

U.S. DISTRICT &
BANKRUPTCY COURTS

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Richard C. Boardman
PENLAND MUNTHER BOARDMAN, CHARTERED
Jefferson Place
350 N. 9th Street, Suite 500
P.O. Box 199
Boise, Idaho 83701
Telephone: (208) 344-4566
File No. 30-3333.59

Attorneys for The Amalgamated Sugar Company

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In re:)	Case No. 96-02095
)	
HIPWELL, TERRY,)	OBJECTION TO CONFIRMATION
)	OF PLAN BY THE AMALGAMATED
)	SUGAR COMPANY
Debtor.)	

The Amalgamated Sugar Company ("TASCO"), by and through its counsel of record, Penland Munther Boardman, Chartered, and pursuant to Fed. R. Bankr. P. 3015(f) and L.B.R. 2002.4(b), objects to confirmation of the proposed Chapter 12 Plan of debt adjustment filed by Debtor on December 27, 1996, upon the grounds that the Plan does not meet the requirements of 11 U.S.C. § 1222 and should not be confirmed pursuant to 11 U.S.C. § 1225 as more particularly explained below.

INTRODUCTION

1.) TASCO is a secured creditor of the Debtor in the amount of \$105,561.09,¹ plus interest under Proof of Claim filed September 24, 1996.

¹ It is anticipated that TASCO's claim will be reduced in the sum of \$25,293.24 by virtue of a pre-petition setoff.

2.) Debtor filed an objection to TASCOS claim stating that "TASCO has no claim that exceeds the claims and setoff amounts subject of litigation in state court filed by the Debtor herein on July 8, 1996 in the Third Judicial District Court in and for the State of Idaho and County of Canyon, CV 96-03391. [TASCOS] claim should be disallowed in total."

3.) Following a December 11, 1996, hearing, this Court entered an Order on January 9, 1997, denying Debtor's objection to the secured claim of TASCOS and lifting the automatic stay allowing Debtor and TASCOS to proceed with the state court litigation.

4.) The proposed Plan filed on December 27, 1996, provides the following in Article III.D.3.:

TASCO has a lien on certain farm equipment and vehicles. These liens are subject to set off by virtue of litigation pending in state court in the Third Judicial District which set off exceeds the creditors claim and no provision will be made for this creditor until such litigation is completed.

Similar statements are made in Article III.E.4., and Article XI contains no provision for debt service to be paid to TASCOS, save for a footnoted statement (page 18) suggesting that if Debtor is unsuccessful in his state court action against TASCOS, he will amend his Plan to account for additional claims of TASCOS.

ARGUMENT

I.

THE PROPOSED PLAN DOES NOT MEET THE REQUIREMENTS OF 11 U.S.C. § 1222 AND SHOULD BE REJECTED PURSUANT TO 11 U.S.C. § 1225

TASCO holds a secured claim against the Debtor in the amount of \$105,561.09¹ plus interest pursuant to TASCOS Proof of Claim which was filed with this Court on September 24, 1996. 11 U.S.C. § 502(a) provides that a claim is "deemed allowed, unless a party in interest . . . objects." *In re Fullmer*, 962 F.2d 1463, 1466 (10th Cir. 1992). Fed. R. Bankr. P. 3001(f) states

that a "proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." The Debtor's objection did not challenge his debt to TASCOCO, either as to its validity, status or amount. Rather, the Debtor stated in his objection "that TASCOCO has no claim that exceeds the claims and set off amounts subject of litigation in state court filed by the Debtor" In other words, the substance of TASCOCO's claim has never been in dispute. It is the claims made by the Debtor against TASCOCO which await litigation in state court. This was acknowledged in the January 9, 1997 Order by the Court in which the Debtor's objection to the secured claim of TASCOCO was denied.

In terms of specific requirements for a Chapter 12 Plan, § 1222 provides, *inter alia*, that "if the plan classifies claims and interests, [it shall] provide the same treatment for each claim or interest within a class" Clearly, Debtor's proposal relating to TASCOCO's claim does not comply with this requirement because TASCOCO is treated much differently than other secured creditors. Payment of TASCOCO's secured claim is indefinitely delayed until some unknown date in the future while other secured creditors are paid on a specified schedule commencing in 1998. No explanation is provided for delaying payment of TASCOCO's secured claim other than it is allegedly "subject to set off" in the state court action between the parties. In effect, Debtor is asserting a legal right to setoff of his state court chose in action against TASCOCO's claim as a creditor in this proceeding despite the absence of any authority to do so. Moreover, Debtor's fortunes or misfortunes in state court are nothing more than conjecture and speculation at this time. It would be prejudicial and unfair to postpone payment to TASCOCO particularly because much of the equipment Debtor will be operating to service the debt to other creditors secures TASCOCO's lien.

Furthermore, 11 U.S.C. § 1225(a) precludes confirmation of the Plan unless:

- (5) with respect to each allowed secured claim provided by the plan -

(A) The holder of such claim has accepted the plan;

(B)(i) The plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim;

First, TASCOCO does not accept the Plan. Second, although TASCOCO may "retain" the lien securing its lien, as discussed below, that lien is losing value during the period of delay in payment, and benefiting other creditors at TASCOCO's expense. Most importantly, under Debtor's Plan, TASCOCO will not receive property, in a timely manner, not less than the allowed amount of its secured claim. Under § 506(b) the amount TASCOCO is to receive also includes postpetition interest and reasonable fees and costs as provided for under the Loan Agreements and Security Agreements between TASCOCO and Debtor which are appended to TASCOCO's Proof of Claim.

II.

ALTERNATIVELY, ADEQUATE PROTECTION MUST BE PROVIDED TO TASCOCO

In the alternative, the Plan must include payments to TASCOCO to provide adequate protection as a secured creditor for the use of the equipment collateralized under the Security Agreements between the parties during the period payment of TASCOCO's claim is delayed. As noted above and detailed in the bankruptcy schedules and proposed Plan, TASCOCO holds security interests in property consisting of farm vehicles and equipment. At best, the values of the collateral, according to Debtor's own estimates, are barely adequate at present to secure the debt which is owed to TASCOCO. The collateral consists entirely of depreciating assets and with every month that passes, the value of these vehicles and equipment will diminish. The vehicles and equipment will be subject to damage and ordinary wear and tear as they continue to be used by

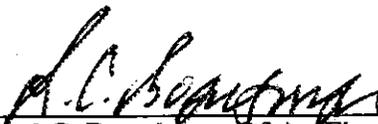
Debtor. Further, the simple passage of time will result in the equipment and vehicles becoming so old that their marketability may be affected if and when liquidation of the collateral is required. While TASCOCO is confident of a successful resolution in state court, by the time TASCOCO's claim is to be paid under Debtor's scheme, the collateral will no longer be adequate to protect the claim unless interim payments are required under the Plan. 11 U.S.C. § 1205(b) provides alternatives for adequate protection under a Chapter 12 Plan. Subsection (b)(1) permits cash payment to a creditor to the extent that the Debtor's use of property results in a decrease in the value of the property securing a creditor's lien. This provision appears well suited to the circumstances presented under Debtor's proposal.

CONCLUSION

For the foregoing reasons, the proposed Plan should be rejected.

DATED this 29th day of January, 1997.

PENLAND MUNTHEY BOARDMAN, CHARTERED



Richard C. Boardman, Of the Firm
Attorneys for The Amalgamated Sugar Company

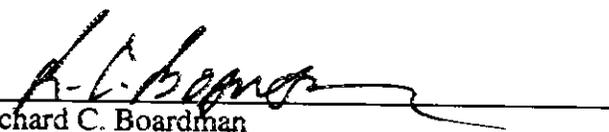
CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 29th day of January, 1997, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the rules of procedure, to the following persons:

<p>Howard R. Foley Foley & Freeman, Chartered 77 East Idaho Street P.O. Box 10 Meridian, ID 83680</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile <u> X </u> Overnight Mail _____</p>
<p>Office of the U.S. Trustee 304 North Eighth Street, Ste. 347 P.O. Box 110 Boise, ID 83701</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile <u> X </u> Overnight Mail _____</p>
<p>United States Trustee Ronald D. Schoen P.O. Box 216 Payette, ID 83661</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile <u> X </u> Overnight Mail _____</p>
<p>Leslie M. Bock Dillion Bosch Daw & Bock 242 North Eighth Street, Ste. 200 Boise, ID 83702</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile _____ Overnight Mail _____</p>
<p>John D. Harrington White Peterson Pruss Morrow & Gigray, P.A. 104 Ninth Avenue South P.O. Box 247 Nampa, ID 83653-0247</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile _____ Overnight Mail _____</p>
<p>Michael L. Schindele 1475 West Hays Street P.O. Box 1990 Boise, ID 83701-1990</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile _____ Overnight Mail _____</p>
<p>Wendell Livingston MBNA America c/o Becket & Lee P.O. Box 3001, Dept. U Malvern, PA 19355-0701</p>	<p>Hand Delivery _____ U.S. Mail <u> X </u> Facsimile _____ Overnight Mail _____</p>

Ramona S. Neal
Givens Pursley & Huntley
277 North Sixth Street, Ste. 200
P.O. Box 2720
Boise, ID 83701-2720

Hand Delivery
U.S. Mail
Facsimile
Overnight Mail


Richard C. Boardman