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ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Alabama State Missionary Baptist Convention, Inc.

CHAPTER: 11

ATTORNEYS:

DATE: 11/17/98

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

ALABAMA STATE MISSIONARY
BAPTIST CONVENTION, INC.

Case No. 97-12946-MAM-11

Debtor.

**MEMORANDUM OPINION IN SUPPORT OF
CONFIRMATION OF DEBTOR'S PLAN OF REORGANIZATION**

THIS MATTER came before the Court for hearing on November 5, 1998 (the "Hunter Reconsideration Hearing") to consider a motion filed by Rev. Melvin Hunter to set aside this Court's earlier oral ruling on the confirmation of the Plan of Reorganization filed by the Alabama State Missionary Baptist Convention, Inc. (the "Convention" or, the "Debtor") that arose pursuant to the hearing which took place before the Court on August 31, 1991 (the "Confirmation Hearing"). Based upon the pleadings of record in this case, the arguments and representations of counsel, the evidence admitted, after due deliberation, it is hereby ORDERED as follows:

Background

1. On August 18, 1997 the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Southern District of Alabama, Northern Division.
2. The Debtor filed various disclosure statements and two plans of reorganization, with the Fourth Amended Disclosure Statement being filed on June 10, 1998 (the "Disclosure Statement"), and the Amended Plan of Reorganization being filed on May 11, 1998 (the "Plan").
3. Confirmation of the Plan was sought by the Debtor pursuant to § 1129 of the Bankruptcy Code and Bankruptcy Rule 3020.

4. This Court has jurisdiction over the matters concerning the confirmation of the Plan pursuant to 28 U.S.C. § 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b).

5. By Order of the Court dated June 10, 1998, the Court approved the Disclosure Statement (the “Disclosure Order”). The Disclosure Order established deadlines for filing objections to the confirmation of the Plan and ballots to accept or reject the Plan.

6. On July 13, 1998, the Court heard testimony on the pending Plan.

7. On July 23, 1998, the Court orally indicated its initial decision to deny confirmation of the Plan.

8. On August 3, 1998, the Debtor filed a Motion to Modify Plan and Alter or Amend Judgment pursuant to 11 U.S.C. § 1127 and Bankruptcy Rule 9023.

9. On August 31, 1998, the Court held the Confirmation Hearing on the plan as modified in the August 3, 1998 motion. Before the Court at the Confirmation Hearing, the Debtor further orally amended its Plan to increase the amount and years of guaranteed payments to creditors over the course of the Plan.

10. The Court’s oral ruling confirming the Plan was incorporated into a Bench Order dated September 1, 1998.

11. Rev. Hunter filed a Motion to Alter, Amend or Vacate Order of the Court requesting that the Court set aside its oral decision to confirm the Plan on September 11, 1998.

12. On October 2, 1998, Rev. Hunter also filed a Motion for Clarification of Terms of Plan.

13. Pursuant to Court Order, Rev. Hunter was given the opportunity and, in fact, conducted additional discovery concerning the Debtor, its assets, liabilities and the pending Plan.

14. The Debtor appeared before the Court, along with counsel for Rev. Hunter, at the Hunter Reconsideration Hearing in Selma, Alabama, at which both of Rev. Hunter's motions were addressed. The Court received evidence and heard arguments of counsel.

15. The Court made oral findings and conclusions on August 31, 1998 and on November 5, 1998, which are incorporated by reference. On November 5, 1998, the Court reserved the right to supplement the findings and conclusions in this written order.

Facts and Conclusions

16. In accordance with the Disclosure Order, the Debtor served the Disclosure Statement, the Disclosure Order, the Plan, and form ballots upon all creditors of the Debtor, all equity security holders of the Debtor, all parties in interest, and the Bankruptcy Administrator.

17. Due and proper notice of the confirmation and the opportunity to object to the Disclosure Statement and to confirmation of the Plan, the deadline for filing ballots accepting or rejecting the Plan was given to creditors and parties in interest.

18. The Disclosure Statement contains adequate information and the information of the Disclosure Statement is of a kind, and in sufficient detail to give a reasonable investor typical of the holders of the claims or interest of the relevant class to make an informed judgment about the Plan. The Disclosure Statement contains adequate information within the meaning of § 1125 of the Bankruptcy Code and is due to be approved.

19. The Plan complies with applicable provisions of the Bankruptcy Code, as required by § 1129(a)(1) of the Bankruptcy Code, including §§ 1122 and 1123.

20. The Debtor, as a proponent of the Plan, has complied with the applicable provisions of the Bankruptcy Code as required by § 1129(a)(2) of the Bankruptcy Code, including §§ 1125 and 1126 of the Bankruptcy Code.

21. The Court finds that the Plan, as further amended by the Motion to Modify Plan and oral modifications by counsel, has been proposed in good faith and not by any means forbidden by law. In determining that the Plan has been proposed in good faith, the Court has examined the totality of the circumstances surrounding the formulation of the Plan.

22. Under the Plan, the Plan has satisfied all of the requirements for confirmation of § 1129(a) of the Bankruptcy Code.

23. As previously noted, at the Confirmation Hearing on the Motion to Modify Plan held on August 31, 1998, the Debtor, by and through counsel, further orally amended the Plan and Motion. Specifically, the Debtor agreed that in addition to the provisions contained in the pleadings before the Court that the following amendments shall be incorporated into the plan:

(a) The initial distribution as contemplated under the Plan to Class IV—Allowed Unsecured Claims—shall be in the amount of \$120,000.00. The initial distribution shall be placed in an escrow account with the law firm of Haskell Slaughter & Young within 60 days after the entry of the Confirmation Order. Within 120 days after the entry of the Confirmation Order, the Debtor shall make a distribution. The initial distribution amount of \$120,000 shall be allocated based upon a pro rata distribution to all Filed Claims. In the event a Filed Claim is not an Allowed Unsecured Claim, the initial distribution for that filed claim shall be withheld ("Withheld Funds") and held in the trust account at Haskell Slaughter & Young, L.L.C., pending final allowance or disallowance of the claim. When each unsecured claim is finally allowed or disallowed, a recalculation shall be made, and a supplemental distribution of the initial Withheld Funds shall be made to Allowed Unsecured Claims. The Debtor shall make such distribution within ten days of the entry of the final order or of the entry of the settlement agreement resolving each pending claim objection.

(b) The Debtor agrees to pay an additional sum each year to the class of Allowed Unsecured Claims (as defined in the Plan) beginning in the year 2000 for a period of five years. The yearly payment shall be made no later than January 31 of each calendar year with the first payment being made no later than January 31, 2000. The annual payment shall be one half of Debtor's Annual Gross Receipts which exceed \$600,000, or \$50,000, whichever is greater. The Debtor's Annual Gross Receipts is defined as all income received by the Debtor from any source. For purposes of this Plan, Debtor's Annual Gross Receipts shall include:

(1) All contributions (but not loans) made directly or indirectly to the Debtor for any purpose from any source;

(2) All income earned by the Debtor;

(3) All monies contributed to Selma University on Founders' Day or as a result of similar fund-raising efforts regardless of who initially receives the funds;

(4) All direct contributions to Selma University made by any member churches or organizations of Debtor or by any individual member of the Debtor made wholly or partially as a result of fund raising efforts of the Debtor or any of its employees; and

(5) Any other source of income which the Debtor included in its determination that its income was \$500,000 in its Disclosure Statement, Exhibit C.

(c) The annual distribution of \$50,000 (or more) is to be divided among the Allowed Unsecured Claims as follows:

(1) As of December 31 of each year the Debtor shall calculate the amount of each Allowed Unsecured Claim which at that time remains unpaid. To determine the unpaid amount, the Debtor shall credit all allowed unsecured claims with all payments made on such claims

by Selma University or any other parties. The debtor is directed to make diligent inquiry of Selma University and the claimholders as to the amount of each claim. The first calculation shall be made on December 31, 1999. On or after January 1 and before January 15 of each calendar year beginning in 2000 for a period of five years, the Debtor shall send written notification to each holder of an Allowed Unsecured Claim requiring that entity to transmit to the Debtor a verified written statement itemizing the amount due on its Allowed Unsecured Claim as of December 31 of that year. If any holder of an Allowed Unsecured Claim does not submit a verified written statement after notification, that entity shall not receive a distribution. If the Debtor and any claimant disagree about the amount then due and owing, a party or the parties shall file in the bankruptcy court an appropriate action to determine the claim amount.

(2) The unpaid amounts of the Allowed Unsecured Claims shall be totaled. The annual distribution shall be divided on a pro rata basis among the unpaid Allowed Unsecured Claims. The distribution shall be made no later than January 31 of each year.

(3) Annual distributions shall be applied to the Allowed Unsecured Claims for five years or until the claims are paid in full, whichever occurs first.

(d) The Debtor shall keep records in its corporate office available for review by claimants. The records shall identify the Debtor's Annual Gross Receipts, operational expenses and its payments to or on behalf of Selma University.

(e) The Debtor shall file a financial report with the Court, the Bankruptcy Administrator, and the attorney for the Creditors Committee each year, beginning with the year 1998, for a period of six years. The report shall be filed no later than January 31 of the succeeding year. The report shall be provided to any creditor who requests it in writing.

24. Rev. Hunter raised several reasons why his motion to alter, amend or vacate order of the court should be granted. The Court denied the motion for the reasons stated on the record and the reasons stated below:

(a) An oral modification of a Chapter 11 Plan of Reorganization is appropriate under 11 U.S.C. § 1127(a) under the facts of this case. The oral modification was put in writing in this order and was therefore filed. Rev. Hunter was not prejudiced by the modification. In fact, he and all other unsecured creditors were benefitted because of the substantially increased dividend required in the modification. No further notice was necessary. Rev. Hunter's due process rights were not impaired. As his counsel admitted at the hearing, the only thing the amendment did was promise a greater return to creditors. *In re American Solar King Corp.*, 90 B.R. 808 (Bankr. W.D. Tex. 1988). If oral modifications to improve creditor treatment were not allowed (when followed up by a written amendment), it would stifle plan negotiations and prolong the plan confirmation process, all to the detriment of creditors like Rev. Hunter.

(b) The plan meets the good faith test required under 11 U.S.C. § 1129(a)(3). The main reason the Court found the plan was not in good faith in the July 23, 1998 ruling was its failure to pay enough to its unsecured creditors. The modification approved in the order of September 1, and this order remedies that. A secondary issue was failure to fully or clearly disclose all assets and debts. The testimony at the August 31, 1998 hearing and at the November 5, 1998 hearing satisfied the Court on this issue. Although the Debtor is not as organized or as precise about its finances as the Court would like, the Debtor provided enough information to make clear that the plan was feasible and fair. Any omissions are *de minimus* or will not impact the plan in a negative manner. The plan of Selma University, which is also a Chapter 11 debtor in this Court, as orally confirmed on November 5, 1998, requires the Debtor to contribute \$500,000 to its operations on an annual

basis for Selma University's plan to be feasible. The plan of Selma University also includes payments to Rev. Lett, the main party that Rev. Hunter indicates is not provided for in the Debtor's plan.

(c) The Court is not treating the Debtor's Motion to Modify the Plan as a motion to reconsider pursuant to Fed. R. Bankr. P. 9023. Therefore, consideration of the standards for reconsideration are not necessary. *In re Investors Florida Aggressive Growth Fund, Ltd.*, 168 B.R. 760 (Bankr. N.D. Fla. 1994) (requiring court to consider only three grounds in ruling on motion: (1) manifest error of fact; (2) manifest error of law; or (3) newly discovered evidence).

(d) The Court may confirm a plan which impairs a creditor's right to a jury trial. Rev. Hunter asserts in his Motion for Clarification that the plan eliminates his jury trial right and this is improper. He is correct about the result of the Debtor's plan. The plan requires any creditor who wishes to receive a distribution under the plan to file a proof of claim within 60 days after confirmation. Once a claim is filed, the Debtor is entitled to object to it. An objection results in a claim objection hearing in the bankruptcy court without a jury.

Rev. Hunter has a lawsuit pending in Circuit Court in Alabama which seeks a liquidation of his claim against the Debtor. In state court, Rev. Hunter has a right to a jury trial.

Rev. Hunter must file a claim to share in the bankruptcy estate. If he does not file a claim, he will be barred from collecting his debt. If he files a claim, his right to a jury trial is lost unless the bankruptcy court allows the claim to be liquidated in state court by delaying its own claim objection hearing.

Numerous courts have discussed this issue, usually in the context of creditors against whom preference or fraudulent transfer actions have been brought. The creditors wish to have the preference or fraudulent transfer cases tried to a jury and therefore do not want to file a claim.

Presumably they believe a jury trial offers them the chance for a more favorable verdict or at least a delay. Courts have rejected their claims that their jury trial right is or should be preserved.

As the Supreme Court has explained, by filing a claim against the estate a creditor triggers the process of allowance and disallowance of claims, and the Debtors' preference action against the creditor becomes part of the claims-allowance process. This process is integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction, which the creditor has invoked by filing the claim, and the preference action is therefore triable only in equity. *First Fidelity Bank, N.A., New Jersey v. Hooker Investments, Inc. (In re Hooker Investments, Inc.)*, 937 F.2d 833, 838.

Other actions with state trial jury rights have received the same treatment. *Benedor Corp. v. Conejo Enterprises, Inc. (In re Conejo Enterprises, Inc.)*, 96 F.3d 346 (9th Cir. 1996); *Barto Technical Services, Inc. v. Taylor-Winfield Corp. (In re Barto Technical Services, Inc.)*, 1996 WL 16664 *13, n.7 (Bankr. W.D. Pa. 1996). Rev. Hunter cannot have what he wishes without this Court deciding to delay allowance of his claim. All claims must necessarily be filed with the bankruptcy court or they cannot be paid. A claim is an integral part of the central process of the court—liquidating debts and distributing assets to pay them. Rev. Hunter does not like this result. He cannot change it. His only remedy is to ask this Court to delay its process through a motion to abstain once a claim is filed by him and the Debtor objects to it pursuant to 28 U.S.C. § 1334(c)(1) or a motion for stay or continuance of the Bankruptcy Court claims process.

Accordingly, for the reasons set forth above and based upon the record in this case, it is hereby,

ORDERED and ADJUDGED:

- A. Due and proper notice of the confirmation and hearing on the Plan, the Motion and Disclosure Statement was given to all creditors and parties in interest;
- B. The Plan meets the requirements of § 1129(a) of the Bankruptcy Code;

C. The Plan is CONFIRMED;

D. Except as otherwise provided in the Plan, on the effective date and in accordance with §§ 1141(b) and 1141(c) of the Bankruptcy Code, all property of the Debtor in the estate and all property dealt with by the Plan be and it is hereby vested in the Debtor free and clear of all claims and interest of creditors and equity security holders of the Debtor;

E. The plan shall be binding upon and inures to the benefit of the Debtor, the reorganized Debtor, the holders of all claims and the holders of all interest, their respective successors and assigns;

F. Claims must be filed pursuant to the Plan on or before 60 days from the date of entry of the contemporaneously filed Confirmation Order approving the Plan (the “Bar Date”);

G. Pursuant to the Plan, any party in interest, including the Debtor, shall have 30 days from the Bar Date identified in the preceding paragraph to file an objection to a claim which shall be timely considered by the Court;

H. The Debtor shall file with the office of the U.S. Bankruptcy Administrator, Post Office Box 3083, Mobile, Alabama 36652, an initial post-confirmation report within 60 days from the date of this Memorandum Opinion and the Confirmation Order and quarterly thereafter until further order of the Court. The initial report shall reflect any progress made in consummating the Plan during the period covered by the report. The report shall include: (i) a statement of distribution by class, name of creditor, date of distribution and amount paid; (ii) a statement of transfer of property; and (iii) a statement of affirmation that the provisions of the Plan are being substantially complied with;

I. The Court shall retain jurisdiction over any disputes regarding orders of the Court or stipulations entered into in the Chapter 11 case, and for other purposes as are consistent with § 1142 of the Bankruptcy Code;

J. In accordance with prior orders, any pending objections to confirmation of the Plan are hereby overruled; and

K. Promptly upon entry of this Memorandum Opinion and the Confirmation Order, the Debtor shall mail to all creditors and other parties in interest, notice of the entry of this Memorandum Opinion and the Confirmation Order.

Dated: November _____, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE