United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
MJR ENTERPRISES,
Debtor. No. 11-01-10936 SA

MEMORANDUM OPINION ON CONFIRMATION OF DEBTOR'S FIFTH AMENDED PLAN

This matter came before the Court to consider confirmation of the Debtor in Possession's Fifth Amended Plan of Reorganization, as Modified (doc 275) (the "Plan") and the objection by Robert Palmer (doc 274). Debtor was represented by Davis & Pierce, P.C. (William F. Davis). Robert Palmer was represented by Moore & Berkson, P.C. (George M. Moore). The Unsecured Creditors Committee was represented by George D. "Dave" Giddens. The Committee withdrew its objections to the Plan, and the large majority of the unsecured creditors accepted the Plan. Nevertheless, as set forth below, confirmation of the Plan will be denied.

At the confirmation hearing, Palmer established that he holds a claim against the estate for the unpaid portion of a promissory note with a principal balance of $50,000 and an interest rate of 18% per annum. Exhibit E; see also proof of claim no. 19, showing a balance of slightly over $77,000 due.[1] (In closing argument, Palmer's counsel conceded that the

[1] The note is from The Finance Company, conceded to be a name used by the Debtor.

Debtor was the only obligee on this note.) Robert Palmer also established, through cross examination of the Debtor's president Michael Richesin, that he is pursuing other claims against other entities related to the Debtor, including Richesin, Richesin's former spouse Janet Richesin, A&J Automotive, A&J Automotive, Inc., Car Co., Property Investments, Ltd. and Larry Lanphere.

The Plan classifies non-insider unsecured claims of approximately $2.2 million into Class 2, which claims are to be paid 100% without interest after full payment of Class 1 (secured creditor Finova Capital Corporation) and administrative claims. The funds to pay Class 2 claims come from the Car Co., a related company. The Car Co. sells vehicles and finances their purchase on subprime terms. The Plan provides that the Car Co. will assign to the estate 25% of the proceeds of those auto financing contracts. Debtor will not be operating and will not be a source of any funds.

Debtor holds a disputed claim against the Car Co. of $423,000 for a receivable that was on Debtor's books at one time but was written off before the bankruptcy filing. The Plan provides that payment of $423,000 toward Class 2 creditors by the Car Co. releases Car Co. and all other insiders and related parties from all liability related to

that $423,000 transfer. It was clear at the hearing that the intent of the Plan is to require that Car Co. pay at least $423,000. The Plan does not obligate Car Co. to make any payments other than the $423,000, however.

Holders of Class 2 claims are enjoined from proceeding with any claims against the reorganized Debtor, the Car Co., the stockholders (Richesins), or any of the stockholders' other businesses as long as Debtor and Car Co. are not in default. Default is not specifically defined, but presumably a default would occur if the Car Co. stopped payment at less than $423,000. If Car Co. paid $423,000 or more, it appears that the Car Co. would not be in default and Class 2 creditors would be permanently enjoined.[2]

Debtor cites In re Master Mortgage Investment Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994) for the proposition that

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[2] Although the First Modification of Debtor's Fourth Amended Plan of Reorganization (doc 240) provided that any Class 2 creditor rejecting that plan was not bound by the injunction provisions, Debtor's (Fifth) Plan does not contain this dispensation. A relevant portion of the Plan (page 10) is as follows:

"Holders of Allowed Class 2 Claims shall be prohibited and enjoined from proceeding with any claims against Reorganized Debtor, the Car. Co., Mickey Richesin, Janet Richesin, and of the their affiliated businesses or companies, including without limitation A&J Automotive, Frontline Automotive, and Property Investments, Ltd. ... as long as the Reorganized Debtor and the Car Co. are not in default on their obligations as set forth herein to the Holders of allowed Class 2 Claims."

permanent third party releases are acceptable in certain circumstances. Master Mortgage recognized the split of authority on this issue and specifically cited the Tenth Circuit case of Landsing Diversified Properties-II v. First Nat'l. Bank and Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.), 922 F.2d 592 (10th Cir. 1991) as the contrary view. In Western Real Estate the Tenth Circuit acknowledged that, in certain circumstances, a temporary injunction against collection from third parties may be warranted during the pendency of a bankruptcy proceeding. Id. at 599. The Court found, however, that permanent injunctions, which act as discharges of third party bystanders, are improper. Id. at 600.

> "Obviously, it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders."

Id. (Citations omitted.)

In the instant case, the injunction would have the effect of depriving Robert Palmer of significant property rights, specifically the right to collect additional claims from the Richesins and other entities. Even if there were circumstances in which such an injunction would be justified (a position that would seem to be at odds with the "less permissive" position enunciated in Western Real Estate), such

a permanent injunction ought to be a "rare thing, indeed, and [available] only upon a showing of exceptional circumstances...." Master Mortgage, 168 B.R. at 937. In this case, the mere facts that a company controlled by Richesin has (re)obligated itself to pay into the estate the full amount ($423,000) of the estate's claim against it, and may in fact pay into the estate $2.2 million, a sum sufficient to pay all the unsecured claims 100% of principal, are not sufficient to override the property rights of Robert Palmer. The fifth Master Mortgage factor is that a plan must provide a mechanism for payment of all or substantially all of the claims of the class affected by the injunction. Id. at 935. Even assuming that Car Co. pays the full $2.2 million into the estate, there will be no payment on Robert Palmer's "non-bankruptcy" claims. This differs from Master Mortgage and the cases cited therein, in which the claims affected by the injunction were all bankruptcy claims. Id. at 935 n. 5. Thus payment of 100% of all the class 2 claims, including that of Robert Palmer, does not meet the Master Mortgage test.

Given the relatively large sums that Car Co. is pledging to pay into the estate, the comparatively small sums that all the Robert Palmer claims comprise, the benefit that the injunction would provide to the Richesins and all the related

entities, and the interest of the remainder of the unsecured creditors in getting the Plan confirmed, it is surprising that some arrangement to satisfy whatever claims Robert Palmer has could not be worked out and incorporated into the Plan in such a way to make the Plan confirmable with or without the approval of Robert Palmer. That is, even if the Court were to apply the Master Mortgage standard, this Plan would still not be confirmable for lack of a showing of exceptional circumstances which compelled the injunctive relief requested.

For the foregoing reasons, the Court cannot confirm the Debtor's Plan over the objection of Robert Palmer. Because the injunction provisions of the Plan preclude its confirmation and because the parties requested an expedited decision, the Court does not discuss or imply any ruling on any other objections to the Plan.

The Court will enter an order denying confirmation of the Debtor's Fifth Amended Plan of Reorganization, as Modified, and schedule a status conference on this case and a preliminary hearing on the joinder by Robert Palmer (doc 191) in the Unsecured Creditors Committee's Motion to Convert or for Appointment of Trustee (doc 176).[3]

[3] The UCC has since withdrawn the conversion motion (doc 285). However, Palmer's joinder in the motion before its withdrawal, in a filing which standing on its own would

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I hereby certify that on December 31, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the following:

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independently constitute a conversion motion, means that the requested relief is effectively still “on the table”, even if the original motion (doc 176) is not.