

Terry L. Myers
Ramona S. Neal
GIVENS PURSLEY & HUNTLEY, LLP
277 North Sixth Street, Suite 200
Post Office Box 2720
Boise, Idaho 83701
(208) 388-1200
Fax: (208) 388-1201
S:\CLIENTS\342618\OBJECTION.FIN
Attorneys for The Travelers Insurance Company

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO**

In re:

HIPWELL, TERRY,

Debtor.

Case NO. 96-02095

**THE TRAVELERS INSURANCE
COMPANY'S OBJECTION TO
CONFIRMATION**

COMES NOW The Travelers Insurance Company ("Travelers"), by and through its counsel of record and, pursuant to §§ 1222 and 1225 of Title 11, U.S. Code (the "Code"), Fed. Rule Bankr. Proc. 3015(f) and L.B.R. 2002.4(b), files this objection to confirmation of the Chapter 12 Plan of Reorganization ("Plan") filed by Terry Hipwell, the debtor herein ("Hipwell" or "Debtor") on or about January 27, 1997.

INTRODUCTION AND NATURE OF TRAVELER'S CLAIM

Hipwell filed a voluntary petition for relief on August 23, 1996. Ronald D. Schoen serves as the Chapter 12 Trustee. Hipwell has remained in possession of his assets pending proposal and confirmation of his Plan.

Travelers' debt stems from a Promissory Note Dated December 20, 1994 in the original principal amount of \$375,000.00, a Mortgage of even date pledging real property located in Canyon and Payette Counties as security for the payment and performance of the obligations

owed to Travelers, and a Security Agreement pledging Hipwell's irrigation equipment as further security which was recorded as a fixture filing in both Canyon and Payette Counties.

As of the date of the bankruptcy filing, Hipwell had made but one payment, interest only, on the debt owed by him to Travelers. The Debtor has made no other payments to Travelers, either pre-petition or post-petition. As of the date of filing, the default due and owing to Travelers consisted of three missed semi-annual payments totalling \$71,628.00.

Travelers filed its claim on October 2, 1996. An objection to Travelers' claim was resolved by the parties and Travelers filed an amended claim on December 26, 1996 (the "Amended Claim"). The amount of the Amended Claim is \$480,030.45 which includes interest as of December 6, 1996 and approximate legal fees as of November 30, 1996. Travelers, as an over-secured creditor, is entitled to post-petition interest, costs, charges and reasonable attorneys' fees per Section 506(b) of the Code. As of February 5, 1997, the date set for the confirmation hearing, post-petition interest will total \$17,478.14 (161 days from 8/24/96 to 2/5/97 at \$105.29 per diem). Travelers' debt as of the date of the confirmation hearing, exclusive of fees and costs accruing since November 30, 1996, is approximately \$486,453.14.

DEBTOR'S PROPOSED PLAN

Debtor treats Travelers' debt under Class I: Liens on Real Property and Class III: Liens on Equipment. Debtor's plan makes no provision for cure of the default on Travelers' loan. Instead, the plan proposes to capitalize all amounts due. The proposed payments are as follows:

| | |
|------------------|---------------------|
| February, 1998 | \$21,500.00 |
| February 1, 1999 | \$35,500.00 |
| February 1, 2000 | \$35,500.00 |
| February 1, 2001 | \$40,000.00 |
| February 1, 2002 | <u>\$40,000.00</u> |
| Total: | <u>\$172,500.00</u> |

A balloon payment of the entire amount remaining due would be made on February 1, 2003.

At first blush, it may seem that Travelers is receiving adequate payments. However, the loan bears interest at the rate of 9.625% (the contract rate). Annual interest on the principal amount of \$486,453.14¹ totals \$46,821.11. Thus, none of the payments made by Debtor under his proposed plan cover annual interest. At the end of the plan (again using the \$486,453.14 as an estimated amount due), Travelers' debt will **increase** some \$61,605.55.² This means that the Debtor's balloon payment at the end of his Plan will total \$548,058.69.³

Utilizing the Debtor's real property value of \$803,000.00, Travelers has an approximate cushion of \$316,846.87 as of the date of confirmation. If the Debtor's plan is confirmed, 19% of Travelers' equity will be consumed by interest alone, not to mention additional fees, costs and charges due to it.

DISCUSSION OF OBJECTIONS TO PLAN

Debtor's Plan fails to conform with Sections 1222 and 1225 of the Code, any one of which would be sufficient grounds for this Court to deny confirmation, in the following respects.

1. The negative amortization of Travelers' loan is unacceptable and violates Section 1225(a)(5)(B). This Court has previously shown its disapproval for interest-only amortizations. *In re Summers*, 88 I.B.C.R. 236, 239. There, this Court concluded that delays in payment of principal are not contemplated by the structure of Chapter 12 proceedings. The Court pointed out that Section 1225(a)(5)(B) entitles secured creditors to "lien retention and value maintenance."

¹ This interest is calculated on a principal amount of \$486,453.14 which uses the stipulated claim amount and adds \$6,422.69 as interest which has accrued on the loan since December 6, 1996. This amount does not include additional costs, charges or attorneys' fees. Following the Debtor's reasoning, these amounts must be included in the capitalized balance due.

² Annual interest of \$46,821.11 X 5 years = \$234,105.55. \$234,105.55 less the total amount paid by Debtor under his plan, \$172,500.00 = \$61,605.55.

³ This amount does not include the amount of a pre-payment premium which Travelers can assert under the terms of the loan documents. Debtor is aware of this pre-payment premium and of his obligation to pay should the Promissory Note be paid in full before maturity.

Here, the treatment of Travelers by the Debtor goes beyond interest only payments. In fact, the Plan provides for "less-than-interest" only payments.

Structuring plan payments in a way which increases Travelers' debt, rather than decreasing the principal owed, exemplifies the Debtor's inability to conduct a business which is sufficiently profitable to pay his debts. The question becomes one of the plan being a means only of delaying the inevitable liquidation of assets to satisfy debt.

3. The Plan does not provide that Travelers shall retain its lien. The Plan violates Section 1225(a)(5)(B)(i) because it does not provide that Travelers shall retain its first priority lien in Debtor's real property and irrigation equipment.

4. The Plan discriminates between creditors in the same class. The Plan does not comply with the mandate of Section 1222(a)(3) which requires that each claim within a particular class be provided the same treatment unless the holder of a particular claim agrees to less favorable treatment.

For example, in Class I - Liens on Real Property, three creditors are paid in full as of February 1998.⁴ Payment terms to another creditor in this class, Landview Fertilizer, do not begin until the third year of the Plan. Finally, Travelers' debt is not being paid in full as of the end of the Plan, much less by the end of February 1998. Travelers does not accept the less favorable treatment.

Similarly, claims are unequally treated in Class III - Liens on Equipment. There, Case Credit is supposedly paid in full, as is West One Bank, and Key Bank.⁵ TASC0 and Landview

⁴ These creditors are the Payette County Assessor (\$3,549.00); the Canyon County Assessor (\$1,700.00); and the Idaho State Tax Commission (\$985.00). Total amounts paid to these creditors are \$6,234.00.

⁵ Key Bank, N.A. is paid in full not by virtue of the Plan, but by virtue of a stay lift. The Debtor does not indicate whether the vehicle has been repossessed or whether the value of the vehicle is sufficient to satisfy the amounts owed in full.

are not treated and Travelers and John Deere are subject to balloon payments at the end of the Plan.

The Debtor's discrimination between creditors in the same classes is indicative of its cavalier treatment of the requirement of Section 1222(a)(3).

5. The Plan is not Feasible: Section 1225(a)(6) requires that the Debtor be able to make all payments under his Plan. While the Debtor need not guarantee ultimate success, he must provide "reasonable assurances that the plan can be effectuated." *In Re McIntyre*, 95 I.B.C.R. 202, 206. Feasibility cannot be proven by "impossibly high" income projections and "impermissibly low" expense projections. See, *In re Bevans*, 95 I.B.C.R. 176 (Hagan, J.).

Here, the Debtor's expense projections do not include:

- Payments to Landview Fertilizer, a significant secured creditor, during the first two years.
- Payments to TASC0, a creditor holding a security interest in Debtor's crops.
- Payments for fertilizer expenses.
- Harvesting expenses.

Thus, Debtor's expense projections are unrealistically low.

Additionally, success of the Debtor's Plan hinges, in part, on his success in a lawsuit against TASC0 and/or Hulet Management Company. No detail is provided in the Plan regarding the value of these lawsuits, how the lawsuits will be funded (will Debtor be responsible for attorneys' fees and costs of the litigation?), the timeframe for expected resolution of the lawsuits, and/or the possibility of success. The Debtor's plan also hinges upon the production of 800 pounds of clover seed per acre. The Debtor projects that income from these sources will be sufficient to fund his Plan. These projections go beyond impossibly high income estimates - they rise to the level of speculation.

Because the Debtor's plan depends, in part, on success in litigation which cannot be predicted and crop yields which cannot be substantiated, Debtor cannot reasonably assure creditors that his Plan will be successful.

a. Debtor will not be able to meet the annual projected income. Travelers is prepared to present evidence supporting the conclusion that Hipwell's projected yields for clover seed crops, in the area farmed by Hipwell, are unreasonably high, especially for the first few years of production. Without these yields, Hipwell cannot meet his plan payments.

Additionally, Travelers remains concerned as to whether contracts for sale of beans and/or the clover seed have been obtained. Travelers has requested copies of Debtor's contracts, has been informed that Debtor has a contract for clover seed, but as of yet, has no contract for beans. Debtor has not provided a copy of the clover seed contract to Travelers.

b. The annual projected income is insufficient to meet Plan payments. According to Debtor's projected income and expenses, the Plan will have a shortfall of \$9,400.00 in February, 2000. This shortfall increases to \$16,900.00 a year in the years 2001 - 2003. Debtor indicates that these shortfalls can be made up by reducing capital expenditures by \$10,000.00 and an increased crop yield which could provide an additional \$9,000.00 to his estate. However, Debtor's numbers do not account for payments which will be due to TASC0 if the Debtor does not prevail on its claims, nor payments which may be found to be due to Jay Hulet if Debtor loses that state court litigation. Finally, these amounts assume good crop years and make no provision for years when crop yields are less than predicted.

c. Debtor's feasibility rests upon payments to some creditors which are so low as to result in increased amounts due at the end of the Plan. Even if Debtor successfully performs his plan, he will face substantial balloon payments at the end of the Plan. Those payments are approximated as follows:

| | | |
|----|---------------------|---------------------------------|
| 1. | Travelers | \$548,058.69 |
| 2. | John Deere | \$19,916.67 ⁶ |
| 3. | Landview Fertilizer | \$330,540.65 ⁷ |
| 4. | TASCO | <u>\$105,561.09⁸</u> |
| | TOTAL | <u>\$1,004,007.10</u> |

These projections point out that the Plan's success rests upon low payments to several creditors, which creditors suffer an increase in total debt. Without these low payments, Debtor clearly cannot propose a feasible Plan.

If Debtor makes payments as required under the Plan pursuant to his income and expense projections, Debtor will have no cash reserves with which to pay the balloon payments listed above. Debtor will have to refinance these obligations. Essentially, these creditors are asked to bear the risk not only that the Debtor will be able to perform for five years, but that at the end of such period, Debtor will be able to obtain refinancing of the amounts owed to them.

This risk is particularly acute in Travelers' case. Travelers is asked to endure payments which do not pay the interest due and owing (much less reduce the principal debt) and a reduction in its equity cushion while other creditors are paid in full or their balances reduced.

5. The terms of the Plan do not satisfy the best interest of creditors test. The Code requires, at Section 1225(a)(4), that unsecured creditors, whose claims here total some \$76,000.00, receive plan payments equivalent to the amount they would receive if the Debtor's

⁶ Per the Stipulation between Debtor and John Deere, the debt amount owed to John Deere is currently \$47,000.00. That amount will bear interest at the rate of 10% during the term of the plan. Four payments of \$10,000 each will be made, but interest of \$11,983.33 will accrue each year. By year five, the balance owing will be \$19,916.67.

⁷ As of the time of filing this objection, Debtor's Plan purports to treat Landview as an unsecured claim, notwithstanding the fact that Landview holds a lien in the Canyon County real property. Interest accrues on this claim at the rate of 14.5% or approximately \$25,630.14 per annum. Over six years, the accumulated interest will total \$153,780.85. Only \$40,000.00 will be paid to Landview Fertilizer over the term of the Plan. Landview Fertilizer's debt will increase by approximately \$113,780.85.

⁸ Debtor's plan does not provide payment for TASCO, but assumes that its recovery against TASCO in a litigation pending in the Third Judicial District will fully pay this debt.

assets were liquidated. *In re Wood*, 90 I.B.C.R. 436, 441 (1990); *In re McIntyre*, 95 I.B.C.R. 202.

Here, using the numbers provided in Debtor's liquidation analysis, Debtor's assets total:

| | | |
|----|--------------------------------|-----------------------|
| 1) | Real property and improvements | \$803,300.00 |
| 2) | Crops ⁹ | \$102,948.23 |
| 3) | Personal Property | \$119,800.00 |
| 4) | Vehicles | \$12,000.00 |
| 5) | Remaining Vehicles | \$ 43,800.00 |
| 6) | Other equipment | \$109,900.00 |
| | TOTAL | \$1,187,555.00 |

Debtor's Plan debts total:

| | | |
|-----|---------------------------|---------------------------|
| 1) | Travelers | \$486,453.14 |
| 2) | State Tax | \$985.00 |
| 3) | Payette County Assessor | \$3,500.00 |
| 4) | Canyon County Assessor | \$1,700.00 |
| 5) | Landview Fertilizer | \$176,756.00 |
| 6) | TASCO | \$105,562.00 |
| 7) | John Deere | \$47,000.00 ¹⁰ |
| 8) | Case Credit | \$32,700.00 |
| 9) | West One | <u>\$12,000.00</u> |
| | Secured Creditor Balance: | <u>\$865,671.14</u> |
| 10) | Unsecured (Timely Claims) | \$76,826.68 |
| | TOTAL PLAN DEBT: | \$936,879.68 |

Assuming a 21% reduction in value (due to assessment of a 6% sales commission, a 10% trustee's fees, and a 5% reduction in value for quick sale), there are adequate funds to pay both secured and unsecured claims in full. Assuming a 26% reduction in value (as per Debtor's plan), the amount realized would be \$881,301.69, leaving approximately \$21,248.69 for the benefit of unsecured creditors.

⁹ Per the Trustee, Ron Schoen.

¹⁰ Per Stipulation between Debtor and John Deere.

However, even a 21% reduction in value may be high. First, consider that the 6% commission will not be charged on liquidation of personal property, and that it may be unreasonable to conclude that the land will not be sold for its fair market value, notwithstanding that it will be sold quickly. Finally, a 5% costs of sale allowance totals \$59,377.75, which amount may be unreasonably high. Instead, consider the following:

| | | | |
|----|------------------------------------|--------------|---------------------|
| 1) | Real property and improvements: | \$803,300.00 | |
| | Less 6% commission: | \$48,198.00 | |
| | Less 10% Trustee's fees: | \$80,333.00 | |
| | Less Costs of Closing/Sale (2%): | \$16,066.00 | |
| | Value Remaining: | | \$658,703.00 |
| 2) | Crops: | \$102,948.23 | |
| | Less 10% Trustee's Fees: | \$10,294.82 | |
| | Value Remaining: | | \$92,653.41 |
| 3) | Personal Property, Vehicles, etc.: | \$285,500.00 | |
| | Less 10% Trustee's Fees: | \$28,550.00 | |
| | Less Quick Sale/Costs 5%: | \$14,275.00 | |
| | Value Remaining: | | \$242,675.00 |
| | TOTAL LIQUIDATION VALUE: | | \$994,031.41 |

The Plan provides payments of \$5,000.00 a year to unsecured creditors, commencing in Year 2000, in which year there is a deficit of \$9,400.00. Thus, the Plan does not have adequate funding to pay unsecured creditors anything, whereas, if Debtor's assets were liquidated, unsecured creditors could be paid in full. Debtor's plan fails the best interests of creditors test.

5. The Plan is not proposed in good faith as required under § 1225(a)(3). Debtor was granted an extension of 30 days after the expiration of his initial 90 day period to propose and file a plan. This amount of time should have provided Debtor adequate opportunity to work out the details and formulate a coherent and workable plan. However, the Plan limited information, does not adequately treat creditors, and contains numerous discrepancies and inconsistencies.

a. The Plan indicates on page 5 that approximately \$13,000.00 will be owed by Debtor to his Counsel. However, Plan payments to Debtor's counsel total \$30,000 (\$5,000 in 1998 - 2003). Counsel is overpaid by approximately \$17,000.00 over the term of the Plan.

b. The Plan mentions the claim of TASCOCO as an expense in its liquidation analysis, but disputes its validity for the purposes of Plan payments.

c. The Plan purports to treat Landview Fertilizer as a unsecured claim, notwithstanding the fact that Landview Fertilizer ("Landview") is secured in the Canyon County property and crops. According to Debtor, his real property security in Canyon County is valued at \$339,300 and the crops are valued at approximately \$100,000.00. Notwithstanding the fact that Travelers hold a prior claim, and that Travelers' loan documents grant it the right to marshal the sale of Debtor's real property, there should be sufficient value in the real property and/or the crops, according to Debtor's numbers, to provide Landview with a secured claim. Treatment of Landview as a totally unsecured creditor is not warranted.

d. Debtor's expenses, listed on page 15, add up to \$225,000 not \$232,000. This provides an extra \$7,000.00 annually for plan payments.

e. The Plan does not specify whether the Debtor shall provide monthly or annual reports to the Chapter 12 trustee. The Plan should provide for monthly reports and should specify the dates upon which such reports are due.

f. Debtor's liquidation analysis uses an unrealistically high discount percentage. Debtor contends that the value of his property should be discounted by 26% - with 10% as a Trustee's fee; 6% as a Sales Commission, 5% as an unspecified administrative fee and 5% reduction for a quick sale. Additionally, Debtor uses certain debts more than once to show that there is no equity for unsecured creditors. Debtor's calculations are confusing at best, and may be misleading to creditors.

6. The Plan term is impermissibly long. Section 1222(c) provides that plan terms, with certain exceptions, cannot exceed five years. Here, the Plan is a six-year plan wherein payments are made to unsecured creditors in the sixth year. This Court has not approved and should not approve this longer Plan period.

RESERVATION OF RIGHT TO AMEND OR SUPPLEMENT OBJECTION

Travelers is informed and aware that the Debtor is amending its plan in certain respects. Travelers reserves its right to amend, modify or supplement this objection in response to those amendments.

CONCLUSION

As the Plan and the Debtor fail to meet the applicable requirements of § 1222 and §§ 1225(a)(1), (3), (4), (5) and (6), the Plan cannot be confirmed. Based on the foregoing, and following the submission of evidence and argument at confirmation hearing, Travelers prays the Court to deny confirmation of the Plan, and to reject any request of the Debtors for an opportunity to file yet another Plan.

DATED this 27th day of January, 1997.



Ramona S. Neal
GIVENS PURSLEY & HUNTLEY, LLP
Attorneys for The Travelers Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 1997 I caused to be served a true and correct copy of the foregoing to each of the persons named below by the method indicated below each of their names.

Leslie M. Bock
Dillion Bosch Daw & Bock
242 N. 8th Street, Suite 200
Boise, ID 83702

U.S. Mail Fax By hand Overnight

Howard R. Foley
FOLEY & FREEMAN
77 E. Idaho Street, Suite 300
P.O. Box 10
Meridian, ID 83680

U.S. Mail Fax By hand Overnight

John D. Harrington
White Peterson Fruss Morrow
& Gigray, P.A.
104 9th Avenue S
P.O. Box 247
Nampa, ID 83653-0247

U.S. Mail Fax By hand Overnight

Wendell Livingston
MBNA America
Becket & Lee c/o
3001, Dept. U P.O. Box
Malvern, PA 19355-0701

U.S. Mail Fax By hand Overnight

Michael L. Schindeler
1475 W. Hays St.
P.O. Box 1990
Boise, ID 83701

U.S. Mail Fax By hand Overnight

Ronald D. Schoen
Standing Chapter 12 Trustee
P.O. Box 216
Payette, ID 83661

U.S. Mail Fax By hand Overnight

Office of the U.S. Trustee
304 N. 8th St., Suite 347
P.O. Box 110
Boise, ID 83701

U.S. Mail Fax By hand Overnight



Ramona S. Neal