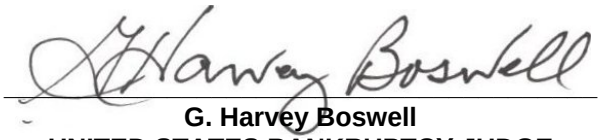
This opinion is not intended for publication.

Dated: July 20, 2007
The following is SO ORDERED.



G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

C & W Manufacturing, Inc.,	**Case No. 05-15437**
Debtors.	**Chapter 11**

MEMORANDUM OPINION AND ORDER
RE: (1) DEBTOR'S MOTION FOR CRAM DOWN UNDER 11 U.S.C. § 1129 and
(2) OBJECTION TO CONFIRMATION OF PLAN FILED BY EDWARD LEE CARPENTER AND GAGECO PROPERTIES

The Court conducted a hearing on the debtor's Motion for Cram Down and the objection to confirmation of the plan on June 20, 2007. FED. R. BANKR. P. 9014. Resolution of these matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

A. Business Background

C & W Manufacturing, Inc., ("debtor" or "C & W"), was a Tennessee Corporation that was engaged in the business of manufacturing and distributing chain link portable dog kennels for consumer use. From C & W's inception until January 7, 2000, Edward Carpenter was a director and 50% shareholder of C & W. Edward Carpenter also served as C & W's president until 1997. Edward

Carpenter's ex-wife, Deborah Carpenter, was a director, a 50% shareholder, and an employee of C & W. In 1995, C & W hired David Perkins as its Chief Financial Officer. Perkins took over the role of president for C & W in 1997 when Edward Carpenter resigned.

Gageco Properties, ("Gageco"), is a Tennessee general partnership which owns real property at 15 Bell Camp Road in Jackson, Tennessee. At all times relevant to this case, Gageco leased this real property to C & W for use as C & W's principal place of business. Edward L. Carpenter and Deborah Carpenter are Gageco's general partners.

In the latter half of 1999, Edward Carpenter expressed a desire to sell his interest in C & W. Edward Carpenter entered into negotiations with Deborah Carpenter and David Perkins to effectuate this intent in the Fall of 1999. To accomplish this sale, Edward Carpenter entered into a Stock Repurchase Agreement, ("Redemption Agreement"), on November 1, 1999, whereby Edward Carpenter agreed to sell his 50% ownership interest in the corporation back to C & W for $2,700,000.00. Because C & W did not have sufficient stockholder equity at the time of the redemption, the funds used to pay Carpenter came from a loan obtained by C&W from Amsouth Bank.[1]

The Redemption Agreement was interdependent upon the execution by C&W and Carpenter of certain ancillary agreements set forth in the Redemption Agreement, including: (a) a Consulting Agreement between C&W and Carpenter; (b) a Commercial Lease Agreement (the "Lease") between C&W and Gageco; (c) a Covenant Not to Compete Agreement (the "Non-compete Agreement") between C&W and Carpenter; (d) an Agreement of Guaranty of Payment and Performance (the "Guaranty Agreement") between C&W and Carpenter (the foregoing agreements are hereinafter referred to as the "Ancillary Agreements"). The Redemption Agreement was also contingent upon financing to be provided by AmSouth Bank to C&W.

Carpenter and C&W entered into the Consulting Agreement and the Non-Compete Agreement on November 1, 1999. Pursuant to the Consulting agreement, Carpenter agreed to render consulting services to C&W for a period of ten (10) years for $96,000 per year, payable in monthly installments of $8,000. Pursuant to the Non-Compete Agreement, C&W agreed to pay to Carpenter the sum of $6,000 per month or $72,000 per year, for a period of ten (10) years. According to the debtor's adversary proceeding complaint against Edward Carpenter and Gageco, Carpenter was paid a total of $859,900 under the Consulting Agreement and the Non-Compete Agreement between November 1999 and October 2004.

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[1]Although the Redemption Agreement and the Ancillary Agreements were all dated as of November 1, 1999, the transactions described in those documents did not actually close until January 7, 2000 (the "Closing").

Along with the Consulting Agreement and the Non-Compete Agreement, Carpenter and C&W entered into the Guaranty Agreement pursuant to which C&W agreed to pay to Carpenter the sum of $44,450.00 per year for a period of ten (10) years in consideration for Gageco's agreement to grant a mortgage on its real property to AmSouth Bank to secure a loan from AmSouth to Gageco in the amount of $439,746.50, as well as to secure a loan from AmSouth to C&W in the amount of $1,296,250.00. According to the adversary complaint, Carpenter was paid a total of $202,950.00 pursuant to the Guaranty Agreement between January 1, 2000, and October 21, 2005.

Contemporaneously with the execution of the Redemption Agreement, Gageco and C&W entered into the Lease pursuant to which C&W agreed to lease the Property for a period of ten years at a lease payment which was equal to the debt service owed by Gageco on its loan from Amsouth Bank in the amount of $439,746.50, plus $2,000.00 per month.

In August 2001, C & W refinanced the Amsouth Bank debt incurred in connection with the Redemption Agreement with CIT and First South Bank. Gageco executed a non-recourse guaranty for this refinancing in favor of First South Bank on August 22, 2001. On the same day, Carpenter entered into a subordination agreement with First South Bank. The subordination agreement provided:

> 1. Subordination. The consultant [Carpenter] hereby agrees to subordinate all rights, claims and other obligations of repayment on the consultant agreement to any and all rights of the Bank for repayment of the Bank Loan.

Gageco and C&W's remaining shareholders also entered into a Shareholders Subordination Agreement on August 22, 2001. Pursuant to this agreement, Gageco and the shareholders agreed to ". . . subordinate . . . all rights, claims and other obligations of repayment on account of the shareholder loans and the affiliate loans to any and all rights and claims of the bank for repayment of the bank loan."

B. Bankruptcy Filing

On October 21, 2004, West-Tenn Express, Inc., W.W Transport, Inc., and Reed Freight Services, Inc., filed an involuntary chapter 7 bankruptcy petition against C & W. The petitioning creditors and the debtor entered into a consent order converting the case to chapter 11 on November 16, 2005. The Court entered an order on December 19, 2005, authorizing the debtor's auction of assets free and clear of liens, claims and interests. The auction took place on December 15, 2005.

C & W filed its original chapter 11 plan on February 13, 2006. Thereafter, the debtor filed an amended plan of reorganization on August 7, 2006, a second amended plan on August 10, 2006, and a third amended plan on December 4, 2006. The Third Amended Plan states that the plan is a "liquidating plan and is based upon the debtor's belief that this liquidation is in the best interest of its creditors."

The Third Amended Plan establishes seven classes. Class One consists of the priority claims of the Internal Revenue Service, the State of Tennessee and the City of Jackson. The plan proposes to pay the tax and interest portions of the priority claims in full within ten days of confirmation. The non-compensatory portions of the priority claims will be paid as Class Four claims.

Class Two consists of unsecured creditors listed on the Plan's exhibit 1 as well as First South Bank. According to the terms of the proposed plan, unsecured creditors "will receive approximately 12 - 14% of their claim based on their pro-rata portion of the proceeds from the sale of the debtors' assets after Class One and the administrative expenses of Class Three have been paid." The plan proposes that the debtor's counsel will disburse the pro-rata share of funds to all allowed Class Two claims within 45 days of confirmation unless an objection or other adversarial pleadings are filed seeking to disallow or subordinate such claim. Class Two is an impaired class.

Class Three consists of administrative claims that have accrued since the case was converted to chapter 11 on November 16, 2005. With the exception of professional fees that have to be approved by the court, the plan proposes to pay all Class Three claim within ten days of confirmation.

Class Four consists of pre-petition non-compensatory tax penalty claims. These will be paid on a pro-rata basis after satisfaction of the allowed Class Two, Five and Six claims.

Class Five consists of the claims of insiders, which the plan identifies as Deborah Carpenter, David Perkins and Gageco. The plan proposes to subordinate Class Five claims to the general unsecured claim of First South Bank pursuant to 11 U.S.C. § 501(a) and an August 22, 2001, Loan Agreement and Shareholder's Subordination Agreement. After satisfaction of the First South Bank debt, Class Five will receive any remaining assets on a pro-rata basis with the Class Six claim of Edward L. Carpenter and the allowed Class Four claims.

Class Six consists of Carpenter's claim for $459,612.00 arising out of the November 1, 1999, consulting agreement. The plan proposes to subordinate the Class Six claim to the general unsecured claim of First South Bank under 11 U.S.C. § 510(a) and an August 22, 2001, Subordination Agreement. Once the claim of First South Bank is paid, the Class Six claim will be paid on a pro-rata basis with the Class Five claims.

Class Seven is Wachovia Bank. This is a contingent and unliquidated claim. There will be no distribution to this class under the proposed plan.

According to the terms of the plan, the debtor anticipates two distributions under the plan. The debtor estimates that the first distribution will total $600,000 and will be paid to classes one and two.

"The balance shall be paid after all fees and expenses have been paid and all claims objections and any litigation to and with Ed Carpenter and Class Two members have been resolved."

Edward Carpenter filed three unsecured nonpriority claims in the debtor's case on February 24, 2006: (1) Claim #55 for $241,500.00. Carpenter listed "Guaranty of Corporate Debt to AmSouth Bank–moved to First South" as the basis for this claim; (2) Claim #57 for $459,612.00. Carpenter listed "money due under Consulting Agreement" as the basis for this claim; and (3) Claim # 58 for $351,388.00. Carpenter listed "Covenant not to Compete" as the basis for this claim. Gageco filed two unsecured nonpriority claims in the debtor's case on February 24, 2006: (1) Claim #54 for $2,912.00 for "post petition lease default (taxes and insurance) from 11-16-05 to 12-31-05;" and (2) Claim #56 for $745,586.08 for "Balance due under non-recourse guaranty of Corporate debt by Gageco Properties."

A summary of ballots was filed in the case on May 9, 2007. Pursuant to 11 U.S.C. §1126(f), classes One and Three did not submit ballots and are deemed to have accepted the plan. Class Four did not return any ballots. Classes Five and Six rejected the plan. In Class Two, twenty of the twenty-two ballots cast voted for acceptance of the plan. The total value of the accepting creditors' claims is $3,666,729.90. The two Class Two creditors who rejected the plan have claims totaling $6,101.15. Pursuant to 11 U.S.C. § 1126(c), Class Two has accepted the plan.

Edward Carpenter and Gageco filed an objection to confirmation of the debtor's plan on October 10, 2006, in which they objected to (1) their exclusion from the general unsecured claims of Class Two and (2) the unlikelihood that they would receive any payments under the plan. Edward Carpenter and Gageco filed a "Brief in Support of Objection to Confirmation" on January 31, 2007. In footnote 1 of this brief, Carpenter and Gageco stated that "[f]or purposes of confirmation, Carpenter and Gageco concede that separate classification of their claims related to the executed Subordination Agreements is appropriate."

Prior to filing its amended plan in December 2006, C & W filed an adversary proceeding against Edward Carpenter and Gageco. The "Complaint to Avoid Fraudulent Conveyances and Unlawful Redemption, for Equitable Subordination, Contractual Subordination, Breach of Contract and for Money Judgment" was filed on October 12, 2006, and was styled "C & W Manufacturing, Inc. and the Official Unsecured Creditors Committee of C & W Manufacturing, Inc., v. Edward L. Carpenter, Jr. And Gageco Properties, a Tennessee General Partnership." C & W and the Official Unsecured Creditors Committee also incorporated within the complaint an objection to the claims of both Edward Carpenter and Gageo.

As a result of the fact that impaired Classes Five and Six rejected C & W's third amended plan, the debtor filed a "Motion for Cram Down Under 11 U.S.C. § 1129." That motion was filed on June 1,

2007, and alleges that the debtor's "plan as proposed treats the rejecting classes no differently than they would be treated by a chapter 7 liquidation." The motion further states that "[t]he claims of Classes 5 and 6 have been objected to and it would be expected that a trustee would also pursue those objections. If the objections are denied, then the claims would be paid as would any other unsecured creditor as the plan reserves monies for those payments. There is no prejudice to the rejecting classes."

II. CONCLUSIONS OF LAW

Section 1129(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act mandates that a court can only confirm a chapter 11 plan if all the requirements of that section are met. Subsection (8) of § 1129(a) requires that each impaired class of creditors accepts the plan. Should an impaired class reject the plan, (or be deemed to have rejected the plan under 11 U.S.C. § 1126(g)), the court may approve the plan only if the plan (1) satisfies all the requirements of § 1129(a), with the exception of paragraph 8, and (2) does not discriminate unfairly and is fair and equitable with regard to each impaired class that has not accepted the plan. 11 U.S.C. § 1129(b). This subsection is known as the "cram-down" provision. The plan proponent bears the burden of proof in demonstrating that the plan meets § 1129(b)'s requirements. *In re Dow Corning Corp*. 244 B.R. 678, 695 (Bankr. E.D. Mich. 1999); *In re Graphic Communications, Inc*., 200 B.R. 143, 147 (Bankr. E.D. Mich. 1996). Because members in impaired classes 5 and 6 have rejected the plan, § 1129(b) is the only option for this debtor to obtain confirmation of its plan.

Under paragraph (a) of § 1129, the only alleged deficiency with the debtor's plan under this subsection is paragraph (a)(7). This subsection requires that each claimant under a chapter 11 plan either accept the plan or "receive or retain under the plan . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7)(A)(ii). This requirement is known as the best-interest-of-creditors test. *In re Dow Corning Corp.*, 255 B.R. 445, 500 (Bankr. E.D. Mich. 2000). The plan proponent bears the burden of showing that the best interests test has been satisfied. *In re Lason, Inc.,* 300 B.R. 227, 232 (Bankr. D. Del. 2003).

In the case at bar, the best interest test is easily satisfied. C & W's plan is a liquidating plan. The debtor has already sold all of its assets and has money on hand to distribute to its creditors. If this case were a chapter 7 one, there would be no other assets to liquidate. The creditors are going to receive as much in this case as they would in a chapter 7 case. The two rejecting creditors in Class Two will receive approximately 12 - 14% of their claim after Classes One and Three have been paid. The creditors in Classes Five and Six will receive payment of their claims after satisfaction of the Class Three claims

and after First South Bank has been paid. As a result of the subordination agreements all of the creditors in those classes signed, Classes Five and Six are receiving as much as they would in a chapter 7 case.

Turning to the requirements of § 1129(b), the plan cannot discriminate unfairly and it must be fair and equitable before a motion for cram down can be granted. In order to determine the first requirement of § 1129(b), that of unfair discrimination, a court must decide (1) if there is a rational or legitimate basis for the discrimination and (2) if the discrimination is necessary for the reorganization. *In re Crosscreek Apartments, LTD.,* 213 B.R. 521, 537 (Bankr. E.D. Tenn. 1997). In the case at bar, the Class Five and Class Six claims are unsecured claims similar to the claims of Class Two; however, because all of the creditors in Class Five and Class Six signed subordination agreements in favor of First South Bank, the debtor has placed them in separate classes. Deborah Carpenter and David Perkins have never objected to their separate classification. Edward Carpenter and Gageco originally objected to their separate classification, but conceded in their Brief in Support of their Objection to Confirmation, that such classification was proper in light of the subordination agreements. The subordination agreements have the effect of subordinating the claims of Deborah Carpenter, David Perkins, Edward Carpenter and Gageco to the claim of First South Bank. Until such time as First South Bank is paid in full, none of the Class Five and Six creditors are entitled to be paid. Accordingly, the Court finds that C & W's plan does not discriminate unfairly.

"A plan is deemed fair and equitable as to a dissenting class of unsecured creditors only if it does not violate the absolute priority rule-i.e., the allowed value of the claims held by that class is to be paid in full, or "the holder of any claim junior to the claims of such class will not receive or retain under the plan on account of such junior claim any property." *In re Dow Corning Corp.*, 456 F.3d 668 (6th Cir. 2006). In the case at bar, Deborah Carpenter, David Perkins, Edward Carpenter and Gageco all signed subordination agreements. Because of this agreement, the Class Five and Class Six creditors are junior to the Class Two creditors. The debtor's plan only has one junior creditor behind Classes Five and Six–Wachovia Bank in Class Seven. Class Seven is not going to receive a disbursement under the plan. Because of this fact, the Court finds that C & W's plan is fair and equitable.

III. ORDER

It is therefore **ORDERED** that:

(1) the Objection to Confirmation filed by Edward Carpenter and Gageco is **OVERRULED**;

(2) the Debtor's "Motion for Cramdown" is **GRANTED**; and

(2) the Debtor's Plan is hereby **CONFIRMED.**

IT IS SO ORDERED.

Mailing information:
Matrix