IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

IN RE: **CASE NO. 9702549WEE**

CONDERE CORPORATION D/B/A
SERVIS FLEET TIRE COMPANY D/B/A
FIDELITY TIRE MANUFACTURING COMPANY

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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON *CONFIRMATION OF THE AMENDED JOINT PLAN OF LIQUIDATION*

This matter came before the Court on the Confirmation of the *Amended Joint Plan of Liquidation of Condere Corporation and Official Unsecured Creditors Committee* (Amended Plan) filed by Condere Corporation (Debtor) and the Official Unsecured Creditors Committee of Condere Corporation (UCC) and on the *Objections* thereto by the Internal Revenue Service (IRS), the Office of the United States Trustee (UST), the Mississippi Department of Environmental Quality (DEQ) and the United Steelworkers of America/Local 303L (the Union). Having considered the testimony and the evidence presented at the trial and the arguments of the parties, the Court finds that confirmation should be denied.

FINDINGS OF FACT

On May 13, 1997, Condere Corporation (Debtor) filed a voluntary petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code.[1] On August 23, 1998, the Court entered its *Findings of Fact and Conclusions of Law on the Amended Motion for an Order Pursuant to 11 U.S.C. § 363 to Sell All Assets of the Debtor*[2] in which the Court approved the sale of the Debtor's assets to Titan Tire of Natchez, Inc. (Titan-Natchez) pursuant to the *Asset Purchase Agreement*[3] (as modified by the Court). The Union has appealed this Court's order, and the appeal[4]

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[1]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[2]In re Condere Corporation, 228 B.R. 615 (Bankr. S. D. Miss. 1998).

[3]The *Asset Purchase Agreement* was entered into by the Debtor, the UCC and Titan Tire, Inc. and its related corporations.

[4]Civil Case number 5:98cv196Brs

is pending before United States District Judge David C. Bramlette. As the Union did not request a stay pending appeal, title to the Debtor's assets involved in the sale has been transferred to Titan-Natchez. Basically, the Debtor's secured lenders have been paid in full. The unsecured creditors have not been paid and will not be paid until a plan is confirmed. Upon confirmation, the unsecured creditors are to be paid sixty-five cents on the dollar which the Debtor estimated at trial to be fifteen million dollars.

Pursuant to the Agreement, on November 2, 1998, the *Joint Disclosure Statement of Condere Corporation and Official Unsecured Creditors Committee of Condere Corporation* (Disclosure Statement) and the *Joint Plan of Liquidation of Condere Corporation and Official Unsecured Creditors Committee* were filed. As the result of the objections filed to the Disclosure Statement, the *Amended Joint Disclosure Statement of Condere Corporation and Official Unsecured Creditors Committee of Condere Corporation* (Amended Disclosure Statement) and the *Amended Joint Plan of Liquidation of Condere Corporation and Official Unsecured Creditors Committee* (the Amended Plan) were filed on December 23, 1998. On the same date, the Amended Disclosure Statement was approved by the Court.

The Amended Plan elicited many objections. The trial on confirmation of the Amended Plan was held on March 17, 1999. All of the objections were resolved prior to the trial except for the objections of the IRS, UST, DEQ and the Union. At the trial, the Debtor and the UCC announced that the objection of the IRS was resolved and that the Debtor and the UCC had agreed to amend the plan to include specific language which would resolve the objection of the IRS. The remaining objectors presented their arguments and testimony to the Court.

The UST and the Union objected to the inclusion of language in the Amended Plan which

would grant non-debtor third parties a discharge. The UST and the Union also objected to the language in the Amended Plan which would grant the Debtor a discharge. The Debtor and the UCC have now agreed to delete from the Amended Plan the language granting non-debtor third parties a discharge. However, the issue of the Debtor's discharge is still contested.

In addition to the discharge issues, the Union also objects to provisions in the Amended Plan which approve/ratify this Court's previously entered order in which the Court approved the sale of the Debtor's assets to Titan-Natchez pursuant to the *Asset Purchase Agreement.*

In its objection, the DEQ is seeking to clarify the provisions in the Amended Plan which relate to post-confirmation environmental issues. The DEQ seeks to have certain language regarding post-confirmation environmental issues, if any, added to any order confirming the Amended Plan.

At the conclusion of the trial, the Court instructed the parties to submit proposed findings of facts and conclusions of law supporting their prospective positions.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A) and (L).

II.

At the trial, the Debtor and the Committee (the Plan Proponents) announced that to resolve the objection of the UST and of the Union with respect to the discharge of non-debtor third parties, the Plan Proponents have agreed to amend and clarify the Amended Plan as follows:

The request of the Debtor and the Committee, for releases and

discharges of the non-debtor third parties under the Plan, is modified and withdrawn.

In addition, the Plan Proponents agreed that in order to specifically resolve a portion of the objection of the UST, the Amended Plan is amended and clarified as follows:

> (a) All fees due to the UST by the Debtor, or the Reorganized Debtor, as the case may be, subsequent to the commencement of these Chapter 11 Cases and prior to the entry of an order closing the case of the Reorganized Debtor, pursuant to section 1930(a)(6) of title 28, based upon disbursements of property of the estate, shall be paid by the Debtor or Titan-Natchez.
>
> (b) The Plan Administrator shall prepare and file the required reports to the UST post-confirmation.

In order to resolve the objection of the IRS, the Plan Proponents have agreed, subsequent to the trial, to amend and clarify the Amended Plan with the inclusion of the following language:

> When Debtor files its 1998 federal income tax return, it shall forward a copy thereof to the Special Procedures Function office of the Internal Revenue Service (the "Service"), Jackson, Mississippi; the Service will have ninety (90) days from the date the Special Procedures Function office of the Service in Jackson, Mississippi receives said copy to file an estimated administrative expense claim against Debtor for the tax year 1998; an amount equivalent to any estimated administrative expense claim against Debtor *shall be paid*[5] into the registry of this Court within thirty (30) days of the filing thereof; the Service will have two hundred seventy-five (275) days from the date the Service files its estimated administrative expense claim against Debtor for the tax year 1998 to file a final administrative expense claim against Debtor for the tax year 1998; Debtor will have one hundred twenty (120) days from the date the Service files its final administrative expense claim against Debtor for the tax year 1998 to object to same, and if Debtor does not object to the Service's final administrative expense claim against it for the tax year 1998 or, if such an objection is filed by Debtor, after resolution of such objection, or

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[5]The Debtor, the UCC and the IRS agreed to the inclusion of this language in the Amended Plan, and the Debtor submitted this language to the Court in its proposed findings of fact. However, it appears that the italicized words were omitted from the draft submitted to the Court.

> ruling by the Court on such objection, the lesser of the funds deposited into the registry of this Court or the amount determined by the Court will be paid to the Department of Justice for and on behalf of the Service within ten (10) days of entry of an Order thereon and any remaining funds will be returned to the Debtor.

The Court will now address the objections of the UST, the DEQ and the Union which have not been resolved by the parties.

III.

In order to have its plan confirmed, a debtor must comply with the requirements of § 1129. The Debtor must prove that it has met the requirements of § 1129(a) by a preponderance of the evidence. Heartland Federal Savings & Loan Ass'n v. Briscoe Enterprises, Ltd., II (In re Briscoe Enterprises, Ltd., II), 994 F.2d 1160, 1165 (5th Cir. 1993), *cert. denied,* 510 U.S. 992, 114 S.Ct. 550, 126 L. Ed. 2d 451 (1993). With the exception of the three above listed objections, no party disputes that all of the other provisions of the Debtor's Amended Plan meet the standards set forth in § 1129 and that without the three above listed objections, the Debtor would be entitled to have its Amended Plan confirmed by the Court. Even though no party has contested any of the other provisions of the Debtor's Amended Plan,

> (t)he court has a mandatory, independent duty to review plans and ensure they comply with the requirements of section 1129, *Williams v. Hibernia Nat'l Bank (In re Williams),* 850 F.2d 250, 253 (5th Cir. 1988), and the court must consider the plan in light of the facts and circumstances of the case. *In re D & F Construction,* 865 F.2d 673, 675 (5th Cir.1989).

In re Westwood Plaza Apartments, 147 B.R. 692, 699 (Bankr. E.D. Tex. 1992).

The Court finds that after reviewing the Amended Plan in light of the facts and circumstances of this case, with the exception of the three remaining objections of the UST, the DEQ and the Union,

the Amended Plan complies with the requirements of § 1129. As such, the Court will now address the three remaining objections of the UST, the DEQ and the Union.

The objections of the UST, the DEQ and the Union to confirmation of the Amended Plan pertain to three issues. First, the Amended Plan provides that the Debtor shall receive a discharge. The UST and the Union argue that the Debtor is not entitled to a discharge and that inclusion of this provision violates 11 U.S.C. § 1129(a)(1) and 11 U.S.C. § 1141(d)(3), and therefore, confirmation should be denied. At the trial, the UCC withdrew its request for the Debtor's discharge, however, the Debtor did not. *Record at p. 57.* Second, the DEQ states that unless the Debtor agrees to modify the plan to include language to clarify that the Bankruptcy Court does not have jurisdiction over post-confirmation environmental matters and that such matters may be properly brought before the Mississippi Commission on Environmental Quality, then confirmation should be denied on the grounds that the Debtor has not complied with § 1129(a)(2). While the UCC supports the inclusion of DEQ's proposed language, the other Plan Proponent, the Debtor, opposes the inclusion of this language in the Amended Plan. The final issue in dispute is the Union's objection to language in the Amended Plan which seeks to approve/ratify the *Findings of Fact and Conclusions of Law on the Amended Motion for an Order Pursuant to 11 U.S.C. § 363 to Sell All Assets of the Debtor* this Court entered on August 23, 1998, and which the Union has appealed to the District Court.

A. Discharge of Debtor.

Whether a debtor receives a discharge depends on the type of plan, if any, that is confirmed and the type of debtor. Section 1141(d)(3) pertains to the discharge in Chapter 11. Section 1141 (d)(3) provides that the confirmation of a plan does not discharge a debtor if–

(A) the plan provides for the liquidation of all or

> substantially all of the property of the estate;
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> (B) the debtor does not engage in business after consummation of the plan; and
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> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

If all three requirements of this section are met, then a Chapter 11 debtor will not be granted a discharge.

The case law interpreting § 1141(d)(3) is clear that a discharge is not available to corporate or partnership debtors who propose a liquidating plan of reorganization. In re Wood Family Interests, LTD., 135 B.R. 407 (Bankr. Colo. 1989). Prior to the sale of its assets to Titan-Natchez, the Debtor engaged in the manufacturing of tires. *Record at p. 20.* Russell Ash, Operations Manager for the Debtor, testified at trial that the sale of the Debtor's assets to Titan-Natchez has been completed and that the only assets which the Debtor now has are the account receivables which it is collecting. *Record at p. 13.* Mr. Ash further testified that after the sale to Titan-Natchez closed on September 4, 1998, the Debtor no longer manufactured tires, and the Debtor has no intention to resume manufacturing tires in the future. *Record at p. 21.* When asked by the attorney for the UST if "the only business (of the Debtor) that remains is the collection of some outstanding accounts receivable, possibly the payment of some bills, and then in accordance with the plan, the disbursement (of) payments," Mr. Ash responded, "Yes." *Record at pp. 21-22.* The Court finds that all that is left of the Debtor is a corporate shell that has transferred all of its major physical assets to Titan-Natchez. The Debtor's remaining assets are the outstanding accounts receivables which it is attempting to collect and the proceeds from the sale of its assets to Titan-Natchez. The Debtor's Amended Plan

is nothing but a plan to distribute the money that the Debtor received from the liquidation of the property of its estate. Therefore, the Court finds that the Debtor's Amended Plan is a liquidating plan for purposes of § 1141(d)(3)(A).

As stated above, the Debtor, prior to the sale to Titan-Natchez, was engaged in the business of manufacturing truck and passenger tires. The Debtor has not engaged in the manufacturing of truck and passenger tires since the transfer of its assets to Titan-Natchez. The sale included substantially all assets of the Debtor, including without limitation, the proceeds of receivables (which will be collected by Debtor) and causes of action both pre-petition and post-petition. The post-sale activities of the Debtor are nothing more than the winding down and conclusion of the sale to Titan-Natchez. No other activities, other than to liquidate and distribute property of the estate in accordance with the sale of substantially all of Debtor's assets, are being conducted by the Debtor, and therefore, the Court finds that the Debtor is not and will not continue to engage in business after consummation of the plan for purposes of § 1141(d)(3)(B).

The Debtor would be denied a discharge under § 727(a) because it is a corporation. Section 727(a)(1) states that a court will grant a discharge unless the debtor is not an individual. In re Mcorp Financial, Inc., 137 B.R. 219 (Bankr. S.D. Tex. 1992). Therefore, the Court finds that the Debtor would be denied a discharge under § 727(a) for purposes of § 1141(d)(3)(C).

Therefore pursuant to § 1141(d)(3), the Court finds that the Debtor is not entitled to a discharge because it is a corporation which is liquidating and discontinuing its business, and as such, the Debtor is not entitled to a discharge pursuant to § 1141(d)(3). Further, the Court finds that as the Debtor is not entitled to a discharge, the inclusion of this provision in the Amended Plan violates

§§ 1129(a)(1)[6] and 1141.

B. DEQ Objection.

The *Term Sheet for the Purchase of Assets of Condere Corporation by Titan Corp. of Mississippi*[7] states that "(t)he Purchaser will hold the estate harmless in connection with all environmental claims." In the Debtor's Amended Disclosure Statement, the Debtor listed in some detail the environmental issues which are currently present at the Debtor's Natchez plant site. *Amended Joint Disclosure Statement*, p. 7. However, the Debtor's Amended Plan only contains the following sentence in regard to its environmental obligations: "Titan Tire has also indemnified Debtor in connection with any environmental claims." *Amended Joint Plan*, p. 16 ¶ 7.3. In Section XVI of the Debtor's Amended Plan, it states in the broadest terms that "the Bankruptcy Court shall retain full jurisdiction. . . ." to, among other items, hear and determine objections to claims, to liquidate or estimate contingent or unliquidated claims, and to determine all causes of action, controversies, disputes, or conflicts, whether or not pending as of the date of confirmation, between the Debtor and any party. *Amended Joint Plan*, p. 24-5 ¶ 16.1.

In the *Response of the Mississippi Department of Environmental Quality to Condere Corporation's Proposed Findings of Fact and Conclusions of Law*, the DEQ states that it "does not seek to impose additional environmental obligations on any party. It merely seeks to clarify those environmental obligations of Debtor for which Titan Tire has agreed to indemnify the Debtor." *DEQ Response*, § 1, p. 2. Basically, the DEQ wants the Amended Plan to be clarified or amended to state

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[6]Section 1129(a)(1) states: "(a) The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of this title."

[7]The Term Sheet is attached to the Debtor's April 27, 1998, *Amended Motion for an Order Pursuant to 11 U.S.C. § 363 to Sell All Assets of the Debtor.*

that the Debtor's and/or Titan-Natchez's post-confirmation environmental obligations are not claims as defined by the Bankruptcy Code[8] and are not subject to the Bankruptcy Court's jurisdiction.

In *Condere Corporation's Proposed Findings of Fact and Conclusions of Law in Support of Confirmation of the First Amended Joint Plan of Liquidation*, the Debtor states that "(t)he DEQ . . . seeks to impose certain environmental obligations upon various parties herein." *Condere Findings*, ¶ 2, p. 12.

It is obvious to the Court that the parties are engaged in a *war of words*–the DEQ states that it is not attempting to impose additional environmental obligations whereas the Debtor states that the DEQ is attempting to do that exact thing.

The DEQ argues that the Debtor's plant site presents a threat to the public health and the environment, and therefore, the plant site requires remediation and continued monitoring. The DEQ further argues that the Debtor's Amended Plan does not adequately address the responsibility of the Debtor and/or Titan-Natchez with regard to the environmental issues. The DEQ cites the case of Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection (In re Torwico Electronics, Inc.), 8 F.3d 146 (3rd Cir.1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1576, 128 L. Ed. 2d 219 (1994), and the code sections 11 U.S.C. § 1129(a)(3)[9] and 28 U.S.C. § 959[10] in support of its position.

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[8]*See* 11 U.S.C. § 101(5).

[9]11 U.S.C. § 1129(a)(3) states: "The plan has been proposed in good faith and not by any means forbidden by law."

[10]28 U.S.C. § 959 states: "(A) debtor in possession, shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which the property is situated. . . ."

In Torwico, the Chapter 11 debtor sought to preclude the New Jersey Department of Environmental Protection (DEPE) from imposing any liability or enforcing any obligation for environmental cleanup. The Third Circuit held that the DEPE's efforts to force the debtor to comply with environmental obligations under an administrative order to clean-up hazardous waste which was issued by the DEPE did not constitute claims under the Bankruptcy Code. The Third Circuit stated that "(t)his is not a situation where the state is attempting to get money from the debtor but rather, it is an exercise of the state's inherent regulatory and police powers." Torwico, 8 F.3d at 151. Therefore, the Third Circuit found that certain environmental obligations are not claims as defined by the Bankruptcy Code and that these types of regulatory claims are not within the jurisdiction of the bankruptcy court.

As stated previously, in the case at bar, the DEQ likewise argues that the post-confirmation environmental obligations of the Debtor and/or Titan-Natchez are not claims under the Bankruptcy Code and are not subject to the jurisdiction of the Bankruptcy Court. The Debtor argues that the language in the plan sufficiently addresses the Debtor's environmental obligations. The Debtor has not offered any case law or statutory law to support its position that the DEQ's objection should be overruled.

The Amended Plan is not clear as to what type of environmental claims Titan Tire has agreed to indemnify the Debtor. Does it mean the pre-confirmation monetary claim which the DEQ has filed or the post-confirmation regulatory claims which the DEQ may have against the Debtor and/or Titan-Natchez? With the broad language contained in Section XVI of the Amended Plan, it appears that the Debtor is attempting to have this Court retain jurisdiction over all environmental controversies, disputes and conflicts–including post-confirmation regulatory claims of the DEQ. Based upon

Torwico, any post-confirmation regulatory claims of the DEQ are not claims under the Bankruptcy Code, and therefore, this Court cannot retain jurisdiction of such claims. Consequently, the Court finds that the objection of the DEQ should be sustained as the Amended Plan violates § 1129(a)(3) as it has not been proposed in good faith and it contains provisions forbidden by law.

C. Approval of Sale of Assets.

The Debtor's Amended Plan states that "(c)onfirmation of the Plan shall constitute approval of the sale of the Sold Assets to Titan Tire and shall modify and alter the rights of all holders of Claims and Interests as provided herein." *Amended Joint Plan of Liquidation of Condere Corporation and the Official Unsecured Creditors' Committee*, ¶ 11.1, p. 20, December 23, 1998. In its objection to the Amended Plan, the Union argues that since the sale of the Debtor's assets pursuant to § 363 has been litigated by the parties and ruled upon by this Court and is now on appeal to the District Court[11], the Debtor cannot now use the confirmation process to correct any deficiencies in its § 363 motion. The Debtor argues in its proposed findings of fact and conclusions of law that the approval of the sale in the Amended Plan is necessary so that the Debtor may implement the terms, conditions and provisions of the sale. However, neither the Debtor nor the Union has offered any case law to support their respective positions. The only authority cited by either party is § 1123(b)(4) which is cited by the Debtor.

Section 1123(b)(4) states that "a plan may–(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." While the Court agrees that a plan may provide for the sale of the assets of a debtor,

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[11]In re Condere Corporation, 228 B.R. 615 (Bankr. S. D. Miss. 1998); Civil Case number 5:98cv196Brs.

that is not what the Debtor is seeking in its Amended Plan. The sale of the Debtor's assets was accomplished by the order entered by this Court on August 23, 1998. As Mr. Ash testified at the trial, all of the Debtor's assets were transferred to Titan-Natchez and the sale closed on September 4, 1998. There are no provisions in the Amended Plan which "provide(s) for the sale . . . of the property of the estate, and the distribution of the proceeds of such sale . . ." as contemplated by § 1123(b)(4). As stated previously, the actual sale of the Debtor's assets has already occurred. The Debtor's plan merely implements some of the terms of the sale, mainly, the distribution to the unsecured creditors. Rather than providing for the sale of its assets, the Debtor's Amended Plan is attempting to have this Court approve/ratify its previously entered order approving the sale to Titan-Natchez. The Union has appealed to the District Court this Court's order approving the sale of the Debtor's assets to Titan-Natchez. Once an appeal is noticed, the Bankruptcy Court loses jurisdiction of the matter. 28 U.S.C. § 158(a). Therefore, this Court will not approve/ratify or make any other ruling upon matters which are currently on appeal.

CONCLUSION

Pursuant to § 1127(a), "(t)he proponent of a plan may modify such plan at any time before confirmation. . . ." However, "(t)he Bankruptcy Court cannot, *sua sponte*, modify the Chapter 11 plan." In re MCorp Financial, Inc., 137 B.R. 219, 228 (Bankr. S.D. Texas 1992), *appeal dismissed and remanded*, 139 B.R. 820 (1992). Therefore, the Court may either confirm the Amended Plan or deny confirmation of the Amended Plan.

The inclusion in the Amended Plan of the discharge provision, the provision for jurisdiction over all environmental issues and the provision approving/ratifying this Court's previously entered order violates § 1129 and § 1141, and the Court must deny confirmation of the Debtor's Amended

Plan.

A separate judgment consistent with this opinion will be entered in accordance with Rule 9021 of the Federal Rules of Bankruptcy Procedure.

This the 19th day of May, 1999.

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

IN RE: **CASE NO. 9702549WEE**

CONDERE CORPORATION D/B/A
SERVIS FLEET TIRE COMPANY D/B/A
FIDELITY TIRE MANUFACTURING COMPANY

JUDGMENT DENYING *CONFIRMATION*
OF THE AMENDED JOINT PLAN OF LIQUIDATION

Consistent with the *Findings of Fact and Conclusions of Law* dated contemporaneously herewith:

IT IS ORDERED AND ADJUDGED that the inclusion of the discharge provision, the provision for jurisdiction over all environmental issues and the provision to approve/ratify this Court's previously entered order violates §§ 1129(a)(1), (a)(3) and § 1141.

IT IS FURTHER ORDERED AND ADJUDGED that confirmation of the *Amended Joint Plan of Liquidation of Condere Corporation and Official Unsecured Creditors Committee* is hereby denied.

This is a judgment for purposes of Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED this the 19th day of May, 1999.

UNITED STATES BANKRUPTCY JUDGE