UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
DAN RIVER, INC., et al.,	:	04-10990-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Order Compelling Reorganized Debtors to Pay Final Fee, or, Alternatively, for Entry of Judgment on Final Fee and For Other Relief, filed by Conway Del Genio, Gries & Co., LLC (hereinafter "CDG"). The Motion is opposed by Dan River, Inc. and Related Debtors (hereinafter the "Debtors") and the Official Committee of Unsecured Creditors (hereinafter the "Committee"). Following a hearing held on January 13, 2006, the Court took the matter under advisement.

BACKGROUND AND FINDINGS OF FACT

On March 31, 2004, the Debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code. The United States Trustee appointed the Committee on April 12, 2004. The Court approved the employment of CDG as the Debtors' financial advisor by entry of a final order on June 29, 2004.

On March 31, 2005, CDG filed its final fee application. *See* CDG's Final Application for Compensation, Docket Number 1158; Amended Final Application for

Compensation, Docket Number 1195. The Committee and the Debtors objected to the application to the extent CDG sought payment of a restructuring fee provided for under CDG's employment agreement. *See* Committee's Objection to CDG's Final Application for Compensation, Docket Number 1192; Dan River, Inc.'s Limited Objection to CDG's Final Application for Compensation and Joinder, Docket Number 1194. Following a hearing on the fee application, the Court entered an order granting the application and approving the fee sought (hereinafter the "Fee Order"). *See* Docket Number 1585. On October 12 and 13, 2005, the Committee and the Debtors filed notices of appeal of the Fee Order. On September 21, 2006, the United States District court affirmed the Fee Order.[1]

On November 1, 2005, CDG filed the instant motion, requesting the Court to compel the Debtors to pay the outstanding balance of CDG's approved fees or, in the alternative, to either stay the effect of the Fee Order and require the posting of a supersedeas bond, enter a judgment in favor of CDG for the amount of the unpaid fees, or order the Debtors to escrow the funds required to pay the fee.

On July 28, 2004, the Debtors filed a disclosure statement and proposed plan of reorganization. The Debtors' Third Amended and Restated Plan (hereinafter the "Plan") was confirmed by order entered on January 18, 2005. *See* Docket Number 1042. The Plan has since become effective.

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[1] Notwithstanding the District Court's ruling, the Court will resolve CDG's Motion. The time for an appeal of the District Court's order has not yet expired, and CDG will continue to have an interest in having this matter resolved in the event the Debtors and the Committee pursue such an appeal.

Article 4 of the Plan addresses the treatment of unclassified claims. *See* Plan, § 4 (Docket Number 903). Section 4.1 provides that, in accordance with section 1123(a)(1) of the Code, Administrative Expense Claims, Priority Tax Claims, and the Claims of the DIP Lenders "are not classified for purposes of voting on, or receiving distributions under, the Plan . . . . [and] are instead treated separately in accordance with this Article IV and in accordance with the requirements set forth in section 1129(a)(9)(A) of the Bankruptcy Code." Plan, § 4.1. Additionally, Section 4.2 of the Plan provides the following:

> Subject to the provisions of sections 328, 330(a) and 331 of the Bankruptcy Code, each Holder of an Allowed Administrative Expense Claim will be paid the full unpaid amount of such Allowed Administrative Expense Claim in Cash on the latest of (i) the Effective Date, (ii) as soon as practicable after the date on which such Claim becomes an Allowed Administrative Expense Claim, (iii) upon such other terms as may be agreed upon by such Holder and the Debtors or the Reorganized Debtors, or (iv) as otherwise ordered by the Bankruptcy Court ; . . . .

Plan, § 4.2 (Docket Number 903).

Under Section 1.1(c) of the Plan, an "Administrative Expense Claim" is defined as a "Claim . . . for payment of an administrative expense . . . of the kind specified in section 503(b) . . . of the Bankruptcy Code, including . . . Professional Compensation." Plan, § 1.1(c). In turn, Section 1.1(aa) defines a Claim as "a claim against one of the Debtors (or all or some of them) whether or not asserted, as defined in section 101(5) of the Bankruptcy Code." Plan, § 1.1(aa). Section 101(5) of the Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed,

contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). The Plan defines an "Allowed Claim" as "a Claim or any portion thereof that . . . has been allowed by a Final Order of the Bankruptcy Court . . . ." Plan, § 1.1(e). An order is not a Final Order unless the time for appeal has expired, or, if an appeal has been filed, the appeal has "finally been determined or dismissed." Plan, § 1.1(mmm).

Section 12.1 states that the Court shall retain jurisdiction for certain purposes, including "To remedy any defect or omission or reconcile any inconsistency in this Plan, as may be necessary to carry out the intent and purpose of [the] Plan; To construe or interpret any provisions in [the] Plan and to issue such orders as may be necessary for the implementation, execution and consummation of this Plan, to extent authorized by the Bankruptcy Code; and To make such determinations and enter such orders as may be necessary to effectuate all the terms and conditions of this Plan, including the Distribution of funds from the Estate and the payment of claims."

CONCLUSIONS OF LAW

Upon confirmation, a plan of reorganization is a binding agreement that controls the relationship between the debtor and all parties holding claims against the debtor. The terms of the plan and any provisions within the confirmation order dictate the method, timing, and amount of payments to be made on claims. Any other right to payment that may have been

held by a claim holder is discharged, and the claim holder is left with only the specific rights provided by the confirmed plan. *See* 11 U.S.C. § 1141(d); *see also In re Montgomery Ward Holding Corp.*, 306 B.R. 489, 494 (Bankr. D. Del. 2004). Holders of administrative expense claims are bound by the terms of the confirmed plan. *See id.* § 1141(a) ("The provisions of a confirmed plan bind . . . any creditor, . . . whether or not the claim or interest of such creditor is impaired under the plan and whether or not such creditor has accepted the plan.").

CDG holds an "Administrative Expense Claim" within the meaning of Section 1.1(c) of the Debtors' confirmed plan. The question for the Court is whether the Plan provides for immediate payment of that claim or whether the Plan requires CDG to await payment until the appeal of the Fee Order has been resolved. The Debtors and the Committee argue that Section 4.2 of the Plan prohibits the immediate payment of CDG's claim because only the holder of an "Allowed Administrative Expense Claim" is to be paid on the effective date of the Plan, and CDG is not a holder of an "Allowed Administrative Expense Claim" because the fees have not been allowed by a "Final Order" within the meaning of the Plan. CDG asserts that Section 4.1 of the Plan, which provides Administrative Expense Claims are to be treated in accordance with Article 4 and the requirements of section 1129(a)(9)(A) of the Code, requires immediate payment of CDG's claim, regardless of whether the claim is an "Allowed Claim" within the meaning of the Plan. CDG reasons that, because section 1129(a)(9)(A) requires administrative expense

claims to "receive on account of such claim cash equal to the allowed amount of such claim" on the effective date of the plan, Section 4.1 permits and requires payment of CDG's claim notwithstanding the language of Section 4.2. Alternatively, CDG argues that the "[s]ubject to the provisions of section 328, 330(a), and 331" language excludes professional compensation claims from the requirement of being an "Allowed Administrative Expense Claim."

The Court agrees with the Debtors and the Committee. Section 4.1's statement that Administrative Expense Claims and Priority Tax Claims will be treated in accordance with section 1129(a)(9)(A) cannot be read to eliminate the requirement that such claims also be treated in accordance with the additional provisions of Article 4. Section 4.2 specifically controls the timing of the payment of administrative expense claims. As a prerequisite for payment of the claim, the claim must be an "Allowed Administrative Expense Claim." If the intent were to permit payment of Administrative Expense Claims regardless of whether the claim had become an "Allowed Claim," the inclusion of the phrase "Allowed Administrative Expense Claim" would have been unnecessary and Section 4.2 could have been drafted in the same manner as Section 4.4, which simply provides that "[a]ll amounts owed to the DIP Lenders . . . shall be paid in full in Cash on . . . the Effective Date." Instead of providing for payment of Administrative Expense Claims on the Effective Date, Section 4.2 provides that payment on the Effective Date is permitted only for "Allowed Administrative Expense Claims."

As for CDG's alternative argument, the Court finds that the "[s]ubject to the provisions of sections 328, 330(a), and 331" language in Section 4.2 does not exclude claims for professional compensation from the requirement of being allowed by a Final Order prior to payment. CDG asserts that the effect of this language is that, so long as fees have been awarded by the Court, the fact that the fee order has been appealed does not preclude payment of the fees on the effective date. However, the Court agrees with the Committee and the Debtors that this provision was included to stress that claims for professional fees must also satisfy the requirements of sections 328, 330, and 331.

The Court also agrees with the Debtors and the Committee that an "Allowed Administrative Expense Claim," although not defined specifically, is an "Administrative Expense Claim" that is also an "Allowed Claim," such that it has been allowed by a Final Order. Pursuant to the Plan, an order of this Court is not "final" until any appeal taken has been resolved. The order allowing CDG's fees has been appealed and such appeal has not been resolved. Accordingly, CDG does not hold an "Allowed Administrative Expense Claim" within the meaning of Section 4.2, and the approved fees cannot be paid in accordance with that section, despite the existence of the "otherwise ordered by the Bankruptcy Court" language. This result is buttressed by the language found in Section 9.2 of the Plan, which states that "[e]xcept as otherwise provided herein, no Distributions will be made with respect to any portion of a Claim unless and until (i) the Claims Objection Deadline has passed and no objection has been filed, or (ii) any objection to such Claim has

been settled, withdrawn or overruled pursuant to a Final Order of the Bankruptcy Court." Section 9.2 applies to all claims, including Administrative Expense Claims. The Plan clearly requires all disputed claims to be resolved by a Final Order prior to their payment, and the Court finds no basis in the Plan to treat claims for payment of professional compensation any differently.

CDG argues that the Court has the discretion to grant the alternative relief sought. First, CDG urges the Court to stay the Fee Order so that it may, in turn, require the Debtors to post a supersedeas bond to secure the payment of CDG's claim. Pursuant to Rule 8005, a "motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance." FED. R. BANKR. P. 8005. The bankruptcy court may "make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." *Id.* Although "[t]he bankruptcy judge can design stays to avoid unjust results, taking into consideration all the exigencies of the entire bankruptcy case . . . . [this] [d]iscretion is not unbridled." *In re Gleasman*, 111 B.R. 595, 599 (Bankr. W.D. Tex. 1990).

Staying the Fee Order would not be appropriate. The purpose of a stay is to maintain the *status quo* and protect the rights of the parties during the appeal. The Fee Order simply approves the fees requested by CDG. It does not control the issue of when or how the fees should be paid. It is the Plan, which conditions payment of CDG's fees on the existence of

an allowed claim, rather than the Fee Order, that poses a threat of harm to CDG. CDG neither objected to this provision nor appealed the confirmation of the Plan. Staying the Fee Order would not change the effect of the Plan and would not ameliorate any harm posed by the Plan terms. Accordingly, the *status quo* will be maintained while the appeal is pending, regardless of whether this Court enters a stay. The Court cannot alter the result mandated by the provisions of the Plan. *See, e.g., In re Planet Hollywood, Int'l*, 274 B.R. 381 (Bankr. D. Del. 2001) (although the confirmation order, which required holder of allowed claim to await payment of claim until debtor's appeal of the court's allowance order was resolved may constitute a de facto stay of the court's order, the court could not provide the claim holder relief from the effect of the confirmed plan).

The Court recognizes that, if the Fee Order were stayed, the Court could consider requiring the posting of a supersedeas bond. However, CDG has provided no authority that would permit this Court to stay the order simply for the purpose of requiring the posting of a supersedeas bond. The purpose of the supersedeas bond is to protect the party who has not moved for a stay from the harm caused by the entry of the stay. CDG finds itself in the opposite position, as it is both the party requesting the stay and the party that would benefit from the imposition of the bond. Granting such relief would be tantamount to requiring the Debtors to post a bond as a prerequisite to their appeal. This would constitute an impermissible condition on the Debtors' right to appeal the Fee Order. *See In re Farrell Lines, Inc.*, 761 F.2d 796 (D.C. Cir. 1985).

CDG also requests the entry of a judgment in favor of CDG for the amount of the fees or an order directing the Debtors to escrow the funds necessary for payment of the fees. CDG's right to payment of the fees awarded in the Fee Order is specifically controlled by the terms of the Plan. The Plan does not provide for payment of the fees at this time, nor does it require the Debtors to establish an escrow account or reserve for the payment of any class of disputed claims. The entry of a judgment or an order directing the establishment of an escrow would grant CDG rights greater than those provided by the terms of the Plan. Such relief would constitute a modification of the terms of the confirmed plan. *See In re Planet Hollywood Int'l.*, 274 B.R. 391, 399 (Bankr. D. Del. 2001). Section 1127 provides that only the plan proponent or the debtor can modify a confirmed plan, and, accordingly, this Court has no authority to grant a modification sought by CDG. *See* 11 U.S.C. § 1127(b) ("proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation"); *see also In re U.S. Brass, Corp.*, 301 F.3d 296 (5th Cir. 2002) (debtor's post-confirmation settlement with claimant, which permitted submission to arbitration of claims dispute constituted modification of confirmed plan, which provided that claims would be litigated; bankruptcy court lacked authority to modify the plan, as it had been substantially consummated).

CDG argues that the Court can use its equitable power, as provided by section 105(a) of the Code, to grant such relief. As the Debtors and the Committee point out, it is well established that section 105(a) cannot be used to "'create substantive rights that are

otherwise unavailable under applicable law, [nor does it] constitute a roving commission to do equity.'" *In re Emerald Casinos, Inc.*, 334 B.R. 378, 388 (N.D. Ill. 2005) (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)). "[T]he power conferred by § 105(a) is one to implement rather than override." *In re K-Mart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004). Accordingly, the Court cannot use section 105 to alter the substantive rights of parties specifically provided by the Code or to modify the terms of a confirmed plan where section 1127(b) does not permit such a modification. *See In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 816-17 (S.D.N.Y. 1997); *see also In re WorldCom, Inc.*, __ B.R. __, 2006 WL 2615534 (Bankr. S.D.N.Y. Sept. 13, 2006); *In re Rickel & Assocs., Inc.*, 260 B.R. 673,678 (Bankr. S.D.N.Y. 2001). Additionally, section 1141 of the Code provides that, following confirmation of the plan, "[e]xcept as otherwise provided in the plan" or the confirmation order, "the property dealt with by the plan is free and clear of all claims" of creditors and confirmation of the plan discharges any debt that arose before the date of confirmation. 11 U.S.C. § 1141(c); (d)(1). Section 1141 specifically provides that, following confirmation, creditors rights to collect debts arising prior to confirmation are limited to those rights stated in the plan. Because the Plan provides otherwise, under section 1141, CDG has no right to execute a judgment against the property of the reorganized debtor. It would be inappropriate for the Court to enter such a judgment under these circumstances. Likewise, because the Plan does not provide for the creation of a reserve for disputed claims, section 105 does not authorize the Court to order the Debtors to create such

a reserve. *See Emerald Casinos,* 334 B.R. at 388 (holding that bankruptcy court did not err in refusing to rely on section 105 to order specific performance of third party's alleged commitment to terminate disciplinary hearing against debtor; the debtor's confirmed plan did not obligate the third party to terminate the disciplinary hearing).

Section 12 of the Plan reserves jurisdiction for the Court to issue orders necessary to implement the terms of the Plan. However, Section 12 provides that the Court may modify the Plan only as permitted by the Code. Section 1127(b) does not permit the Court to modify the Plan under these circumstances. *See In re Baker*, 2005 WL 2105802 (E.D.N.Y. Aug. 31, 2005). In *In re Baker*, the court stated that, if the bankruptcy court believes that the debtor is in default of its obligations under the terms of the confirmed plan, the appropriate action is not to modify the plan, but to convert the case to Chapter 7. *See id.* Section 1142 does not provide the court with any authority to order the debtor to do something other than what it is obligated to do under the terms of the plan. *See id.*

Finally, CDG argues that the Debtors' failure to pay CDG's administrative expense claim, assuming it becomes an Allowed Administrative Expense Claim, will cause the Plan not to comply with the "absolute priority rule." Even assuming this argument has merit, it would not provide a basis upon which the Court could disregard the Plan provision at issue and provide CDG with the relief it seeks. *See In re Enron*, 2006 WL 544463 (Bankr. S.D.N.Y. Jan. 17, 2006). In *In re Enron*, the bankruptcy court disallowed an unsecured claim, and the creditor appealed. Upon the debtors' motion, the court estimated the claim's

value as zero for purposes of the disputed claim reserve. The creditor objected to the zero estimate on the basis that the debtors' failure to create a sufficient reserve for the claim, in the event the creditor succeeded on appeal, resulted in different treatment of its claim than other unsecured claims, in violation of section 1123(a)(4). While the court found that such treatment did not violate section 1123(a)(4), the court also noted that the creditor was essentially raising an objection to confirmation, which was barred by the confirmation of the plan. Likewise, any objection CDG may have to the effect of the Plan provisions at issue on the basis that they violate the absolute priority rule is barred.

CONCLUSION

For the above-stated reasons, the Court finds that the Motion to Compel filed by Conway Del Genio, Gries & Co., LLC must be, and hereby is, **DENIED**.

IT IS SO ORDERED.

At Newnan, Georgia, this 26 day of September, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

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