United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
ASSET MANAGEMENT CORP.,
Debtor. No. 11-01-10819 SA

RULING ON DIP MOTION FOR RECONSIDERATION [doc 190]
AND THE OBJECTION THERETO [doc 193]

This matter is before the Court on the Debtor's Motion for Reconsideration and the objection thereto. As used in this ruling, “Creditor Plan” is the Third Amended Creditors’ Plan filed 20 December 2001 [attached as Exhibit 2 to doc 137, Order Confirming Third Amended Creditors’ Plan], the Modification of that plan filed 15 February 2002 [155] and the First amended Modification filed March 13 [162] and the oral correction at trial [“Class 2" should be “Class 5"]. The “DIP Plan” is the Second Amended Plan of Reorganization filed 13 August 2001 [86] and the Second Modification thereto filed 21 December 2001 [140]. (The Second Modification superseded the Modification filed November 13, 2001 [125].) On May 29, 2002 I issued an oral ruling confirming the creditor plan and denying confirmation of the DIP plan. A written confirmation order was entered on 12 June 2002 [187]. The Debtor filed a Motion for Reconsideration on 21 June 2002. On July 15, 2002, I orally granted the motion to reconsider in the sense that I announced that I would reconsider whether the decision was

correct. This written ruling addresses the "substance" of the reconsideration motion.

At issue is whether to leave in place the order confirming the Creditor plan, or to set aside that order in favor of one confirming the DIP plan. Having gone back and reviewed the current plans as modified and/or amended, I have decided to instead confirm the DIP Plan.

LEGAL STANDARD AND ANALYSIS

A timely filed "motion to reconsider" is treated under Rule 59 of the Federal Rules of Civil Procedure,[1] which provides that a motion may be filed within ten days after entry of the judgment (as was done here) to alter or amend a judgment. (Rule 59 is incorporated into Rule 9023 of the Federal Rules of Bankruptcy Procedure.) Tenth Circuit case law provides that grounds warranting a change in the original decision are an intervening change in the controlling law (clearly not applicable here), new evidence previously unavailable (also not applicable), and the need to correct

[1] Adams v. Reliance Standard Life Insurance Company, 225 F.3d 1179, 1186 n. 5 (10th Cir. 2000). (A "motion to reconsider" filed within ten days of the entry of the judgment is considered a Rule 59(e) motion.)

clear error or prevent manifest injustice.[2] Rule 59 relief is appropriate where the Court has misapprehended the facts.[3] The purpose of Rule 59 is to "'mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment."[4]

In this instance, having reexamined at some length both plans, I am convinced that I made a mistake, that I misapprehended the facts and that it would be manifest injustice not to change the confirmation order.

FACTUAL ANALYSIS

There are several major factors in this case that are the determinants of which plan should be confirmed. These factors include what leases will be available to the Reorganized Debtor, how much is being paid into the funds that go to pay the creditors, and thus which plan is likely to result in the greatest payment to the creditors.

I have already ruled, and reaffirm the ruling, that both plans are confirmable, but I can only confirm one. Section 1129(c) requires that therefore I "consider the preferences of

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[2] E.g., Servants of the Paraclete v. Does, I-XVI, 204 F.3d 1005, 1012 (10th Cir. 2000).

[3] Id.

[4] White v. New Hampshire Department of Employment Security, 455 U.S. 445, 450 (1982).

creditors and equity security holders" in making this decision. The equity security holders of course are Ms. Mehler and Mr. Bauder, but I am not sure that Congress in drafting § 1129(c) intended to prefer the position of the shareholders/officers of a closely held corporation so much as it meant for the Court to take into consideration the preferences of shareholders in large publicly held corporations. The majority of the unsecured creditors have also voted for the Creditor Plan, but because the Code does not require me to confirm the plan preferred by the majority of the unsecured creditors, and because I think that the unsecured creditors would prefer to have me confirm the plan that is likely to pay them the most, and because I think that the DIP Plan will result in the highest payment for the unsecured creditors, I will confirm the DIP Plan.

The assumption by the Reorganized Debtor of the leases through the DIP Plan, with the cooperation of the shareholders, appears on review to be much more likely to happen than what is almost sure to be litigation if the Creditor Plan is confirmed, whether the specific Sigurdson proposal includes a consolidation with the USA Corporation case, or merely includes a provision that requires the Reorganized Debtor (or the Debtor in possession) to assume the

leases and litigate as necessary to enforce the assumption motions.

I am comfortable with this conclusion, even after reading pages 16-25 of the 2004 examination of Mr. Bauder. And I am comfortable with this position despite my finding in the earlier, oral decision, that the landlords would prefer cash from the Reorganized Debtor rather than remaining loyal to Mr. Bauder and Ms. Mehler. In fact, it seems on reflection that the landlords could have both the cash flow and continue to deal with Mr. Bauder and Ms. Mehler, directly or through USA Corporation, should Ms. Mehler and Mr. Bauder carry out their threat to compete with the Reorganized Debtor. And thus under the Creditor Plan it is possible if not probable that the Reorganized Debtor might end up losing one or more sites for operating.

This is significant because if one or more of the business locations is lost, that will result in a significant loss of income. And since there is a minimum amount of income that is required just to keep the business going, the loss of even one site may seriously reduce the funds that become available for the creditors.

Another major issue for the unsecured creditors has to do with what cash flow they receive from the Reorganized Debtor.

Both plans last for five years, and both define “net profits” identically. The DIP Plan provides for 75% of the net profits to go into a fund for distribution to creditors. My comments at a previous hearing (November 29, 2001) were that the officers’ salaries had to be capped and at least 75% of the net profits go to creditors. The implication is that the other 25% could go to the officers, or be used by the officers to put back into the business. The DIP Plan does cap the officers’ salaries and puts 75% into a fund for the creditors.

The Creditor Plan has a provision for a Contingency Fund, which is “to facilitate payment of repairs, maintenance, capital improvements, Class 1 administrative expenses [including attorney fees], and contingencies,” and which is to receive 25% of the net income. The uses for which this fund is to be put would appear to be items that would also be covered by the corporation’s ordinary-course-of-business expenditures. This fund will presumably be spent down over time, but it appears that any remaining sums at the end of the five years revert to the Reorganized Debtor.

The Creditor Plan Trust Fund is to be the recipient of 65% of the net profits, with 10% going to the officers, as an incentive for Ms. Mehler and Mr. Bauder to not leave and compete. Thus the effect is to allocate the net profits cash

flow into three different funds, into which various expenses of the business and the estate are separated for payment.

So for purposes of analyzing the competing plans, I have treated the Creditor Plan as paying the creditors in effect 90% of the net profits (although this may be a generous estimate of what the creditors will really receive) and the DIP Plan as paying the creditors in effect 75% (although this may be an ungenerous estimate if the Reorganized Debtor puts any part of the 25% back into the business and thereby increases net profits in future plan years). Those numbers alone would argue for confirmation of the Creditor Plan, but if it is likely that the Creditor Plan will result in the loss of one or more sites, then the question arises whether 90% of the net profits from operating one or two or three sites is better than 75% from four sites. 75% from four sites is better for the unsecured creditors.

Additional considerations are that paying the 75% into the Trust Fund annually instead of more often as proposed in the Creditor Plan makes less likely a default (albeit the Creditor Plan does not require a full 65% deposit every quarter), and the 75% avoids the possibility (hopefully slight) that the 90% plus $500/month might constitute a number greater than the net profit. And confirming the DIP Plan

greatly incentivizes Mr. Bauder and Ms. Mehler from leaving the Reorganized Debtor in order to compete and presumably reduce the Reorganized Debtor's income.

Part of the previous decision was based on what I saw as not so much bad faith on the part of Ms. Mehler and Mr. Bauder to get to a confirmable plan soon enough, as more "good faith" on the part of the Sigurdsons. (Anyway, the DIP Plan might not be confirmable if the Debtor's management were guilty of acting in bad faith, and I have already ruled that both plans are confirmable, implicitly ruling therefore that Ms. Mehler and Mr. Bauder were not acting in bad faith.) In thinking about this some more, it seems to me that paying the creditors less in order to punish the DIP's officers also results in punishing the creditors. That is a result that should be avoided if it can be, regardless of what measures if any to take in connection with the slowness of Ms. Mehler and Mr. Bauder to get a plan confirmed. (It may just be that the length of time in getting a plan confirmed is simply the way the Code works in the face of competing plans that both are uncomfirmable initially, and is "punishment" enough for everyone, including Ms. Mehler and Mr. Bauder.) And it also seems to me that the issue of the personal obligation of Ms. Mehler and Mr. Bauder to repay the Sigurdsons is irrelevant to

the confirmation of either plan.

In a related vein, I previously expressed concern about the loss to the estate of the experience of Ms. Mehler and Mr. Bauder, which significantly exceeds that of John Sigurdson, and I reserved jurisdiction to assure that the Reorganized Debtor was run in a way that fully protected the creditors' interests. Confirming the DIP Plan should alleviate those concerns. I accept in part the Sigurdsons' argument that the business is not closely akin in form to, say, a lawyer's practice, which at least in some cases is closely dependent on the specific lawyer. But there is no denying, based on the track record so far, that Ms. Mehler and Mr. Bauder have a lot of very useful experience running this very business, which as I said on May 29, 2002 the Sigurdsons' proposed manager does not have.

The previous decision also relied on the fact that John Sigurdson was a credible purchaser for the business, and that the Creditor Plan provided for Mr. Behles to take over the operation of the business as Plan Administrator in the event that there were no successful bidders for the stock of the company, whereas the DIP Plan provided for conversion in that circumstance. Again, having thought about it some more, it appears to me that it is unlikely there will not be a

successful bidder for the stock of the Reorganized Debtor, and so this will not be a problem.

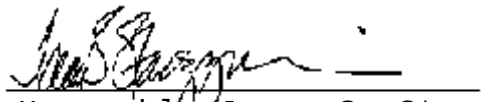
In that connection, I think it is clear, but just to make it very clear, any proceeds from the sale of the stock are to go into the Trust Fund, along with the $500.00 per month and the 75% of net profits, for distribution to creditors. Further, the Code provides that administrative claimants within reason and with the approval of the Court can make whatever arrangements they wish for delayed payments of their claims, and I don't think that they have to make the same arrangements for each plan. And it is permissible, even expected, for a plan to provide that the administrative costs will be paid first out of the Reorganized Debtor's post confirmation income.

CONCLUSION AND A FINAL NOTE

Having reconsidered both plans and the arguments made in favor of them, I have concluded that it would be in the best interests of all the creditors to confirm the DIP Plan, for the reasons stated above, and therefore I will enter such an order upon submission of a form of order by Debtors' counsel. (The form of order as entered should have the DIP Plan attached.)

Finally, Mr. Justice Felix Frankfurter is alleged to have

said, on the subject of judges reversing themselves, "Wisdom too often never comes and so one ought not to reject it merely because it comes late".[5] What is most important is to get the decision right, even if that happens belatedly. And that is what I hope to have accomplished here. But that accomplishment, if it indeed is one, cannot obscure the fact that I got it wrong the first time around, and thus (1) put the DIP in the position of having to ask for reconsideration, and (2) put the Sigurdsons in the position not only of having to object to the motion for reconsideration but also of believing they had won and finding out otherwise. For this I apologize to both sides and to their counsel.



Honorable James S. Starzynski
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[5] Edward Lazarus, Why Judges Rarely Change Their Minds, Legal Affairs: A Magazine of Yale Law School, Vol. 1, No. 2 (July/August 2002), at 39.

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I hereby certify that on September 18, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

Mary B. Anderson