

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

FEB 24 '00

U.S. Bankruptcy Court
Greensboro, NC

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IN RE:

MAC Panel Company,

Debtor.

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Case No. 98-10952C-11G

ORDER

This case was before the court on October 27 and 28, 1999, for a confirmation hearing on Debtor's Second Amended Plan of Reorganization dated July 26, 1999, and for trial of the adversary proceeding entitled MAC Panel Company v. Virginia Panel Corporation. Debtor's Second Amended Plan was accepted by all creditors and parties in interest except for Virginia Panel Corporation ("VPC"), who objected to confirmation of the plan on the grounds that the plan failed to satisfy the requirements of § 1129 of the Bankruptcy Code. VPC also objected to the granting of the injunctive relief sought in the adversary proceeding. Following the hearing on October 27 and 28, this court filed a memorandum opinion regarding confirmation of Debtor's Plan on December 2, 1999. Among other things, the court found that the Second Amended Plan was proposed in good faith and therefore satisfied the requirements of § 1129(a)(3), that the plan satisfied the best interest of creditors requirement

under § 1129(a)(7), that the plan satisfied the feasibility requirements of § 1129(a)(11) and that the plan did not discriminate unfairly against VPC and therefore satisfied the requirements of § 1129(a), and also concluded that the court had jurisdiction to enter an injunction against VPC. However, the court denied confirmation because the Second Amended Plan did not provide VPC with the present value of its claim as required by § 1129(b)(2)(B)(i) and because a portion of the release contained in Article IX of the plan was overly broad.

Based on the findings and conclusions contained in the memorandum opinion, this court entered an order on December 2, 1999, denying confirmation of the Second Amended Plan and allowing the Debtor until December 22, 1999, to modify its Plan. On December 22, 1999, the Debtor filed its Modification to Debtor's Second Amended Plan of Reorganization (the "Modification").

The Modification filed on December 22, 1999, amended the Plan in three principal respects. The first modification involved the treatment of the claim of Bank of America.¹ Under the Modification, interest payable to Bank of America accrues under the term loan and new revolving line of credit at LIBOR plus 2% per annum, rather than

¹Bank of America, N.A., is the successor in interest to NationsBank, N.A., the creditor referred to in the Modification.

LIBOR plus 2½% as originally provided in the Plan. The two remaining changes dealt with the two areas in which the court found the Plan deficient, namely, the rate of interest paid to VPC and the release provisions contained in Article IX. The Plan, as modified on December 22, 1999, provides that VPC will be paid the full principal balance of its claim, plus 9% per annum interest rather than the 5.125% originally provided under the Plan. Additionally, the release provisions in Article IX of the Plan were revised and made more narrow by the Modification.

On December 22, 1999, this court conditionally granted Debtor's motion requesting that the court hold a confirmation hearing on the modified plan without requiring additional disclosure and without additional voting on the modified plan. That order set a confirmation hearing on January 28, 2000, and provided that, pursuant to § 1127(d) and Bankruptcy Rule 3019, all prior ballots indicating acceptance of the plan would be deemed to constitute acceptances of the modified plan unless creditors filed and served a written notice changing their previous acceptance on or before January 10, 2000. The Modification and the December 22, 1999 order were then served upon creditors and other parties in interest.

Pursuant to the December 22 order, this case came before the court on January 28, 2000, for a confirmation hearing regarding

confirmation of Debtor's Plan of Reorganization as amended by the Modification. John H. Small and H. Arthur Bolick II appeared on behalf of the Debtor, Rory D. Whelehan appeared on behalf of VPC, Gerald A. Pell appeared on behalf of the Unsecured Creditors' Committee and Scott P. Vaughn appeared on behalf of Bank of America, N.A. At the outset of the hearing, the Debtor filed acceptances of the Modification from Bank of America and Joseph L. Craycroft, Jr., the only two parties whose treatment under the Plan was adversely affected by the Modification. Debtor also reported to the court that no creditors had changed their previous acceptance of the Plan, leaving VPC as the only party objecting to the Plan as modified.² At the conclusion of the evidence, the Debtor announced a further modification to its Plan involving a further narrowing of the scope of the release contained in the modified Plan. The court granted the Debtor ten (10) days within which to file a written modification and took the matter of confirming the Debtor's plan under advisement pending receipt of the written modification and proposed findings of fact and conclusions of law from the parties. On February 1, 2000, Debtor filed its Second Modification to Debtor's Second Amended Plan

²It was stipulated in open court that VPC no longer objected to the interest rate payable under the Plan as modified, but reserved all other grounds of objection contained in its objections and supporting briefs.

(the "Second Modification") in which Debtor further modified the release contained in Article IX by further narrowing the scope of the release. Both parties then submitted proposed findings of fact and conclusions of law. Having considered the Debtor's Second Amended Plan as modified by the Modification and the Second Modification (the "Modified Plan"), the objections to the Modified Plan, the evidence offered at the confirmation hearings, the proposed findings and conclusions and briefs submitted by the parties and the matters of record in this case, the court makes the following findings of fact and conclusions of law pursuant to Rules 9014 and 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

1. MAC Panel Company, Debtor and Debtor in Possession, ("MAC Panel"), is a North Carolina corporation with its principal place of business in High Point, North Carolina. MAC Panel is engaged in the business of manufacturing and selling high performance interface connector systems and enclosures used for the test and measurement of electronic systems. Its customer base consists primarily of the United States Military, the aerospace industry, the medical electronics industry, the telecommunications industry, and the commercial electronics industry, including several computer manufacturers.

2. Virginia Panel Corporation ("VPC") is a Virginia corporation with its principal place of business in Waynesboro, Virginia. VPC also is engaged in the business of manufacturing and selling high performance interface connector systems used for the test and measurement of electronic systems. VPC is the only significant competitor of MAC Panel in the relevant market for high performance interface connector systems.

3. Joseph L. Craycroft, Jr. ("Craycroft") currently is the president, the chief executive officer, and the director of MAC Panel. Craycroft is actively involved in the day-to-day operations of MAC Panel. His day-to-day duties in operating the business of MAC Panel consume large amounts of his time.

4. John E. Craycroft ("John Craycroft") was the president, the chief executive officer, and a director of MAC Panel Company from 1983 through September 30, 1996. On that date, he terminated his involvement with MAC Panel based on a medical disability.

5. On April 14, 1998, MAC Panel filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. MAC Panel has continued in possession of its property since that time and is authorized under 11 U.S.C. § 1108 to operate its business as a debtor in possession.

6. MAC Panel's operations have been profitable, both before and after the filing of its bankruptcy petition.

7. By order entered April 17, 1998, this court designated Craycroft as the person to perform on MAC Panel's behalf all acts required to be performed by MAC Panel in its bankruptcy case.

8. VPC holds a judgment against MAC Panel as a result of an order of the United States Court of Appeals for the Federal Circuit (the "Federal Circuit Order") reversing a decision of the United States District Court for the Western District of Virginia, (the "District Court") in a case captioned Virginia Panel Corp. v. MAC Panel Company, C.A. No. 93-0006 (W.D.Va.). At trial, MAC Panel was found to have willfully infringed certain patents held by VPC; subsequently, VPC was found to have misused the patent and violated the antitrust laws. As a result of the misuse finding, the District Court held that VPC was not entitled to any damages for infringement, and as a result of the antitrust finding, the District Court awarded MAC Panel a judgment in excess of \$1,500,000.00 against VPC. The Federal Circuit Order reversed the misuse and antitrust findings, and affirmed the infringement finding resulting in the current award held by VPC against MAC Panel. Consequently, on March 30, 1998, the District Court issued an order, which, inter alia, entered judgment against MAC Panel for \$1,846,780.00 for

patent infringement and \$64,853.00 for false advertising under the Virginia Code.

9. On May 21, 1998, MAC Panel filed a petition for writ of certiorari to the United States Supreme Court in an effort to seek an appeal and the ultimate reversal of the Federal Circuit Order. On October 5, 1998, the United States Supreme Court denied MAC Panel's petition for writ of certiorari.

10. On or about August 14, 1994, VPC filed an action against Craycroft and John Craycroft alleging causes of action for inducing patent infringement and false advertising in the District Court in a case captioned Virginia Panel Corporation v. Joseph L. Craycroft, Jr. and John E. Craycroft, C.A. No. 94-0058(H) (W.D.Va.) (the "Individual Litigation"). On or about January 10, 1995, the District Court entered a stay of all proceedings in the Individual Litigation.

11. On or about June 3, 1998, VPC filed a motion with the District Court seeking to lift the stay previously ordered in the Individual Litigation, thereby seeking to renew the action against Craycroft and John Craycroft.

12. On September 11, 1998, the District Court continued the stay in the Individual Litigation pending a decision by the United States Supreme Court on MAC Panel's petition for writ of certiorari.

13. On October 14, 1998, shortly after the United States Supreme Court had denied MAC Panel's petition for writ of certiorari, VPC renewed its motion to lift stay in the Individual Litigation.

14. On or about November 2, 1998, the District Court granted VPC's renewed motion to lift stay, thereby terminating the stay in the Individual Litigation.

15. On July 30, 1998, MAC Panel filed an adversary proceeding in this bankruptcy case seeking to enjoin VPC from pursuing Craycroft in the Individual Litigation during the pendency of this bankruptcy case. That adversary proceeding is captioned MAC Panel Company v. Virginia Panel Corporation, Adv. No. 98-2032 (Bankr. M.D.N.C.) (The "Adversary Proceeding").

16. On November 12, 1998, this court granted MAC Panel's motion for preliminary injunction in the Adversary Proceeding and granted a stay of the Individual Litigation against Craycroft. The preliminary injunction has remained in effect continuously since that time.

17. On December 11, 1998, MAC Panel filed its plan of reorganization dated December 11, 1998. On July 26, 1999, MAC Panel filed its Second Amended Plan of Reorganization dated July 26, 1999 (the "Amended Plan").

18. VPC is the only creditor of MAC Panel who cast a ballot to reject MAC Panel's Amended Plan. VPC's claim (other than any administrative claim) is classified in Class 8B. Class 8B was the only Class rejecting MAC Panel's Plan; all other classes voted to accept MAC Panel's Amended Plan. VPC also is the only creditor who rejected the Modified Plan following the December 22, 1999 modification of the Amended Plan.

19. MAC Panel's Modified Plan provides the payment of one hundred percent (100%) of the claims of all unsecured creditors; in addition, MAC Panel will pay VPC interest on the unpaid balance of its claim at the rate of nine percent (9%) per annum after the effective date of the Modified Plan to provide VPC with the present value of its claim.

20. Under the terms of the Modified Plan, MAC Panel will have significant financial obligations on the effective date of the Modified Plan. Under the Modified Plan, MAC Panel will pay all priority claims in cash in full on the effective date of the Modified Plan. In addition, Class 7, consisting of creditors with unsecured claims less than \$2,000.00 and the claims of unsecured creditors who elect to reduce their claims to \$2,000.00, shall be paid fifty percent (50%) of their allowed claim on the later of the effective date of the Modified Plan or fifteen (15) days after the

claim allowance date.

21. Class 8A, consisting of unsecured creditors with claims in excess of \$2,000.00 (with the exception of VPC and the indemnification claims of Craycroft and John Craycroft), shall be paid through an initial distribution of thirty-five percent (35%) of the allowed claim on the later of the effective date of the Modified Plan or fifteen (15) days after the claim allowance date, followed by quarterly payments for a maximum of seven years; alternatively, creditors with claims in Class 8A may elect to receive a one time lump-sum cash payment equal to sixty percent (60%) of their allowed claims payable on the effective date of the Modified Plan. VPC also will be paid an initial distribution of thirty-five percent (35%) of its allowed claim on the later of the effective date of the Modified Plan or fifteen (15) days after the claim allowance date, followed by quarterly payments for a maximum of seven years.³

22. MAC Panel projects that the amount of cash needed on the effective date of the Modified Plan will be approximately \$1,217,000.00.

³Virginia Panel Corporation, alternatively, could have elected to receive a one time lump sum cash payment equal to seventy percent (70%) of its Allowed Claim on the Effective Date of the Modified Plan; Virginia Panel Corporation did not elect this option.

23. MAC Panel projects that, as of the effective date of the Modified Plan, it will have only \$430,000.00 in operating cash available.

24. Craycroft is committed to make available at least \$1,100,000.00 in funds (the "Craycroft Funds") towards MAC Panel's reorganization efforts to fund payments due on the effective date of the Modified Plan, as well as MAC Panel's future operations. To the extent MAC Panel's operating cash and the Craycroft Funds are not sufficient to provide the amount of cash needed to pay creditors on the effective date of the Modified Plan, Craycroft has committed to make an additional amount of funds available to MAC Panel such that MAC Panel has sufficient funds to pay creditors all amounts due and payable on the effective date of the Modified Plan. Without the Craycroft Funds, MAC Panel could not pay the large initial dividend to unsecured creditors.

25. The Modified Plan provides that the Craycroft Funds are conditioned upon the entry of an injunction in the Adversary Proceeding enjoining VPC from pursuing the Individual Litigation against Craycroft and John Craycroft. On April 7, 1999, MAC Panel amended its complaint to seek a permanent injunction in the Adversary Proceeding. The injunction, as set forth in the Modified Plan and requested at the combined confirmation hearing/trial, shall

remain in effect so long as MAC Panel fulfills its obligations to VPC under the Modified Plan, and shall become permanent once VPC's claim has been paid in full pursuant to the terms of the Modified Plan.

26. In addition to the injunction, the Modified Plan includes a release of Craycroft. The release provision in Article IX of the Modified Plan provides a release of Craycroft, his heirs, successors, assigns, agents or other legal representatives of claims against him related to or arising from his relationship with MAC Panel which arose or existed prior to the confirmation of the Modified Plan. The release of Craycroft, however, is limited in scope such that his release does not exceed the scope of the release granted MAC Panel. The release does not release Craycroft as against any creditor who is not paid pursuant to the terms of the Modified Plan. Further, under the Modified Plan, Craycroft's release is void if he fails to fulfill his obligations under the Modified Plan to provide the Craycroft Funds as set forth in Paragraph 5.2 of the Modified Plan. The release of Craycroft as provided in Article IX of the Modified Plan releases him only from claims asserted or which could have been asserted against MAC Panel in this bankruptcy case.

27. The Craycroft Funds will enable MAC Panel to meet its financial obligations on the effective date of the Modified Plan. The prepetition claims against MAC Panel in this bankruptcy case total approximately \$4,200,000.00; the Craycroft Funds exceed twenty-five percent (25%) of the total prepetition claims against MAC Panel.

28. Without the Craycroft Funds, it is highly unlikely that MAC Panel could propose a plan of reorganization that would result in payment of one hundred percent (100%) of the claims of its creditors within a reasonable period of time.

29. If the Individual Litigation were allowed to proceed against Craycroft, Craycroft would incur enormous legal expenses, and would face the possibility of an entry of a large judgment against him individually.

30. Craycroft also may be subject to efforts by VPC to bring claims against him individually related to his relationship with MAC Panel that were not previously brought in this bankruptcy case against MAC Panel. VPC has sought to bring actions directly against Craycroft both in the Individual Litigation, as well as in a contempt proceeding before the District Court. VPC initially sought relief from stay in this court to seek the finding of contempt in the District Court in May, 1999. At the hearing before this court

on May 25, 1999, counsel for VPC represented that in any contempt proceeding, discovery would be needed only after a finding of contempt in the District Court. VPC further represented that the contempt issues related to one particular device sold by MAC Panel to one customer. Despite these representations, however, VPC initiated discovery prior to any finding of contempt by the District Court, and has broadened the scope of the proceedings through discovery to include other products and other customers of MAC Panel.

31. VPC's activity in the District Court illustrates why Craycroft has a legitimate fear he may be subject to further efforts by VPC to bring claims against him not heretofore raised against MAC Panel. The release provision of the Modified Plan provides Craycroft with reasonable assurance that any further claims that could be asserted against him as a result of his relationship with MAC Panel would be asserted and paid through this bankruptcy case.⁴ Without that release, however, VPC would be free to assert claims against Craycroft individually arising out of his relationship with

⁴If, during the pendency of this case, MAC Panel has violated the injunction issued by the District Court, it is undisputed that VPC is entitled to file an administrative expense claim under § 503. Under the Modified Plan, allowed administrative expense claims are paid in full.

MAC Panel that should have been asserted but were not asserted in this bankruptcy case. In such a case, Craycroft would incur litigation expenses in addition to his substantial contribution to MAC Panel's reorganization efforts through the Craycroft Funds.

32. If the Individual Litigation is allowed to proceed against Craycroft, he is unwilling to commit to providing the Craycroft Funds due to the uncertainty of whether, and to what extent, legal fees and any potential judgment in the Individual Litigation would diminish or eliminate his ability to significantly contribute to MAC Panel's reorganization. Therefore, the Craycroft Funds are expressly conditioned upon the entry of an injunction enjoining the individual Litigation against him.

33. Similarly, without a release, Craycroft is unwilling to commit the Craycroft Funds due to the uncertainty of whether VPC would attempt to assert claims against him individually that it could have asserted in this bankruptcy case against MAC Panel. The release provided in the Modified Plan gives certainty to Craycroft that if the Craycroft Funds are used to satisfy claims against MAC Panel, then he will not incur litigation expenses related to claims against him arising out of his duties with MAC Panel that could have been asserted in this bankruptcy case.

34. In the event of the liquidation of MAC Panel under Chapter 7, it is likely that MAC Panel's assets would yield liquidation proceeds of \$1,842,505.00. If these proceeds were distributed in a Chapter 7 case, after paying secured claims and priority claims, proceeds of only \$42,716.00 would remain for distribution to VPC and the other unsecured creditors. Since the nonpriority unsecured claims in this case are approximately \$2,729,000.00, the dividend which would be received by unsecured creditors in a Chapter 7 case would be some 1.6% or, in the case of VPC, about \$34,000.00. Under the Modified Plan, VPC will receive a cash payment on the effective date of the Modified Plan of some \$743,750.00, representing the initial cash dividend of 35% of its claim.

35. VPC is not just a creditor of MAC Panel, but is also a competitor, if not the only significant competitor, of MAC Panel for a substantial portion of MAC Panel's business. As a competitor, not just a creditor of, MAC Panel, VPC has interests in this case other than those solely related to the recovery of its claim. VPC stands to benefit competitively and financially if MAC Panel ceased operating.

36. Both Craycroft and John Craycroft have potential claims for indemnification under the law of North Carolina arising out of

the Individual Litigation. The Modified Plan provides that for either Craycroft or John Craycroft to be entitled to the benefit of the injunction, he must elect to have his claim for indemnification completely subordinated to claims of MAC Panel's other creditors. The Craycrofts will not receive any payments on their indemnification claims until all unsecured creditors in Classes 8A and 8B are paid the full amount due them under the Plan. The estimated amount of the claims for indemnification of Craycroft and John Craycroft are \$125,000.00 as of the effective date of the Modified Plan.

37. Pursuant to N.C. Gen. Stat. §§ 55-8-52 and 56(a), Craycroft, as an officer and director of MAC Panel, and John Craycroft, as a former officer and director of MAC Panel, if successful in their defense in the Individual Litigation, will be entitled to indemnification from MAC Panel for expenses incurred in actions brought against them arising out of their position as officers and directors of MAC Panel. Pursuant to N.C. Gen. Stat. § 55-8-50(b)(3), this right to indemnification also includes the right to receive compensation for attorneys' fees expended. Even if they are unsuccessful in defense of the action, MAC Panel may reimburse Craycroft and John Craycroft for the amount of any judgment and the cost of their defense pursuant to N.C. Gen. Stat.

§§ 55-8.5 1(a) and 56(2).

38. If the Individual Litigation is allowed to proceed against Craycroft and John Craycroft, because of their right to indemnification rights, additional claims may be created against MAC Panel in favor of Craycroft and John Craycroft, in the form of expenses, and, potentially, the amount of any judgment VPC obtains against Craycroft and John Craycroft.

39. If the Individual Litigation is allowed to proceed against Craycroft and John Craycroft, the amount of their potential indemnification claims will increase, thereby resulting in increased claims against MAC Panel.

40. Craycroft also may be entitled to indemnification from MAC Panel for any future claims brought against him arising out of his relationship with MAC Panel. Therefore, if VPC or any other Creditor could assert such claims against Craycroft postconfirmation, Craycroft's indemnification claim against MAC Panel would increase in the form of expenses and, potentially, the amount of any judgment obtained against Craycroft.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and the findings and conclusions contained in the memorandum opinion filed in this case on December 2, 1999, the Court makes the following Conclusions of

Law:

1. The Modified Plan complies with all of the requirements of § 1129(a) of the Bankruptcy Code, except for the requirement of § 1129(a)(8), compliance with which is prevented by VPC's rejection of the Modified Plan. Regarding the feasibility requirement of § 1129(a)(11), the court has considered the fact that the Modified Plan provides for additional interest to be paid to VPC. MAC Panel's evidence at the hearing on January 28 established that, notwithstanding this additional interest, it is reasonably likely that the Debtor will be able to make the payments provided for under the Modified Plan without the need for further financial reorganization, which satisfies the requirement of § 1129(a)(11).

(2) Even though the Modified Plan does not meet the requirement of § 1129(a)(8), the Modified Plan nonetheless should be confirmed pursuant to § 1129(b) of the Bankruptcy Code because: (a) for the reasons stated in the memorandum opinion, the Modified Plan does not discriminate unfairly as to VPC; and (b) the Modified Plan is fair and equitable with regard to VPC. Section 1129(b)(2) sets forth the minimum required in order for a plan to be fair and equitable. The specific provision of § 1129(b)(2) applicable in the present case is § 1129(b)(2)(B). The increase of the rate of interest payable to VPC from 5.125% to 9% enables the Modified Plan to satisfy the

requirements imposed by § 1129(b)(2)(B) because, with the increased interest rate, the stream of payments payable to VPC under the Modified Plan has a present value equal to the amount of VPC's claim. The Modified Plan also satisfies the overall requirement of § 1129(b)(1) that a plan literally be fair and equitable, as well as satisfying the requirements of § 1129(b)(2). The factors to consider in deciding whether a plan is fair and equitable to an unsecured class of creditors include whether the percentage or formula for proposed payment demonstrates a good faith effort to repay those obligations and whether there are particular inequities inherent in the plan, including special prejudice to a dissenting class arising from its particular circumstances. See In re Montgomery Court Apartments of Ingham County, Ltd., 141 B.R. 324, 346 (Bankr. S.D. Ohio 1992). In the present case, VPC is being paid 100% of its claim under a payment schedule in which 35% of the claim is paid immediately, with the balance of the claim paid by regular periodic payments over a maximum of seven years, with interest at 9% per annum. It is easy to conclude that such a payment proposal amply demonstrates a good faith effort to repay the obligation owed to VPC. Furthermore, there are no particular inequities to VPC inherent in the Modified Plan. Contrary to the arguments of VPC, the injunction and release in the Modified Plan do not render the

Plan inequitable to VPC. The continuation of the injunction against pursuing the Individual Litigation is dependent upon MAC Panel making the payments to VPC provided for under the Modified Plan. If those payments are made then VPC will be paid 100% of the damages which it sustained as a result of MAC Panel's patent infringement. If the payments are not made, the injunction terminates and VPC is then free to pursue the Individual Litigation. A similar situation exists with respect to the release. The release applies only to claims against Craycroft arising out of his relationship with MAC Panel that were asserted, or could have been asserted against MAC Panel in this bankruptcy case. The Modified Plan provides for payment in full of all claims that are asserted in this case. All claims of VPC which are asserted in this case are required by the Modified Plan to be paid in full. If MAC Panel does not comply with the Plan, the release specifically provides that it "shall be voided as to the Claim of any Claimant to the extent that any such Creditor with a Claim is not paid pursuant to the terms of the Plan." This Chapter 11 case is the arena in which any pre-confirmation claim which VPC has against MAC Panel should be presented. The Plan requires that any such claims that are properly presented in this case be paid in full. The release encompasses only such claims and is voided if the claims are not paid in

accordance with the Plan. Under the circumstances of the present case, the injunction and release contained in the Modified Plan are not unfair nor inequitable to VPC.

3. This court has the jurisdiction and power to issue the type of injunction of the Individual Litigation called for under the Modified Plan. This Court also has the jurisdiction and power to confirm the Modified Plan providing such an injunction and a release for Craycroft. Bankruptcy courts have the jurisdiction and power to permanently enjoin claims and actions against nondebtors in the context of a Chapter 11 plan of reorganization, as well as to grant releases to nondebtor third parties. See In re A.H. Robbins Co., 880 F.2d 694, 701 (4th Cir. 1989). This view is supported by significant additional authority taking the same position as the Court of Appeals for the Fourth Circuit. See, e.g., In re Munford, Inc., 97 F.3d 449, 454-55 (11th Cir. 1996); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2nd Cir. 1992); MacArthur Co. v. Johns Manville Corp., 837 F.2d 89, 93-94 (2nd Cir. 1988); In re Master Mortgage Inv. Fund, 168 B.R. 930, 934-38 (Bankr. W.D. Mo. 1994); In re Harron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 685-90 (Bankr. D.D.C. 1992). The power to enter such an injunction and release is conferred upon this Court by § 105(a) and § 1123(b)(6) of the Bankruptcy Code. See Robbins, 880 F.2d at 701;

Johns Manville, 837 F.2d at 93.

4. The court recognizes a split of authority on the issue of jurisdiction to enter injunctions and releases in favor of nondebtor third parties, as reflected by the opinions cited by VPC. (See, e.g., In re Digital Impact, Inc., 228 B.R. 1 (Bankr. N.D. Okla. 1998)). The court finds that the decisions cited by VPC, however, are not controlling, and therefore, the court rejects those cases, and concludes that this court has jurisdiction to enter an injunction and release of the type provided in the Modified Plan.

5. While some courts have approved releases of third parties, see, e.g., In re Specialty Equip. Co., 3 F.3d 1043, 1047 (7th Cir. 1993), and others have approved injunctions in favor of third parties, Robbins, 880 F.2d at 702, the same standard is used to test the propriety of granting relief to a third party, whether it be in the form of an injunction or a release. See, e.g., In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 936-37 (Bankr. W.D. Mo. 1994).

6. The issuance of a third party injunction or release depends upon the contents of the plan and other attendant circumstances. The courts issuing such injunctions and releases have identified a number of factors that are important in deciding whether an injunction and/or release should be issued. These

factors include (1) whether the third party who will be protected by the injunction or release has made an important contribution to the reorganization; (2) whether the requested injunctive relief or release is "essential" to the confirmation of the plan; (3) whether a large majority of the creditors in the case have approved the plan; (4) whether there is a close connection between the cases against the third party and the case against the debtor; and (5) whether the plan provides for payment of substantially all of the claims affected by the injunction or release.

7. The court concludes that each of the foregoing factors favor the entry of an injunction to stay the Individual Litigation and a release of Craycroft as provided in the Modified Plan:

(a) Craycroft has committed to provide a minimum of \$1,100,000.00 to MAC Panel's reorganization efforts. The Craycroft Funds will be used both to fund MAC Panel's obligations to its creditors as of the effective date of the Modified Plan, as well as to partially fund future operations of MAC Panel. The Craycroft Funds are important given that the prepetition claims in the bankruptcy case total approximately \$4,200,000.00. Thus, the Craycroft Funds will fund payments at least in excess of twenty-five percent (25%) of the total claims against MAC Panel and enable MAC Panel to propose a plan which otherwise could not feasibly be

proposed.

In addition, both Craycroft and John Craycroft must agree to have their claims for indemnification completely subordinated to the claims of MAC Panel's other prepetition creditors. In that regard, they will not receive any payments on those indemnification claims until all unsecured creditors in Classes 8A and 8B (VPC) are paid the full amount due them under the Plan. MAC Panel estimated the current value of claims of Craycroft and John Craycroft to be \$125,000.00 as of the effective date of the Modified Plan.

Through the commitment of the Craycroft Funds and the subordination of their claims, Craycroft and John Craycroft are making important contributions to the reorganization of MAC Panel.

(b) Craycroft's commitment to provide the Craycroft Funds to MAC Panel's reorganization efforts is conditioned upon the entry of an injunction preventing VPC from pursuing the Individual Litigation, and the confirmation of the Modified Plan providing a release for Craycroft. Without the injunction and the release, Craycroft is unwilling to provide the Craycroft Funds due to the uncertainty of whether, and to what extent, legal fees and any potential judgment in the Individual Litigation, and/or further expenses necessary to contest any additional claims brought against him individually related to his relationship with MAC Panel would

diminish or eliminate his ability to significantly contribute to MAC Panel's reorganization. Thus, the requested injunctive relief and release, which are prerequisites to the availability of the Craycroft Funds, are "essential" to the confirmation of MAC Panel's Plan of Reorganization.

(c) With the exception of VPC, all creditors of MAC Panel who voted on the Modified Plan have voted to accept the Modified Plan. VPC is the only creditor opposing confirmation of MAC Panel's Modified Plan. VPC is not just a creditor of MAC Panel but is also a competitor of MAC Panel and has interests in this case other than those solely related to the recovery of its claim. VPC stands to benefit competitively and financially if MAC Panel ceased operating and being a competitor. Thus, the vast majority of creditors in this case have approved the Modified Plan.

(d) There also is an identity of financial interest between MAC Panel and both Craycroft and John Craycroft in that each has a potential claim for indemnification against MAC Panel for expenses incurred by them in the Individual Litigation. In exchange for the benefit of the injunction, both have agreed to subordinate their indemnification claims to claims of MAC Panel's other creditors. Because a continuation of the Individual Litigation against Craycroft and John Craycroft would result in potential increased

indemnification claims against MAC Panel, there is a close connection between the claim of VPC against MAC Panel and the case against both Craycroft and John Craycroft.

Similarly, future claims brought against Craycroft arising out of his relationship with MAC Panel not asserted in the bankruptcy case would give rise to additional indemnification claims against MAC Panel. Without a release for Craycroft, creditors could bring claims outside of the bankruptcy case against Craycroft that are, in reality, claims against MAC Panel. These claims would result in increased indemnification claims against MAC Panel. Therefore, there is a close connection between creditors' claims against MAC Panel and claims against Craycroft arising out of his relationship with MAC Panel.

(e) MAC Panel's Modified Plan provides for the payment of one hundred percent (100%) of the claims of all unsecured creditors; in addition, MAC Panel will pay VPC interest at nine percent (9%) after the effective date of the Plan to provide it with the present value of its claim. MAC Panel's Plan provides an initial dividend of thirty-five percent (35%) of the claims of general unsecured creditors, including VPC, on the effective date of the Plan. Without the Craycroft Funds, MAC Panel could not pay the large initial dividend to unsecured creditors, and its ability to ultimately pay

its creditors the full amount of their claims within a reasonable time would be greatly impaired. Thus, the Modified Plan provides for payment in full of the claim of VPC which is affected by the injunction, including the payment of interest on the balance due after the effective date of the Modified Plan.

The release provisions in favor of Craycroft only release claims against Craycroft arising out of his relationship with MAC Panel that were asserted, or could have been asserted, against MAC Panel in this bankruptcy case. The Modified Plan provides for payment in full of all claims that were asserted in the bankruptcy case. As to any unasserted claims, if those claims are later allowed in this bankruptcy case, they will be paid in full as well under the provisions of the Modified Plan.

8. The court therefore concludes that each of the foregoing factors weighs in favor of the entry of a permanent injunction and of granting a release in favor of Craycroft. Because VPC will receive full payment of its claim over time, however, the court finds that it is appropriate to condition the injunction on MAC Panel meeting its obligations to VPC under the Modified Plan. The injunction provided on the Modified Plan is appropriate, fair and equitable to VPC under the circumstances. Therefore, the court will enter an injunction on the terms provided in the Modified Plan.

Therefore, an injunction staying the Individual Litigation is warranted provided payments are made to VPC under the Modified Plan.

9. Because Craycroft only will be released to the extent he and MAC Panel fulfill their respective obligations under the Modified Plan, the release provisions likewise are fair and equitable and are appropriately narrow in scope.

10. Therefore, the Modified Plan containing the injunction and the release of Craycroft may be confirmed.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED that the Second Amended Plan of Reorganization Submitted by MAC Panel Company Dated July 26, 1999, as modified on December 22, 1999 and February 1, 2000, is hereby CONFIRMED.

This 24th day of February, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge