THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 04-12595
	)	
THE CAPITAL CREATION CO., INC.,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The debtor The Capital Creation Co., Inc. and JG Acquisitions LLC filed a joint plan of reorganization. The Coventry Group, Allyne Gottlieb, and the United States trustee object that the proposed plan does not meet the requirements of bankruptcy code § 1129 because the proposal: (1) improperly releases non-parties; (2) improperly gives the debtor a discharge in a liquidating plan; (3) is not made in good faith; and (4) violates the absolute priority rule.[1] The court held an evidentiary hearing on June 28, 2005. For the reasons stated below, the objections are sustained in part and confirmation is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

CERTAIN PARTIES IN INTEREST

Joshua Gottlieb

Joshua Gottlieb owns 100% of the debtor's stock.

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[1] The debtor resolved the objections filed by the Internal Revenue Service and Gordon Haley LLP by agreed orders.

Randi Gottlieb

Randi Gottlieb is married to Joshua Gottlieb.

Allyne Gottlieb

Allyne Gottlieb sold The Capital Creation Co., Inc. (now the debtor) to Joshua Gottlieb. His claim as a creditor in this case has been disallowed.[2]

Isabel Gottlieb Lucas

Isabel Gottlieb Lucas holds a secured claim.

JG Acquisitions LLC

This is the plan sponsor. Joshua Gottlieb formed this corporation to acquire the stock of the reorganized debtor in this case. Joshua Gottlieb is the 100% owner.

J. Gottlieb Companies

This is an affiliate of the debtor owned by Joshua Gottlieb.

J.L. Gottlieb Agency, Inc.

This company, owned by Joshua Gottlieb, supports the sale of insurance but is not itself an insurance agent or broker and does not sell insurance. It is an affiliate of the debtor.

[2] Docket 242, 243. This might lead one to wonder why the court is considering his arguments. The plan provides that Allyne Gottlieb is entitled to vote, which arguably gives him standing to challenge confirmation despite his claim having been disallowed. Moreover, the other entities opposing confirmation raise the same issues raised by Mr. Gottlieb and so it does not make a practical difference whether the arguments are viewed as his or those of other parties who undeniably have standing to object.

OVERVIEW OF THE PROPOSED PLAN

The plan proposes to reorganize the debtor in this fashion:

(1) 100% of the stock in the reorganized debtor will be sold to JG Acquisitions LLC for $100,000.00;

(2) the reorganized debtor will continue to exist and all property of the estate will vest in the reorganized debtor, including commissions, all causes of action, cash, furniture, books and records (including client information), and intangibles such as goodwill;

(3) allowed administrative claims will be paid in full;

(4) secured claims will be paid agreed amounts, with Isabel Lucas being paid less than the full amount of her claim;

(5) holders of allowed unsecured claims will receive a pro rata share of $150,000.00, to be paid 42 months after the effective date. This would result in a 5-10% distribution;

(6) the plan will be funded through the reorganized debtor's cash on hand, commissions, the new equity contribution plus "other funds, as the case may be. The Reorganized Debtor has the absolute discretion, except as otherwise provided in the Plan, to identify the source of any and all Distributions;"[3]

(7) J.L. Gottlieb Agency, Inc. will have an allowed secured claim ($20,500.00), which it will waive;

(8) J. Gottlieb Companies will have an allowed secured claim ($15,000.00), which it will waive;

(9) the debtor and the reorganized debtor will receive a discharge; and

[3] Plan Article VI. A.

(10) confirmation will release non-debtors Joshua Gottlieb, Randi Gottlieb, J.L. Gottlieb Agency, Inc., and J. Gottlieb Companies from all claims against them by all creditors except taxing authorities, regardless of how the creditors vote on the plan. A creditor is any holder of a claim under bankruptcy code § 101(5). The release will be effectuated through an injunction.

The reorganized debtor will need $250,000.00 a year for four years to fund the plan, if all of the debtor's current income stopped. The plan proponents do not have a business plan for generating new business. JG Acquisitions LLC does not presently have the assets to fund the plan. Joshua Gottlieb testified that he will run the reorganized debtor and will administer the plan. He will do what he needs to do to generate new business and administer the plan, without compensation. He expects to bring funds into the reorganized debtor by having his other companies make contributions, if necessary.

The debtor's exclusive right to propose a plan expired September 30, 2004. The plan under consideration is the only plan that has been proposed.

PREPETITION LITIGATION

I.

The Gottlieb Family

Allyne Gottlieb formed The Capital Creation Co., Inc. in the 1970's as an insurance brokerage agency. He sold the company in 1991 to his son Joshua Gottlieb. Among other things, the sale agreement called for Capital Creation to make certain deferred compensation payments to Allyne Gottlieb over a period of years. In 1992, Allyne Gottlieb and his then-wife

Isabel Gottlieb separated and a contentious issue arose as to whether payments due to Allyne Gottlieb should be made in part to Isabel Gottlieb.

In the meantime, Capital Creation ran into financial difficulties in the early 1990's. There were several aspects to the problem. First, the company had been relying heavily on selling life insurance as part of an executive benefit plan with complex tax strategies. When Congress changed the tax laws, this was no longer a viable product. Capital Creation developed a product under the new tax laws, but Congress soon changed the laws again. Second, a major client went into receivership, leaving Capital Creation with an obligation to service the customers without compensation. Third, a major client that had generated $2 million in revenues fired the company. In 1992, Capital Creation made a partial payment to Allyne Gottlieb and by the beginning of 1994 stopped payments altogether.

At some point, litigation ensued between Capital Creation and Allyne Gottlieb, in addition to the domestic relations proceedings involving Allyne and Isabel Gottlieb. In 1998, Allyne Gottlieb, Isabel Gottlieb (now known as Isabel Lucas), Joshua Gottlieb, and Capital Creation entered into an agreement to settle outstanding litigation. Under one term, the payments from Capital Creation that would otherwise have been due to Allyne Gottlieb were bifurcated with part going to Isabel Lucas.

Capital Creation made some payments under the settlement agreement. In 2002, when Capital Creation's revenues dropped, Joshua Gottlieb approached both of his parents to try to renegotiate the payments. Isabel Lucas agreed to a significant reduction in the payments and to refrain from suing in exchange for a security interest in certain of the company's assets. Allyne

Gottlieb did not enter into any modification to the settlement agreement.[4] When the company missed a payment, Allyne Gottlieb sued. Overall, Allyne Gottlieb received $500-$700,000.00 more in payments under the settlement agreement than did Isabel Lucas.

These disputes generated 16 years of litigation in Ohio and Florida state courts and federal courts. The litigation has drained time and money from the debtor, as well as from the other participants.[5]

II.

The Coventry Group

The Coventry Group won a $700,000.00 judgment against Capital Creation that is a final judgment. The suit against Joshua Gottlieb individually was dismissed.

CAPITAL CREATION'S PREFILING SHUT DOWN AND POSTPETITION ACTIVITY

By the fourth quarter of 2003, Capital Creation had fixed expenses that it could not meet, so it fired all of its employees. As part of that shutdown, Capital Creation sold a stream of revenue commissions to J.L. Gottlieb Agency, Inc. for above market value. J.L. Gottlieb Agency, Inc. also purchased the telephone system and copier lease. Capital Creation kept some insurance renewal stream, furniture, fixtures, and goodwill.

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[4] Allyne Gottlieb says Joshua Gottlieb never approached him on this issue. Joshua Gottlieb says Allyne Gottlieb refused to discuss it with him. It is not necessary to decide this issue.

[5] Postpetition, Allyne Gottlieb filed another lawsuit in state court against Joshua Gottlieb relating to the original sale of Capital Creation to Joshua Gottlieb. That suit is not against the debtor.

Capital Creation filed this case on March 4, 2004. Since that time, the debtor has not actively engaged in business. The debtor, acting through Joshua Gottlieb's other companies, has continued to collect commissions from policies sold prepetition. The debtor's assets consist of a renewal stream in the range of $50-100,000.00 a year, goodwill, and a substantial number of clients who have renewal policies. The debtor has collected about $73,000.00 in commissions since the filing.

Joshua Gottlieb's clients in his other companies do not generally overlap with Capital Creation's clients and he has not solicited any of Capital Creation's clients to do business with his other companies.

BURDEN OF PROOF

The plan proponents must prove that the plan meets all of the requirements for confirmation under bankruptcy code § 1129. *See In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 892 (Bankr. N.D. Ohio 2004).

DISCUSSION

I. The plan's releases and injunctions

The plan proposes to release four non-debtors and to enjoin all creditors from proceeding against them,[6] unless the creditor has a personal guarantee from a non-debtor. The non-debtor beneficiaries are Joshua Gottlieb, Randi Gottlieb, J.L. Gottlieb Agency, Inc., and J. Gottlieb Companies.

The discharge of a debtor from a debt does not discharge any other entity from that debt. *See* 11 U.S.C. § 524(e). The Sixth Circuit has held that, in unusual circumstances, bankruptcy

[6] The exception is taxing authorities.

courts may enjoin non-consenting creditors from proceeding against non-debtors. *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002). Specifically, the circuit stated:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id.

The plan proponents concede that the plan does not meet the sixth factor–that it provide an opportunity for non-consenting creditors to recover in full. They counter this by arguing that they are not required to prove each and every one of the seven factors. Instead, they contend, the court must *consider* all of the factors but after consideration may grant an injunction even if the factors are not all present.

There are other bankruptcy issues where the Sixth Circuit has instructed bankruptcy courts to consider certain factors or to make a decision based on the totality of the circumstances. Under that standard, the party with the burden of proof is not required to prove each and every factor. The language used in *Dow Corning* is, however, different: "when the following seven

factors are present" the court may issue an injunction in favor of non-debtors. The court takes this to mean what it says: when the factors are present, the court may issue an injunction. When the factors are not present, the court may not issue an injunction. In this case, the plan proponents admittedly did not prove at least one of the factors and the non-debtors are not, therefore, eligible for injunctive relief.[7] Confirmation is denied on this ground.

II. Good Faith

A plan of reorganization may only be confirmed if it "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Good faith is determined by looking to the totality of circumstances. The focus is on the plan and not on the debtor's prepetition behavior. *See, for example, In re Dow Corning Corp.,* 255 B.R. 445, 498 (E.D. Mich. 2000), *aff'd*, 280 F.3d 648 (6th Cir. 2002). A plan may be proposed in good faith even if it is not confirmable. *See Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997).

The plan proponents argue that they are acting in good faith because they are trying to bring an end to the litigation discussed above and have offered fair terms for the debtor's assets. The objectors contend that the plan proponents are not acting in good faith. They point to the treatment of Isabel Lucas's claim, the settlement of a dispute with Sapers & Wallack before the filing, the sale of assets prepetition to one of Joshua Gottlieb's companies, and the fact that the

[7] The plan proponents also failed to prove that Randi Gottlieb, J.L. Gottlieb Agency, Inc., and J. Gottlieb Companies have contributed substantial assets to the reorganization. There was some disputed evidence as to Joshua Gottlieb's contribution, but the court does not need to resolve this issue in light of the findings above.

debtor's assets were not offered for sale at auction. None of this, considered either as an individual event or collectively, shows a lack of good faith in this context.

The plan treats Isabel Lucas as a secured creditor who will receive less than the full amount of her secured claim. The objectors want the debtor to bring an avoidance action against her, although they do not themselves wish to pursue this. The only evidence presented showed that 13 months before the bankruptcy filing, Capital Creation gave Isabel Lucas a security interest in some property in exchange for valuable consideration; i.e. agreeing not to sue for amounts admittedly due and agreeing to accept reduced payments. There was no evidence that the debtor failed to consider the relevant facts in determining how to treat this claim under the plan. This is not evidence of a lack of good faith.

There was some testimony concerning a dispute with Sapers & Wallack and the prepetition settlement of it, but the testimony did not really show anything relevant. Again, this does not show a lack of good faith.

The next issue was the prepetition transfer of assets from Capital Creation to one of Joshua Gottlieb's other companies. The debtor's prepetition behavior is irrelevant. Moreover, the evidence established that the assets were sold at *above* market value. This is not evidence of a lack of good faith.

The final argument made is that the debtor should have offered its assets for sale at an auction, with Allyne Gottlieb saying he would have been interested in bidding, subject to reviewing books and records. The objectors did not point to any law that requires a debtor to do this. Any interested party could have proposed a plan at any time after the debtor's plan

exclusivity expired. The failure to pursue such an opportunity on the part of an interested party is not a lack of good faith on the part of the plan proponents.

The court finds that the debtor and JG Acquisitions LLC proposed the plan in good faith with the goal of ending years of litigation and paying a reasonable price.[8] This factor is not in itself an impediment to confirmation.

III. The debtor's discharge

The plan proposes that the debtor and the reorganized debtor will receive a discharge at confirmation.[9] Chapter 11 debtors generally receive a discharge from any debt that arose before confirmation. *See* 11 U.S.C. § 1141(d)(1)(A). A debtor does not receive a discharge, however, if the plan liquidates substantially all of the debtor's property, the debtor does not engage in business after plan consummation, and the debtor would not receive a discharge under chapter 7. *See* 11 U.S.C. § 1141(d)(3). On the first factor, the debtor's assets were for the most part liquidated before the filing; it has left only cash, a payment stream, goodwill, avoidance actions, and a minimal amount of furniture. This is, in essence, a liquidating situation. *See In re Global Water Techs., Inc.*, 311 B.R. 896, 900 (Bankr. D. Colo. 2004) (noting in similar circumstances that "[w]hile, this may not represent a total liquidation of the company, it certainly does represent a substantial liquidation of the [d]ebtor's property under § 1141(d)(3)(A)"). As to the second factor, the debtor would not receive a discharge under chapter 7 because it is not an individual. *See* 11 U.S.C. § 727(a)(1). The third factor is disputed. The United States trustee argues that the

[8] The court is not making a finding as to whether the price offered is reasonable, just a finding that this was a legitimate factor in the good faith analysis.

[9] Article IX.A.

debtor has not shown it will engage in business after plan consummation. The debtor contends it will use the existing client base to revitalize the business.

The evidence was insufficient to prove that the reorganized debtor will engage in business after consummation. The court reaches this conclusion by looking to the debtor's prepetition activity, the activity during the chapter 11, and the activity contemplated by the reorganized debtor. The debtor stopped doing business prepetition and the only business it engaged in postpetition was collecting monies due from prepetition activity. There is no evidence in those two time periods to support the statement that the reorganized debtor will engage in business. The evidence relating to the third time period-the post-confirmation years-is inconclusive. While there was testimony that the debtor has a client base that can be used to generate new business, there was no business plan showing the nature or extent of that business. The plan sponsors did not, therefore, prove that the reorganized debtor will engage in business after consummation. *Compare Global Water Techns., Inc.,* 311 B.R. at 900 (finding that the debtor met its burden on this issue by showing it had a business plan, core personnel were in place, and the debtor identified business relationships that would be key to reentering the market). Absent that showing, the debtor is not entitled to the discharge contemplated in the plan and confirmation is denied on that ground.

CONCLUSION

For the reasons stated, confirmation is denied.[10] A separate order will be entered reflecting this decision.

Date: 19 July 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

[10] It is not necessary to address the other objections raised because confirmation has been denied.

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 04-12595
	)	
THE CAPITAL CREATION CO., INC.,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date,

IT IS, THEREFORE, ORDERED that confirmation of the joint plan of reorganization of the debtor and JG Acquisitions LLC is denied. (Docket 172).

Date: 19 July 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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