UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-12287-JMD
Chapter 11

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Debtor

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On October 23, 2000, the Court commenced hearings on confirmation of the Debtor's Sixth Amended Joint Plan of Reorganization dated August 23, 2000 (the "Plan"). Prior to, and at the hearing, a plethora of written motions were filed and oral motions made, regarding the eligibility of certain votes to be counted with regard to acceptance or rejection of the Debtor's Plan by the general unsecured creditors and the amount of each such creditor's claim. Due to the flurry of motions filed by both sides the Debtor represented to the Court that it was not possible to compile a certificate of vote. However, the Debtor did

present the Court with a chart of the votes cast by creditors and the objections that had been raised with regard to each creditor's vote. Due to the rejection of the Plan by Banc of America Commercial Finance Corporation f/k/a NationsCredit Commercial Corporation ("NCC"), the Plan proponents may proceed with confirmation only if Class 5, the general unsecured creditors, has accepted the Plan. The Court utilized the balance of the hearing as a pre-hearing conference to review the issues involved in the estimation of claims and determination of voting status for all creditors whose votes were subject to objection. At the conclusion of the hearing, the Court indicated that it would deal with the objections to the votes of Robert Greuel ("Greuel") and Public Service Company of New Hampshire ("PSNH") without further hearing. A procedural order was entered setting a briefing schedule for the parties. See Doc. No. 370.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

A. Greuel

Greuel originally voted to reject the Plan. His counsel stated that the underlying reason for Greuel's rejection of the Plan was the failure of the Plan to be consistent with the disclosure statement that had been approved by the Court and sent to creditors with respect to the determination of the amount, if any, of Greuel's claim. Greuel and the Debtor represented to the Court that an agreement had been reached wherein the Plan would be changed in a manner making it consistent with the disclosure statement. It was further represented that the change would not affect the treatment of any other creditor. Greuel's counsel stated that once the agreed upon change to the Plan had been made, he wished to change his vote from one rejecting the Plan to one accepting the Plan. On October 23, 2000, in open court, Greuel filed a motion seeking permission under Federal Rule of Bankruptcy Procedure (hereinafter "Rule") 3018(a) to change his

vote. See Doc. No. 362. NCC opposes the motion and argues that Greuel should not be permitted to change his vote and, accordingly, only the first ballot cast, the one rejecting the Plan, should be counted.

Under the terms of the procedural order, only the issue of whether or not Greuel will be allowed to change his vote will be decided by the Court in this opinion. See Doc. No. 370. While there is also an objection pending regarding the amount of Greuel's claim, the matter concerning the estimation of the claim for voting purposes will be taken up at a hearing scheduled for December 5, 2000.

B. PSNH

PSNH had cast two ballots voting its claim. The first ballot cast by PSNH voted to accept the Plan. The second ballot received from PSNH was a vote to reject the Plan. It is important to note that on October 13, 2000, PSNH had assigned its claim to NCC. See Doc. No. 336. NCC, as current owner of the claim, argues that only the second ballot, the one rejecting the plan, should be counted. The Debtor, however, argues that PSNH should not be permitted to change its vote and, accordingly, only the first ballot received, the one accepting the Plan, should be counted. Pursuant to Rule 3018(a), NCC made an oral motion in open court on October 23, 2000, followed by a written motion on November 1, 2000, requesting permission to either withdraw or change the first ballot cast by PSNH that had accepted the Debtor's Plan. See Doc. No. 387.

III. DISCUSSION

Under Rule 3018(a), after notice and a hearing, a court may allow a creditor to change its vote with regard to a plan filed under Chapter 11 of the Bankruptcy Code for cause.[1] As the Bankruptcy Code does not provide any guidance as to what constitutes "cause," case law has established the standards for determining "cause."

> The test for determining whether cause has been shown should not be a difficult one to meet. As long as the reason for the vote change is not tainted, the change of vote should usually be permitted. The court must only ensure that the change is not improperly motivated. Examples of reasons for a change of vote might include a breakdown in communication at the voting entity; misreading the terms of the plan; or execution of the first ballot by one without authority.

In re Kellogg Square Partnership, 160 B.R. 332, 334 (D. Minn. 1993) (citing 8 Collier on Bankr. ¶ 3018.3[4], at 3018-10 (15th ed. 1990)). The court in Kellogg Square went on to further flesh out the standard by stating:

> 1. To ensure certainty in the confirmation process, creditors must commit themselves to accept or reject a plan by the unequivocal means of casting a ballot, by a fixed date.
> 2. As a general rule, creditors should be given the full benefit of their right of franchise under Chapter 11, so long as they complied in the first instance with the ministerial rules governing that exercise.
> 3. Where a creditor that has already voted shows that its cast ballot did not reflect the contemporaneous intention of the holder of the voting claim, the record of votes should be corrected. Otherwise, giving effect to the erroneously-cast ballot would defeat the right of the franchise.

Id. at 335.

A. Greuel

In In re Dow Corning Corp., 237 B.R. 374, 377 (Bankr. E.D. Mich. 1999), a hearing regarding confirmation of the debtor's plan had been scheduled and at the hearing a modification of the plan was filed. The modification did not adversely affect any of the creditors who had previously accepted the plan before the modification. Id. at 379. Some creditors that had previously rejected the plan, however, wished to

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[1] As previously indicated in this opinion, at the confirmation hearing held on October 23, 2000, the questions surrounding the votes of Greuel and PSNH were raised with regard to confirmation and the Court heard the statements of counsel at that time. As all parties involved were present at the October 23rd hearing and were permitted to present their arguments, the Court finds that the notice and hearing requirements of Rule 3018(a) have been met.

change their votes and had filed motions pursuant to Rule 3018(a). Id. at 376. Other claimants, wishing to avoid a cram down situation, opposed the Rule 3018(a) motions. Id.

The court resolved the matter by looking closely at 11 U.S.C. § 1127(d) and Rule 3019. Under 11 U.S.C. § 1127(d), a creditor is deemed to have accepted a plan as modified unless, within a time specified by the court, the creditor changes its previous acceptance or rejection. Rule 3019 states that after a plan has been accepted and before confirmation a plan may be modified. Rule 3019 further states that "[i]f the court finds . . . that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors . . . who have previously accepted the plan."

Through an examination of 11 U.S.C. § 1127(d) and Rule 3019 the court reasoned that creditors that had already accepted the plan were not harmed by the modification and were deemed to have accepted the plan. Dow Corning, 237 B.R. at 379. However, the court found that persons who had rejected the plan should be given a chance to determine whether they wished to continue rejecting the plan once the modification had been made. Id. The court went on to hold that the motions by certain creditors to change their votes under Rule 3018(a) were in fact moot and were instead found to be written acceptances of the plan as modified. Id. at 380.

This Court finds that the facts surrounding Greuel's Rule 3018(a) motion to change his vote are substantively similar to the facts of the Dow Corning case. In the case at hand, the modification to the Plan was made after the voting had ended and prior to confirmation of the Plan. Further, no party that has accepted the Plan is adversely affected by the change. In fact, the change simply seeks to make the Plan consistent with the disclosure statement that was distributed to creditors regarding the Plan. Finally, a creditor, Greuel, who had previously rejected the Plan now seeks to change his vote to one accepting the Plan.

Based upon the policy of encouraging consensual plans in Chapter 11 cases, the rationale of the Dow Corning case, and its own reading of Rule 3019 and section 1127(d), this Court finds that after

modification of the Plan, Greuel is entitled to reconsider his original vote because the modification changes or clarifies the method for determining the validity and amount of his claim under the Plan. Accordingly, the Court deems the motion filed by Greuel under Rule 3018(a) to constitute a written acceptance of the Plan, as modified, in accordance with Rule 3019. Therefore, for purposes of counting votes with regard to the Plan, the ballot cast by Greuel will be counted as a vote to accept the Plan.

The Court also notes that the cases cited by NCC in its Memorandum of NCC Regarding Requests to Change Votes [PSNH and Greuel] ("NCC Memorandum"), which did not allow creditors to change their votes incident to settlement, are not applicable to the Greuel motion on the facts of this case. In In re MCORP Fin., Inc., 137 B.R. 237, 239 (Bankr. S.D. Tex. 1992), the court did not allow a creditor to change its vote specifically for the reason that the change of vote was highly suspect in that it was only made in writing after a confirmation hearing at which it became evident that the ballot was important. In this case, the Court finds that there is nothing suspect about Greuel's change of vote. A resolution of the concerns of Greuel had been reached and incorporated in the disclosure statement, and simply had not been incorporated into the Plan. There is nothing suspect about Greuel's change of vote under these circumstances.

As for the case of In re Jartran, Inc., 44 B.R. 331, 363 (Bankr. N.D. Ill. 1984), the Court finds that the case was decided before the 1991 changes to Rule 3018(a). Under the previous version of Rule 3018(a) changes of votes were only allowed before the voting deadline had passed. See Fed. R. Bankr. Proc. 3018(a) (West, WESTLAW through 1990) (amended 1991). The court in Jartran specifically stated that no exceptional circumstances existed to allow the votes to be changed in direct contrast with the language of the statute. See Jartran, 44 B.R. at 363. Further, Jartran involved the settlement of claims wherein debenture holders agreed to waive participation in the distribution. In the case at hand, neither the claim nor the distribution of Greuel has been changed by the agreement, the agreement simply changes the Plan so that it conforms to the disclosure statement and, therefore, avoids any discrepancy between the Plan and the disclosure statement.

B. PSNH

In In re Kellogg Square Partnership, 160 B.R. 332, 333 (Bankr. D. Minn. 1993), the single largest creditor, Prudential Insurance Company of America ("Prudential"), approached twelve different creditors and was able to entice the creditors into assigning their claims to Prudential. At the time the claims were assigned to Prudential, eleven of the creditors had already cast their ballots in favor of accepting the debtor's Chapter 11 plan. Id. at 334. Prudential then sought leave under Rule 3018(a) to change the votes on the eleven claims it had purchased from votes accepting the plan to votes rejecting the plan. Id. Prudential alleged that the "cause" for changing the votes was that Prudential, as owner of the claims, would not have voted to accept the plan. Id. at 335.

In denying Prudential's Rule 3018(a) motion for permission to change the votes for the claims it had purchased the court stated that, "[a]s a general rule, an entity which acquires a claim [against a bankruptcy estate] steps into the shoes of that claimant, enjoying both the benefits and the limitations of the claim, as a successor in interest." Id. (citations omitted). The court went on to say that "[w]here an entity acquires a creditor's claim after the creditor has already cast a vote on a plan of reorganization, the assignor-creditor's evidenced commitment to that specific participation in the case is a permanent, binding limitation on the transferred claim." Id.

The Court finds the reasoning of the court in the Kellogg Square case to be particularly persuasive to the case at hand. In this case, at the time that NCC sought to purchase the PSNH claim, PSNH had already cast its ballot in favor of accepting the Plan. The "cause" alleged by NCC as grounds to change the vote is that PSNH represented to NCC that no vote had been cast. Further, NCC claims that the first ballot cast by PSNH could not reflect the true intentions of PSNH as PSNH later cast a second ballot rejecting the Debtor's Plan. The Court does not find either of these arguments to be persuasive.

As was stated by the court in Kellogg Square, a purchaser of a claim steps into the shoes of that creditor's claim and enjoys both the benefits and limitations of the purchased claim. Id. While NCC may

have been mistaken as to the style of the shoes it was stepping into, it is not the role of this Court to correct such mistakes. NCC purchased used shoes and may not now exchange them for a pair of new shoes.

NCC contends that PSNH, not NCC, cast the second vote that rejected the Plan. However, in its own memorandum of law NCC states that the second ballot was cast on the same day that NCC purchased PSNH's claim. See Doc. No. 385 at 2. The Court has also examined the assignment agreement executed between NCC and PSNH and found that the agreement specifically states that only at the direction of NCC or NCC's counsel will PSNH vote on the Plan. Doc. No. 336 at 2. It is clear to the Court that the second ballot cast by PSNH was clearly a reflection of the desires of NCC and did not represent an independent attempt by PSNH, for cause, to correct a mistaken vote cast earlier during the voting process. Further, NCC has presented no evidence suggesting that any of the other standards for cause outlined above have been met.

Finally, the Court has examined the case of In re Epic Assocs. V, 62 B.R. 918 (Bankr. E.D. Va. 1986) cited in the NCC Memorandum and has found it unpersuasive. While the court in Epic Associates did allow the votes of creditors to be changed, the court found that cause existed because due to scheduling issues there had been an extremely brief voting period on an intricate plan and the court found that it was likely that creditors would have reevaluated their votes. Id. at 924. No such similar facts exist in this case and the Court, therefore, finds the case unpersuasive.

Accordingly, the first ballot cast by PSNH accepting the Plan will be the vote counted for purposes of confirming the Plan. Any subsequent ballots cast by PSNH and/or NCC on behalf of PSNH shall be disregarded.

IV. ORDER

In accordance with this Memorandum Opinion, it is hereby ordered that:

1. the vote of creditor Robert Greuel will be counted as a vote accepting the modified Plan pursuant to section 1127(d) and Rule 3019.

2. The first ballot submitted by PSNH will be counted and all other ballots cast by PSNH and/or NCC on behalf of PSNH shall be disregarded.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DONE and ORDERED this 28th day of November, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge