

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
SEATCO, INC.,	§	Case No. 00-37332-BJH-11
	§	
Debtor.	§	

MEMORANDUM OPINION

The Court issued its Memorandum Opinion and Order Denying Confirmation of the Second Amended Plan of Reorganization, as modified on January 3, 2001 (the “First Modification”) (hereinafter, the Second Amended Plan and the First Modification will be collectively referred to as the “Plan”), of Seatco, Inc. (“Seatco” or the “Debtor”) on January 19, 2001 (the “Prior Memorandum Opinion” and the “Prior Order”). On January 23, 2001, the Debtor filed its Motion for Approval of Second Modification of Plan and for Reconsideration of Order Denying Confirmation and Request for Expedited Hearing (the “Motion to Modify and Reconsider”) and now seeks an order from this Court confirming the Plan as further modified (the “Modified Plan”). On January 30, 2001, CIT Group/Business Credit, Inc. (“CIT”) filed its Objection to the Motion to Modify and Reconsider (the “Objection”). The Court heard the Motion to Modify and Reconsider on January 31, 2001.

The Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. 28 U.S.C. § 157(b). This Memorandum Opinion contains the Court’s findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable to this action by Federal Rule of Bankruptcy Procedure 7052.

In the Prior Memorandum Opinion and the Prior Order, the Court denied confirmation of the Plan due to certain inconsistencies between the permanent injunction section of the Plan, section 11.03, and the temporary injunction section of the Plan, section 11.04. In the Motion to Modify and Reconsider, the Debtor proposes to modify the Plan to delete the inconsistent language in section 11.03 identified by the Court in the Prior Memorandum Opinion.

CIT objects to confirmation of the Modified Plan for a variety of reasons, but as relevant here, because it believes the permanent injunction provision of the Modified Plan, section 11.03, still violates § 524(e) of the Bankruptcy Code. Specifically, CIT contends that the Modified Plan improperly releases or discharges attorneys and financial advisors of the Debtor from claims that CIT may have against such third parties (and that no record was made to support such an injunction) and because it may release or discharge tort claims that CIT now asserts against Earl Kester (“Kester”), the Debtor’s President and sole shareholder.¹

As the Court noted in the Prior Memorandum Opinion, the Court understood that the Debtor proposed to temporarily enjoin CIT from any effort to collect from Kester pursuant to the Guaranty² those amounts being paid to CIT under the Plan. *See* Prior Memorandum Opinion at p. 6. Moreover, the Court believed that the Debtor had inadvertently failed to conform the permanent injunction provision of the Plan with the First Modification, which had clarified the temporary injunction provisions of the Plan such that CIT could pursue Kester now for claims

¹CIT has been busy since the Debtor filed the Motion to Modify and Reconsider. CIT has retained supplemental counsel who filed the Objection as well as a Complaint against Kester in the United States District Court for the Northern District of Illinois, Case No. 01C - 0653, asserting 2 counts each of conversion and fraud (the “Tort Claims”) and 1 count of liability under the Guaranty (the “Kester Lawsuit”).

²Capitalized terms not defined herein are defined in the Prior Memorandum Opinion.

under the Guaranty that were not being paid under the Plan. The Debtor confirmed the correctness of the Court's understanding of the Debtor's intent when it filed the Second Modification because in it, the Debtor agreed to delete the language in the permanent injunction section of the Plan that the Court had found to be inconsistent with a temporary restraint of CIT's collection efforts against Kester of those amounts being paid to CIT under the Plan.

After considering the Objection and the newly filed Kester Lawsuit,³ the Court agrees with CIT that the provisions of the Modified Plan providing permanent injunctive relief, section 11.03, and temporary injunctive relief, section 11.04, must be clarified further. CIT suggested language it would find acceptable with respect to section 11.03 of the Modified Plan in paragraph 19 of the Objection. While the Court agrees that CIT's language would clarify section 11.03 of the Modified Plan to be consistent with the Court's understanding of the Debtor's intended scope of relief (*i.e.* no permanent injunction against CIT, but only a temporary restraint of collection from Kester of those amounts being paid under the Plan provided the Plan was not in default), the Court cannot impose its understanding of the Modified Plan on the Debtor. The Court can only confirm a plan or deny confirmation of a plan once the parties and the Court are clear on the plan's terms.

The Court also agrees that the Debtor must clarify its intention with respect to section 11.04 of the Plan in light of the Kester Lawsuit, particularly the Tort Claims asserted in the Kester Lawsuit. The Debtor agreed in the First Modification that if CIT could assert claims

³The Debtor contends that the Court should overrule these objections as untimely. While some of the other issues raised by CIT in the newly filed Objection may be overruled as untimely if and when those issues are reached, CIT is entitled to understand specifically what the Debtor intends to enjoin it from pursuing, whether permanently or temporarily, in the Modified Plan. Since the Kester Lawsuit is now on file and the Modified Plan has not yet been confirmed, CIT's issues in this regard are timely.

against Kester under the Guaranty that were not being paid under the Plan, CIT was free to pursue those claims now – section 11.04 of the Plan did not temporarily enjoin CIT from suing Kester for amounts not being paid under the Plan. Consistent with the Debtor’s position with respect to CIT’s contract claims under the Guaranty, it makes sense that if CIT has independent tort claims against Kester, individually, that allow an independent recovery from him, CIT’s pursuit of those independent claims are not temporarily enjoined by section 11.04 of the Plan.⁴ Again, however, the Court cannot impose its inferences from the First Modification on the Debtor. Thus, the Debtor must clarify the scope of its intended relief in light of the new developments.

While it is unfortunate that these tort versus contract issues were not clearly raised earlier, neither CIT nor the Court should be required to guess what the Debtor seeks to permanently enjoin CIT from doing under the Modified Plan, if anything, or what the Debtor seeks to temporarily enjoin CIT from doing under the Modified Plan. CIT is entitled to a clarification of these important plan provisions before the Court is asked to rule on the Debtor’s request that the Order Denying Confirmation be reconsidered. Once these two plan provisions are clarified, the Court can properly evaluate CIT’s remaining objections to confirmation.

For these reasons, the Motion to Modify and Reconsider will be denied without prejudice. A separate Order will be entered denying the Motion to Modify and Reconsider.

⁴When asked if the Modified Plan sought to temporarily enjoin CIT’s pursuit of the Tort Claims, the Debtor’s counsel stated that he did not know – he had not considered that issue until it was raised by CIT in the Objection, which was filed only on the afternoon of the previous day. Counsel then argued that CIT’s objection should be summarily overruled as untimely. As explained herein, the Court disagrees.

CIT filed an Expedited Motion for Reconsideration of the Prior Memorandum Opinion on February 1, 2001. In light of this Memorandum Opinion and Order, no hearing shall be held at this time. If the Debtor files a further modification to the Modified Plan and seeks another reconsideration of the Order Denying Confirmation, the Court will hear both motions simultaneously.

Signed this 2nd day of February, 2001.

Barbara J. Houser
United States Bankruptcy Judge