

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

EDGAR RAYMOND PERKINS,

Chapter 11 Case No. 84-11046

Debtor.

MEMORANDUM AND ORDER RE "DEBTOR'S MOTION TO INCREASE
THE 180-DAY PERIOD OF EXCLUSIVITY" AND OBJECTION THERETO

In this contested matter the Chapter 11 debtor in possession, Edgar Raymond Perkins ("Mr. Perkins"), **has** filed a written motion pursuant to 11 U.S.C. §1121(d)¹ styled "Debtor's Motion To Increase The 180-Day Period Of Exclusivity" and **the** Third National Bank has filed a written objection thereto and a post-hearing brief in opposition to Mr. Perkins' instant motion.

¹11 U.S.C. §1121 provides in its entirety as follows:

"(a) The debtor **may** file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

"(b) Except as otherwise provided in this section, only **the** debtor may file a plan until after 120 days after the date of **the** order for relief under this chapter.

"(c) Any party in interest, including **the** debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if

"(1) a trustee has been appointed under this chapter;

"(2) **the** debtor has not filed a plan before 120 days after the date of **the** order for relief under this chapter; or

"(3) the debtor **has not** filed a plan **that has been** accepted, before 180 days after **the** date of **the** order for relief under this chapter, by each class of claims or interests **that** is impaired under **the** plan.

"(d) On request of a party in interest made within **the** respective period specified in subsection (c) of this section and after notice and a hearing, **the** court may for 'cause reduce or increase the 120-day period or the 180-day period referred to in this section."

The narrow and ultimate question for judicial determination here is whether cause or special circumstances exist pursuant to **11** U.S.C. §1121(d) to warrant the enlargement of the 180-day period of exclusivity referred to in 11 U.S.C. §1121(c)(3) within which Mr. Perkins may obtain acceptances of his reorganization plan.

After careful consideration of the testimony of Mr. Perkins, statements of counsel, the case record as a whole, and applicable law, **the court** makes the following findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052(a).

BACKGROUND

The relevant facts may be briefly summarized as follows: On November ~~21, 1984~~, Mr. Perkins filed an original, voluntary petition under Chapter 11 of the Bankruptcy Code and an order for relief was accordingly entered. Mr. Perkins' original Statement of Affairs and Schedules filed on December 12, 1984, reflects, in relevant part here, that approximately 100 creditors hold approximately 225 claims against this estate in the approximate amount of \$10,000,000.00 and that his properties are worth approximately \$13,500,000.00 consisting of, inter alia, shopping centers, radio stations, and substantial income and non-income producing real properties.

On March 20, 1985, Mr. Perkins filed a proposed disclosure statement as modified on May 7 and 9, 1985, and a document styled "Plan Of Reorganization" whereupon notice of a hearing to consider the disclosure statement was scheduled for May 9, 1985. Only four asserted creditors filed objections to the proposed disclosure statement. One of the objectors was Mr. Ben M. Gaines ("Mr. Gaines"), who made over forty detailed objections.² Third National Bank

²Mr. Perkins strongly denies that Mr. Gaines is a holder of any allowable claims against this estate. These gentlemen are former business partners: who have obviously encountered a bad business divorce. Substantial litigation is pending in the state courts to determine their claims against each other. Mr. Gaines orally objects to Mr. Perkins' instant motion and previously requested the appointment of a trustee.

also objected to **the** proposed disclosure statement. The other two objections were resolved prior to the scheduled hearing. Short of meaningless disclosure work, this court generally directs that proponents of disclosure statements modify them according to the wishes of parties in interest. At the disclosure statement hearing Mr. Perkins kindly agreed to the wishes of the asserted creditors. Under the circumstances, the court granted Mr. Perkins until July 11, 1985, to file a modified disclosure statement. An accounting firm **has now been** employed to assist him in this endeavor. A hearing has been scheduled for August 1, 1985, to consider Mr. Perkins' disclosure statement, as modified. Also at the disclosure statement hearing Mr. Perkins' attorney indicated in open court **that the** prior plan also would **be** modified. (Pursuant to 11 U.S.C. §1127(a), the proponent of a plan may modify such plan at any time before confirmation.)

On Monday, May 20, 1985, Mr. Perkins filed the instant motion seeking an enlargement of the 180-day exclusivity period; and after notice to all creditors and parties in interest, a hearing was conducted in open court on June 20, 1985, at Jackson, Tennessee. Mr. Perkins was the only witness to testify at the hearing.

CONCLUSIONS

From the outset it should be noted that this is the largest and perhaps most complex Chapter 11 case which this court has presided over in the Eastern Division of this Judicial District and that this is the first request made by Mr. Perkins seeking to extend the exclusivity period. See In re Manville Forest Products Corp., 31 B.R. 991 (D.C. N.Y. 1983).

11 U.S.C. §1121(b) is designed to give the debtor in possession control over **the** future of the business **by** giving the debtor the exclusive right to file a plan during the 120-day period following the order for relief.³ By virtue of 11 U.S.C. §1121(c) the debtor loses this exclusive right to file a plan in any

³ An underlying premise of the Bankruptcy Code is that the debtor should retain control of the business throughout a Chapter 11 case unless there is "cause" to remove **the** debtor in possession. See, among **others**, In re Garland, 6 B.R. 456,

of the following three situations: (1) if a trustee is appointed; (2) if the 120-day period expires and the debtor has not filed a plan; or (3) if the debtor does not file a plan which has been accepted, before 180 days after the order for relief under Chapter 11, by each class of claims and interests which is impaired under the plan.⁴ 11 U.S.C. §1121(d) provides, however, that on request of any party in interest and after notice and a hearing, the court may "for cause" increase or reduce the 120-day or 180-day periods. See H.Rep. No. 595, 95th Cong. 2d Sess. 231, 332 (1978); S. Rep. No. 989, 95th Cong. 2d Sess. 118 (1978). II. S. Code Cong. & Admin. News 1978, p. 5787. The purpose of subsection (d) of 11 U.S.C. §1121 is to give the court flexibility to extend the period in unusually complex or large cases or when creditors cause delay. Also the court may shorten these periods in small cases or when the debtor is found to be delaying the case unnecessarily. See, e.g., In re Manville Forest Products Corp., 31 B.R. 991 (D.C. N.Y. 1983); In re Trainer's, Inc., 17 B.R. 246 (Bankr. Ct. Pa. 1982); In re Tony Downs Food Co., 34 B.R. 405 (Bankr. Ct. Minn. 1983); In re Lake In The Woods, 10 B.R. 338 (D.C. Mich. 1982); In re Gage1 & Gagel, 24 B.R. 674 (Bankr. Ct. S.D. Ohio 1982).

The House Report, *supra*, regarding 11 U.S.C. §1121(d) provides, in relevant part, as follows:

"Subsection (d) permits the court, for cause: to increase or reduce the 120-day and 180-day periods specified. Since, the debtor has an exclusive privilege for 6 months during which others may not file a plan, the granted extension should be based on a showing of some promise of probable success. An extension should not be employed as a tactical device to put pressure on parties in interest to yield to a plan they consider unsatisfactory."

⁴Once the debtor loses the exclusive right to file a plan, any party in interest may file one.- i.e. a competing plan. Cf. 11 U.S.C. §1129(c).

The Senate Report, supra, regarding 11 U.S.C. §1121 provides.

in relevant part, as follows:

“Proposed chapter 11 recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy. At the same time, the bill recognizes the legitimate interests of creditors, whose money is in the enterprise as much as the debtor’s, to have a say in the future of the company. The bill gives the debtor an exclusive right to propose a plan for 120 days. In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors. The court is given the power, though, to increase or reduce the 120-day period depending on the circumstances of the case. For example, if an unusually large company were to seek reorganization under chapter 11, the court would probably need to extend the time in order to allow the debtor to reach an agreement. If, on the other hand, a debtor delayed in arriving at an agreement, the court could shorten the period and permit creditors to formulate and propose a reorganization plan. Again, the bill allows the flexibility for individual cases that is unavailable today.” (footnotes omitted.)

As previously mentioned, Mr. Gaines and the Third National Bank requested substantial and sophisticated modifications of Mr. Perkins’ disclosure statement, which Mr. Perkins has voluntarily agreed to make. Because the hearing on the disclosure statement has been adjourned to August 1, 1985, to allow for the modifications, Mr. Perkins now essentially requests something in the nature of a concomitant enlargement of the 180-day period of exclusivity within which to obtain acceptances of his plan. There is no proof in this voluminous case record to indicate that Mr. Perkins is unnecessarily delaying this case administration or that he seeks such an enlargement of the exclusivity period as a tactical device

to put pressure on parties in interest to yield to a plan they consider unsatisfactory. The delay here, if any, was actually brought about because the disclosure statement hearing was adjourned. Likewise, there is no proof in this record to indicate that Mr. Gaines or the Third National Bank is intentionally delaying the disclosure statement hearing in order that the 180-day exclusivity period will expire.⁵ Mr. Gaines and the Third National Bank requested modifications to Mr. Perkins' disclosure statement and same were granted. It would therefore not be likely under the circumstances for Mr. Perkins to obtain acceptances of his plan before 180 days after November 21, 1984, the date of the order for relief.

It was suggested by two other parties in interest at the hearing on the instant motion that perhaps a competing plan or plans might be helpful here for a number of reasons as it is contemplated that a substantial liquidation of properties will result under anyone's plan (including Mr. Perkins'). The court cannot seriously quarrel with this logic as competition is generally helpful in these matters; however, at this stage of the case administration and in light of the congressional purpose and special circumstances, the court is reluctant at this time to abort Mr. Perkins' exclusivity period.⁶ The court, however, is not unmindful of another congressional purpose - i.e. of putting a certain amount of pressure on Chapter 11 debtors to obtain acceptances of reorganization plans.

⁵ Once the disclosure statement is approved, the court will schedule a hearing to consider confirmation of Mr. Perkins' reorganization plan with at least 25 days notice by mail to creditors and parties in interest. See Bankruptcy Rule 2002(b).

⁶ The Third National Bank also asserts that Mr. Perkins' instant motion, filed on May 20, 1985, was not filed before 180 days after November 21, 1984. The 177th day fell on Friday, May 17, 1985, and the 180th day fell on Monday, May 20, 1985. Under the circumstances this argument fails based on equitable reasons. Bankruptcy Rule 9006(a) and Rule 6 F.R. Civ. P. In addition, the Third National Bank argues that Mr. Perkins' plan does not meet the statutory requirements under the mandatory provisions contained in 11 U.S.C. §1123(a). This argument is premature and may be subsequently resolved upon the filing of an objection to confirmation. See 11 U.S.C. §§1128(b) and 1129(a)(1). For purposes of 11 U.S.C. §1121, Mr. Perkins' document filed on March 20, 1984, and styled "Plan Of Reorganization" is minimally sufficient at the very least. As previously noted, Mr. Perkins' original plan may be modified prior to confirmation by virtue of 11 U.S.C. §1127(a).

Based on a totality of the particular facts and special circumstances, cause existing, and in an effort to harmonize the competing interests here, the court feels that the following result is fair, reasonable, and equitable: Mr. Perkins shall have sixty (60) days from August 1, 1985, to obtain acceptances of his plan; otherwise, he will lose the exclusivity period and any creditor or party in interest may file a competing plan. It should be noted that since Mr. Perkins' plan provides for a substantial liquidation of properties, the court cannot conclude at this stage of the case administration that there is no promise of probable success. Cf. 11 U.S.C. §1123(b)(4) and §1129(a)(11).

Parenthetically the court notes that 11 U.S.C. §363(b) provides that a trustee [or debtor in possession by virtue of Bankruptcy Rule 9001(10)] may sell property of the estate, other than in the ordinary course of business, upon notice and opportunity for objections and hearing thereon. Although liquidating plans are permissible under 11 U.S.C. §1123(b)(4), perhaps this estate should vigorously seek to sell properties of the estate prior to the confirmation hearing, if it is not already doing so.

Based on the foregoing reasons,

IT IS ORDERED THAT the exclusivity period to obtain acceptances of Mr. Perkins' plan is enlarged sixty (60) days from August 1, 1985;

IT IS FURTHER ORDERED that the Clerk of the Court mail copies of this Memorandum and Order to the persons attending the hearing on June 20, 1985, as reflected, infra.

Dated at Memphis, Tennessee, this 24th day of June, 1985.


DAVID S. KENNEDY
UNITED STATES BANKRUPTCY JUDGE/

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