment Business, including any past due amounts owed on the leases;

h) all intellectual property including the patents, trade marks, trade names, whether registered or commercially used, including the right to use, exclusively, the name of "Lockwood," together with the exclusive right to use Lockwood's "nested L" or "double L" trademarks, or modifications thereof;

i) all prepaid expenses and other prepaid assets of Lockwood, relating to the Potato Equipment Business;

j) all engineering and design materials, hardware, software and historical documentation related to the Potato Equipment Business and Potato Equipment Assets, of Lockwood, including without limitation the designs, engineering drawings, schematics, blueprints, plans, specifications, disclosures, material lists, manufacturing procedures or other similar items, including all computer or other electronic media, programs or data;

k) all books, records, files, lists, customer orders, purchase records, warranty records, sales records, manuals, brochures, trade secrets or other papers, data or information, including all computer or other electronic data and programs related to the foregoing, relating to the Potato Equipment Business and Potato Equipment Assets, excluding Lockwood's Corporate Minutes, Minute Books and tax records or returns;

l) the trust fund established for the RCRA site at the Gering Works property of Lockwood;

m) all goodwill associated with the Potato Equipment Business and the Potato Equipment Assets;

n) the specific liability, as follows, for current-active employees of Lockwood as of Closing, including:

1) any accrued-and-unearned unpaid salaries or wages;

2) earned-vested and unpaid vacation, holiday and optional holiday pay

3) insured employee benefits (only those provided through Regional Care Inc., and Phoenix Life);

4) approved-unreimbursed business expenses;

5) the union contract between Lockwood and General Drivers & Helpers Union, Local No. 554.

> Notwithstanding anything in the foregoing to the contrary, the Potato Equipment Assets will not include any of the following: a) all assets of the pivot irrigation business that are part of the pending sales agreement between Lockwood and Powerhorse Corporation; b) all assets, including accounts receivable, associated with the military and commercial truck body and the pump and cylinder businesses of Lockwood; c) any past product liability; d) any past workman's compensation or past or current employee claims, lawsuits or actions against Lockwood; e) currently existing or pending dealer or distribution contracts; and f) any post petition obligations of Lockwood except as provided hereinbelow.

Ex. 3, Tab 13.

The potential bidder that brought to the attention of the Court that Lockwood did not provide sufficient information, is Mr. J. Ward McConnell. He is involved in the manufacturing of potato harvesting equipment in the State of North Carolina. He has been involved in the farm equipment business, either in the manufacturing, retail or wholesale distributorship capacity for 35 years. He is not a creditor and as his counsel so artfully stated, "he has no dog in this fight."

The Debtor has several different manufacturing divisions, including a truck body division, an irrigation division, and the potato equipment division. The information provided by Lockwood to McConnell through the bidding advisor did not break down inventory, equipment, or accounts receivable by division. McConnell requested such a breakdown and it was not provided. At the hearing, the chief financial officer of the Debtor testified that such information is not broken down in the Debtor's financial records.

McConnell requested copies of all contracts and agreements with any party concerning the potato equipment business. No contracts or agreements were provided, other than copies of leases of the retail stores in various locations.

McConnell requested specific information on patents. That information was not provided.

McConnell requested information concerning the identity of dealers and retail customers. The information was not provided, but the chief financial officer testified that it could be gleaned from the accounts receivable documents that were provided. However, the accounts receivable documents that were

provided do not break down accounts receivable by potato equipment dealers versus other parties.

McConnell requested information concerning return policies and specifically requested information with regard to accounts receivable and any setoffs or other agreements concerning return of purchased items. No such information was provided.

The Court concludes from the testimony of Mr. Lawlor, the chief financial officer, and the testimony of Mr. McConnell, the frustrated potential bidder, that it was not possible for a legitimate potential bidder to determine exactly what assets were being sold. There is no break down in the material provided through the bidding advisor about what specific equipment, furniture, and fixtures is included in the sale. There is no information about what specific items of inventory are related to the potato equipment business versus irrigation or truck body business. There is no information concerning which accounts receivable can be identified with the potato equipment business versus the other divisions. In other words, neither Mr. McConnell nor any other party that attempted to bid against Agromac could obtain from the information provided a clear picture of exactly what was to be bid upon.

Since that information was not available to potential bidding competitors of Agromac, the Court reviewed the Agromac proposal in detail. The operating terms of the proposal are specifically set out above. In the general introductory paragraph of the Agromac proposal and in subparagraphs b, c, d, e, f, g, i, j, k, and m, the assets to be purchased by Agromac are those "related to the potato equipment business" or "to be used in connection with the potato equipment business and potato equipment assets."

There is not one bit of specificity in the Agromac proposal. There is no identification of any specific assets which are to be purchased. There is no break down of those assets which are related to the potato equipment business versus the other businesses. There is no formula for determining which particular pieces of equipment, which inventory and which accounts receivable are being purchased by Agromac.

Notwithstanding the fact that there is no detail with regard to what is being purchased, the parties agree that the Agromac bid is worth approximately $7.1 million and the secured claims of Norwest and FirsTier will be satisfied. To enable Agromac to make such a purchase, Agromac has obtained, in addition to capital contributions by individuals, financing from Norwest and perhaps some financing from FirsTier. Although the Court is not

privy to the specific financial arrangements between Agromac and those parties, the Court must assume that Agromac knows exactly what Agromac is purchasing from the Debtor. The Court must further assume that Agromac has been able to identify specific assets which are being purchased in order to obtain financing.

It seems only logical that if Agromac had the ability to obtain from Lockwood specific information about inventory, equipment, and accounts receivable directly related to the potato equipment business, Lockwood should have been able to provide such specific information to all potential bidders. The chief financial officer of Lockwood testified that anyone familiar with the business would be able to review the financial documents he provided and from such a review, determine exactly which assets were subject to sale. He did admit, however, that the documents he provided did not identify any of the assets by department or division.

Either Agromac obtained from Lockwood information about the assets which no other party was able to obtain, or Agromac has made a blind bid and intends, once the bid is approved, to sit down with the officials of Lockwood and specifically identify those assets which are the subject of the purchase offer. Under either scenario, the estate cannot be assured that the Agromac bid and the sale process authorized by this Court has been fair. If Agromac had inside information about the identify of particular assets which are for sale and others did not, others were precluded from properly evaluating the assets and preparing a bid. If Agromac has the benefit of hindsight, and, after the bid is approved, can pick and choose amongst assets of the estate which shall be included in the sale, the process is obviously set up only to benefit Agromac and not to benefit the estate.

No evidence was presented at the hearing on December 11 or at any other hearing, concerning the appraised value of the assets being sold. As a result of the process, the Court has before it only the bid of Agromac for certain unidentified assets. The Court also has before it the threat by the secured claimholder, Norwest, that if this sale is not approved, it will exercise its state law rights to liquidate its collateral. As claimed by the Debtor and those parties interested in the approval of this Agromac bid, the matter before the Court is simple. It is either approve the bid or kill the company. From the point of view of the official unsecured creditors' committee and others aligned with the committee, the matter before the Court is also simple. They suggest that the Agromac bid is one presented by insiders and the process for sale of the assets was set up from the beginning to eliminate any legitimate potential bidders and leave only the Agromac bid on the table, even though

under a proper sale format, the estate might receive more for the assets. If a different type of sale format brought more for the assets, the unsecured creditors, as well as the administrative claimants, might benefit.

The matter is not as simple as the various parties suggest. A sale in a Chapter 11 case pursuant to 11 U.S.C. Section 363(b) is a sale not in the ordinary course of business. It is a sale that must be viewed critically, because it does not provide for the protection that a Chapter 11 reorganization plan and disclosure statement process would provide. It is a sale that must have, according to all of the case law, a sound business purpose, a fair price, and not appear to be solely for the benefit of insiders. All of the parties were informed in prior orders concerning this matter that the sale process would be reviewed in depth to assure that the system was not being abused and that the sale terms were fair, that all interested parties received sufficient information to enable them to decide whether to bid against Agromac and to insure that Agromac's bid, if it is the only bid, is in fact the best bid.

In a bankruptcy case the process is important. The appearance as well as the reality of fairness is important. In this case, it appears that the sale process was not fair. Either Agromac has more information than anyone else, or Agromac has the ability to obtain more information after its bid is approved. The Agromac bid is not specific. Neither this Court nor anyone else can determine what is actually being sold by Lockwood and purchased by Agromac. This Court cannot determine that the price offered by Agromac is fair or is anywhere close to the value of the assets. There is no identification of the goods to be sold. There is no appraisal of the goods to be sold. There simply is no information upon which this Court can determine that the Agromac bid meets all of the requirements of a Section 363 sale, is fair, is in good faith, and is not solely for the benefit of insiders. Therefore, the sale shall not be approved.

If the disapproval of the Agromac bid results in the closing of the business, a "fire" sale of the assets, the layoff of the Lockwood employees and the loss of a significant payroll in the Gering, Nebraska, area, the Committee will have won the battle, but will have lost the war. No entity, whether a prepetition creditor, an administrative claimant, a secured claimholder, or an employee of the Debtor will benefit under such circumstances. However, this Court cannot and will not rubber stamp a hurry up process which results in the transfer of assets of an estate under the supervision of the bankruptcy court without proper disclosures having been made.

Separate journal entry shall be entered denying the approval of the Agromac bid.

BY THE COURT:

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

Copies faxed by the Court to:
*Thomas Stalnaker/Robert Becker 393-2374
Steven Turner/Terrence Michael 344-0588
Williams Biggs 344-3407
T. Randall Wright/Harry Dixon 345-0965
Robert Ginn/Everett Wooten 348-1111
Tamara Brehmer 392-0816
Jeffrey Wegner 346-1148
Mike Whaley 392-1538

Copies mailed by the Court to:
William Schonberg, 2300 BP America Bldg., 200 Public Square, Cleveland, OH 44114
Henry Carriger, IRS/USA
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.

UNITED STATES BANKRUPTCY COURT
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	)	DATE: December 12, 1995
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		at 1:30
Defendant(s)	)	OBJ. DEADLINE: December 4, 1995

JOURNAL ENTRY

Regarding: Motion for Authority to Sell Assets of the Estate other than in the Ordinary Course of Business, Free and Clear of Liens, Claims and Encumbrances.

APPEARANCES

Thomas Stalnaker/Robert Becker: Debtor
Steven Turner/Terrence Michael: FirsTier
Henry Carriger: IRS/USA
William Schonberg: Norwest
Williams Biggs: Agromac
T. Randall Wright/Harry Dixon: Creditors Committee
Robert Ginn/Everett Wooten: J. Ward McConnell
Tamara Brehmer: Jade Sterling Steel, Inc.

( ) Copy to Law Clerk ( ) Exhibits received

( ) NO HEARING HELD ( ) WITHDRAWN ( ) SETTLED

IT IS ORDERED:

The sale to Agromac is not approved. See Memorandum this date.

BY THE COURT:

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

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 Steven Turner/Terrence Michael 344-0588
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