

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

FEB 24 '00

U.S. Bankruptcy Court
Greensboro, NC

CPH

IN RE:)
)
MAC Panel Company,) Case No. 98-10952C-11G
)
Debtor.)
_____)
)
MAC Panel Company,)
)
Plaintiff,)
)
v.) Adversary No. 98-2032
)
Virginia Panel Corporation,)
)
Defendant.)
)

JUDGMENT

This adversary proceeding was before the court on October 27 and 28, 1999, for a joint hearing involving a confirmation hearing on Debtor's Second Amended Plan of Reorganization and the trial of this adversary proceeding. Following the hearing on October 27 and 28, this court filed a memorandum opinion and order denying confirmation of the Second Amended Plan and allowing the Debtor until December 22, 1999, to modify its Plan. On December 22, 1999, following the filing of a modification to Debtor's Second Amended Plan of Reorganization (the "Modification"), the court entered an order scheduling a further hearing on plan confirmation and the continued trial of this adversary proceeding for January 28, 2000.

The further hearing on confirmation of Debtor's Modified Plan and the continued trial of this adversary proceeding were held on January 28, 2000. John H. Small and H. Arthur Bolick II appeared on behalf of the Debtor, Rory D. Whelehan appeared on behalf of Virginia Panel Corporation, Gerald A. Pell appeared on behalf of the Unsecured Creditors' Committee and Scott P. Vaughn appeared on behalf of Bank of America, N.A.

Having considered the pleadings filed in this adversary proceeding, the evidence offered at the aforesaid hearings, the proposed findings and conclusions and briefs submitted by the parties and the matters of record in this adversary proceeding and the underlying 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 this adversary proceeding in the MAC Panel bankruptcy case seeking to enjoin VPC from pursuing Craycroft in the Individual Litigation during the pendency of this bankruptcy case.

16. On November 12, 1998, this court granted MAC Panel's motion for preliminary injunction in this 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 April 7, 1999, MAC Panel amended its complaint in this adversary proceeding to seek a permanent injunction enjoining VPC

from pursuing the Individual Litigation. On October 27-28, 1999, at the initial trial of this adversary proceeding, MAC Panel amended its prayer for relief to request that the injunction would remain in effect only so long as MAC Panel fulfills its obligations to VPC under the Modified Plan, and would become permanent once VPC's claim in Class 8B has been paid in full pursuant to the terms of the Modified Plan. The pleadings are therefore amended to conform to the evidence offered at trial pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure to reflect MAC Panel's requested injunction as described in the Modified Plan.

18. 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").

19. 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.

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.¹

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

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

25. 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

¹Virginia 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.

against him individually.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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).

34. 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.

35. 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.

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. 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.

2. 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.

3. 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 case 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.

4. The court concludes that each of the foregoing factors favor the entry of an injunction to stay the Individual Litigation:

(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, which is a prerequisite to the availability of the Craycroft Funds, is "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.

(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.

5. The court therefore concludes that each of the foregoing factors weighs in favor of the entry of a permanent injunction 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, an injunction staying the Individual Litigation is warranted provided payments are made to VPC under the Modified Plan and such an injunction will be entered on the terms provided in the Modified Plan.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Virginia Panel Corporation is hereby enjoined from further prosecuting or pursuing its lawsuit against John E. Craycroft and Joseph L. Craycroft, Jr. which is pending in the United States District Court for the Western District of Virginia, captioned Virginia Panel Corporation v. Joseph L. Craycroft, Jr. and John E. Craycroft, CA #94-0058(H) (W.D.Va.), until further order of this court.

2. This injunction shall remain in effect so long as the Debtor, MAC Panel Company, fulfills its obligations to make payments to Virginia Panel Corporation on its Claim in Class 8B under MAC Panel Company's Modified Plan confirmed by this court by an order of even date. In the event that (1) MAC Panel Company has defaulted upon its payments due Virginia Panel Corporation on its Class 8B Claim, (2) MAC Panel Company receives notice of and an opportunity to cure such default as provided in its Modified Plan, and (3) MAC Panel Company fails to cure such default, then this injunction shall be dissolved by further order of this court upon a motion filed by Virginia Panel Corporation in accordance with the provisions of the Modified Plan.

3. In the event that there has been no uncured default in payments to Virginia Panel Corporation on its Class 8B Claim, and all payments due Virginia Panel Corporation on its Class 8B Claim

under MAC Panel Company's Modified Plan have been made, then this injunction shall become a permanent injunction permanently enjoining Virginia Panel Corporation from prosecuting or pursuing its lawsuit against John E. Craycroft and Joseph L. Craycroft, Jr. which is pending in the United States District Court for the Western District of Virginia, captioned Virginia Panel Corporation v. Joseph L. Craycroft, Jr. and John E. Craycroft, CA #94-0058(H) (W.D.Va.).

This 24th day of February, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge