

**IT IS SO ORDERED.**



**Dated: October 01, 2009  
04:01:50 PM**

**Honorable Kay Woods  
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

**IN RE:**

**AEROTECH MECHANICAL  
CONTRACTORS, INC.,**

**Debtor.**

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\* **CASE NUMBER 06-40955**  
\*  
\* **CHAPTER 11**  
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\*  
\* **HONORABLE KAY WOODS**  
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**MEMORANDUM OPINION REGARDING MOTION TO MODIFY PLAN**  
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This cause is before the Court on Motion to Modify Plan ("Motion to Modify") (Doc. # 575) filed by Reorganized Debtor Aerotech Mechanical Contractors, Inc. ("Aerotech") on September 22, 2009. The Court entered Order Scheduling Expedited Hearing (Doc. # 577) that same day, which set the Motion to Modify for hearing on September 29, 2009 ("Hearing"). KeyBank National Association ("KeyBank") filed Response of KeyBank National Association in Opposition to Debtor's Motion to Modify Plan ("Response") (Doc. # 579) on September 28, 2009.

Counsel for Aerotech and counsel for KeyBank were present at the Hearing and made arguments in support of their positions concerning the Motion to Modify. At the conclusion of the Hearing, the Court denied the Motion to Modify. This Memorandum Opinion more fully states the Court's reasons for its ruling.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Aerotech filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code on June 30, 2006. Aerotech filed its First Plan of Reorganization (Doc. # 296) on January 27, 2007. Several creditors filed objections thereto. Aerotech filed its First Amended Plan of Reorganization (Doc. # 345) and Disclosure Statement (Doc. # 344) on May 1, 2007. Several parties objected to the First Amended Plan. The Court held a hearing on the First Amended Plan on June 12, 2007, at the conclusion of which Aerotech was to further amend the plan. Aerotech filed its Second Amended Plan of Reorganization (Doc. # 388) on July 25, 2007. The Court held a hearing on the Second Amended Plan on August 29, 2007, and thereafter entered Order Confirming Plan (Doc. # 404) on August 30,

2007.

In the Motion to Modify, Aerotech seeks the following relief: (i) reduction of the amount of eligible accounts receivable and inventories from \$1,4999,497.84 to \$1,150,000.00 for the reason that the debt to KeyBank has been reduced post confirmation by \$356,000.00; and (ii) delay until December 31, 2009, of imposition of the default rate of interest of 16% on payment of KeyBank's debt. Aerotech argues that "[e]quity dictates that a modification or amendment is in order" due to the change in the economic climate and because KeyBank is adequately protected. (Mot. to Modify at 4.) Aerotech further argues that it "should not be held responsible for these economic times[,]" (*id.*) which have (i) caused its customers to take longer to pay and (ii) retarded Aerotech's ability to refinance in order to pay off the KeyBank debt.

In opposition, KeyBank states that Aerotech waived the ability to amend or modify the Second Modified Plan by agreeing that: "Debtor shall not seek to modify or amend the Plan, or KeyBank's rights in order to avoid the consequences of a KeyBank Default [sic]." (Second Amend. Plan at 18.) KeyBank further argues that, in addition to the waiver of the right to modify the Plan, Aerotech is estopped from seeking modification because the Plan has been substantially consummated.

A reorganized debtor does not have the same freedom to modify a plan after confirmation as it does prior to confirmation. "Unlike preconfirmation modifications of a Chapter 11 plan, which may be

done at any time prior to confirmation, the procedure for postconfirmation modifications is more involved. Compare 11 U.S.C. § 1127(a) and (b).” *In re Burnsbroke Apartments of Athens, Ltd.*, 151 B.R. 455, 457 (Bankr. S.D. Ohio 1992). There are reasons for this distinction, including that (i) confirmation of a chapter 11 plan generally acts as a discharge of a debtor’s pre-confirmation obligations and establishes new contractual relationships between the debtor and all other parties; and (ii) the need to establish finality for creditors after they vote on a plan.

The standard for modifications is significantly more restrictive for post-confirmation modifications than for pre-confirmation modifications. In fact, Congress drafted § 1127(b) to safeguard the finality of plan confirmation. If this were not the case, a proponent of a plan could file an endless series of motions to modify the plan, at every bump in the road, seriously jeopardizing the incentive for creditors to vote in favor of a plan.

*Antiquities of Nevada, Inc. v. Bala Cynwyd Corp.* (*In re Antiquities of Nevada, Inc.*), 173 B.R. 926, 928 (B.A.P. 9th Cir. 1994) (internal citations omitted).

Because the Motion to Modify was filed post-confirmation, it is governed by 11 U.S.C. § 1127(b), which provides:

- (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. § 1127 (West 2009). Aerotech is both the proponent of the Second Amended Plan and the reorganized debtor; accordingly, it is the appropriate party to bring the Motion to Modify.

The first question for the Court to address, which was raised by KeyBank in its Response is whether the Motion to Modify is timely. In other words, has "substantial consummation" of the Second Amended Plan occurred? Substantial consummation is a defined term:

- (2) "Substantial consummation" means --
  - (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
  - (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
  - (C) commencement of distribution under the plan.

11 U.S.C. § 1101 (West 2009). For the reasons set forth below, this Court finds that Aerotech's Second Amended Plan has been substantially consummated.

"The proponent of the plan bears the burden of proving 'substantial consummation' has *not* occurred." *Antiquities of Nevada, Inc.*, 173 B.R. at 929 (emphasis in original). Aerotech concedes that subsections (B) and (C) of § 1101(2) have been met. As a consequence, the only question is whether Aerotech has transferred all or substantially all of the property proposed by the plan, pursuant to subsection (A). Aerotech did not address this issue directly; instead, counsel for Aerotech argued that the Second Amended Plan has not been substantially consummated because the Plan

called for payments to be made over a five year period whereas it has been only two years since confirmation. Thus, Aerotech argued, substantial consummation has not yet occurred. In arguing in favor of the Motion to Modify, Aerotech represented that it had paid KeyBank and its other secured and priority creditors significant amounts on their allowed claims.

This case is similar to *Antiquities of Nevada, Inc.*, in which the reorganized debtor, a retailer, sought to modify the confirmed plan because average monthly sales had dropped subsequent to confirmation. As a consequence, the debtor sought to reduce the level of inventory collateral, reduce the monthly payment to its secured creditor and extend the payments for an additional two years. In that case, the Bankruptcy Court denied the motion to modify on the basis that the plan had been substantially consummated. The *Antiquities* debtor (like Aerotech) conceded that it had assumed management and control of the property administered under the plan and that it had commenced distributions, but it argued that, because it had made only 58% distributions on unsecured debt and 20% on secured debt that the plan had not been substantially consummated. The Ninth Circuit BAP ("BAP") analyzed the "two primary schools of thought on what constitutes 'substantial consummation[.]'" comparing *In re Heatron, Inc.*, 34 B.R. 526 (Bankr. W.D. Mo. 1983) with *In re Hayball Trucking, Inc.*, 67 B.R. 681 (Bankr. E.D. Mich. 1986). *Antiquities of Nevada, Inc.*, 173 B.R. at 929. The BAP was persuaded by the analysis in *In re Hayball*

because, in order to reconcile subsections (A) and (C) of § 1101(2), there had to be a distinction "between transfers of property to or from the debtor at or near the time the plan is confirmed . . . and distributions of dividends to creditors made over a period of time from operating revenues. 'Substantial consummation' requires completion or near completion of the former, but only commencement of the latter." *Id.* at 930 (quoting *Hayball Trucking, Inc.*, 67 B.R. at 684) (emphasis removed).

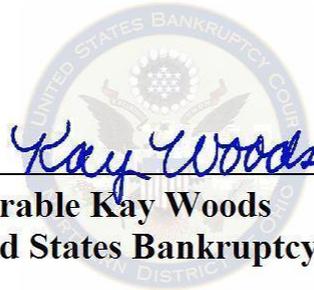
In *Burnsbrooke Apartments of Athens, Inc.*, the Bankruptcy Court undertook a similar analysis and concluded "that the better reasoned approach is that enunciated in *Hayball Trucking*," finding that distinguishing between transfers of property and distributions of dividends to creditors is necessary in order to give meaning to each subsection in § 1101(2). *Burnsbrooke Apartments of Athens, Inc.*, 151 B.R. at 458.

In the instant case, Aerotech did not argue that it had not yet transferred all or substantially all of the property proposed by the plan to be transferred. Aerotech merely argued that less than half of the plan period had passed and, thus, substantial consummation had not yet occurred. This Court cannot agree with Aerotech's argument. Instead, this Court agrees with the analyses of *Antiquities of Nevada, Inc.* and *Burnsbrooke Apartments of Athens, Inc.*

An appropriate order will follow.

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**IT IS SO ORDERED.**



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**Honorable Kay Woods  
United States Bankruptcy Judge**

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<b>CONTRACTORS, INC.,</b>	*	<b>CHAPTER 11</b>
	*	
<b>Debtor.</b>	*	<b>HONORABLE KAY WOODS</b>

\*\*\*\*\*  
**ORDER DENYING MOTION TO MODIFY PLAN**  
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This cause is before the Court on Motion to Modify Plan ("Motion to Modify") (Doc. # 575) filed by Reorganized Debtor Aerotech Mechanical Contractors, Inc. ("Aerotech") on September 22, 2009. KeyBank National Association filed Response of KeyBank National Association in Opposition to Debtor's Motion to Modify Plan (Doc. # 579) on September 28, 2009. The Court held a hearing on the Motion to Modify on September 29, 2009 ("Hearing").

For the reasons set forth at the Hearing and in the Memorandum Opinion entered this date, the Court hereby denies the Motion to Modify.

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