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JUN 10 2004

UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re
THE DON LUSCOMBE AVIATION
HISTORY FOUNDATION,

Debtor.

Chapter 11
Case No. 02-18352-PHX-SSC
Adv. 03-332
MEMORANDUM DECISION AND
ORDER DENYING STAY PENDING
APPEAL

On June 10, 2004, this court conducted oral argument on the Combs/Eder Motion for a Stay Pending Appeal, which Motion was filed on May 19, 2004 and refers to this Court's order dated April 30, 2004 allowing a sale of the vast majority of the bankruptcy estate assets to Renaissance. The appearances are as noted of record. At the conclusion of the hearing, this Court notified parties that the Combs/Eder Motion would be denied, with the Court's opinion to follow shortly. This is the decision and Order of the Court. The Court notes that it has jurisdiction over this matter pursuant to 28 U.S.C. §§1334 and 157. To the extent necessary, the Court has set forth its findings of fact and conclusions of law pursuant to Fed. R. Bank. P. 7052.

At the hearing on May 21, 2004, shortly after the Motion for Stay was filed by Combs/Eder, this Court discussed a number of problems with Combs/Eder as to their Motion. The Court also set a response date for any interested party. No reply date was set by the Court. The Trustee of the bankruptcy estate and Renaissance filed a response by the authorized date of

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1 June 1, 2004. However, although the Court did not set a reply date, Combs/Eder filed a reply at
2 9:57 a.m. on June 10, 2004, almost immediately prior to this Court's hearing on the stay. The
3 Court granted the Trustee's and Renaissance's oral motion to strike, because the reply of
4 Combs/Eder was not authorized and because it was filed immediately prior to the hearing so that
5 no interested party had a chance to review the document. However, the Court did allow
6 Combs/Eder to review the arguments in the reply and assert those arguments as a part of their
7 oral argument.

8 There are several troubling problems with the Combs/Eder Motion for Stay. First, the
9 Motion is inaccurate in that it refers to the estate as producing regular income and positive cash
10 flow in its operations. As this Court pointed out to Combs/Eder on May 21, such statements are
11 misleading. The case has been converted to a Chapter 7 as of April 26, 2004. Combs/ Eder did
12 not oppose the conversion of the case at the time of the hearing, since they agreed that the Debtor
13 could no longer continue with its operations based upon the monthly operating reports that had
14 been filed by the Debtor over a substantial period of time. Although Combs/Eder hoped that the
15 case, at some point, could be reconverted to a Chapter 11, they did not see that happening in the
16 foreseeable future. Therefore, the statements made by Combs/Eder are inaccurate, and they
17 conceded as much on the record on May 21 even before this Court heard their Motion.

18 Because Combs/Eder inaccurately state the posture of this case, their arguments in the
19 Motion for Stay are also inaccurate as to the necessity of the Trustee to sell the estate assets,
20 through an auction procedure, as soon as possible. As the Court stated to Combs/Eder on the
21 record on May 21, the Trustee is not authorized to operate the business of this Chapter 7 Debtor
22 without a Court order. 11 U.S.C. §§721 and 704(1). The Trustee is to liquidate the assets of the
23 estate "as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C.
24 §704. Moreover, the Trustee, at the time of the hearing on the conversion of the case, articulated
25 a sufficient basis on the record to authorize a prompt auction sale of the vast majority of the
26 estate assets.

27 The Court also advised Combs/Eder on May 21 that it had not granted Renaissance's
28 Motion for Adequate Protection other than to note that the bankruptcy estate assets would be sold

1 subject to the interest, if any, of Renaissance in the estate assets. Yet Combs/Eder continue to
2 insist in their Motion for Stay that the Motion for Adequate Protection has been granted, and that
3 that somehow affects the current Motion for Stay. Combs/Eder have consistently argued, and
4 they do so again in the Motion for Stay, that the License Agreement between Renaissance and the
5 Debtor has expired. In fact, at the hearing re Renaissance's Motion for Adequate Protection and
6 at the sale hearing, Combs/Eder insisted that they could easily set aside the interest of
7 Renaissance in the estate assets. In fact, at the sale hearing, they ultimately agreed to make an
8 offer for the estate assets subject to the interest of Renaissance. To now argue that they are
9 somehow prejudiced, and, as a result, they should be granted a stay pending appeal, misses the
10 point that they agreed to such a procedure regarding a sale subject to Renaissance's interest when
11 they submitted their offer or bid to the Court.

12 It should also be noted that since the sale of assets has occurred, any argument by
13 Combs/Eder that they should be entitled to adequate protection is now moot.¹

14 As to the merits of the Motion for Stay, this Court usually utilizes the test set forth in In
15 re Wymer, 5 B.R. 802 (Bank. 9th Cir. 1980), which provides:

16 As stated by one authority, FRCP 62(c) and (g), taken together, reflect 'the
17 inherent power of the courts to make whatever order is necessary to preserve the
18 status quo and to ensure the effectiveness of the final judgment.' 11 Wright &
19 Miller 315. The discretion of the court is exercised 'upon such terms as to bond
20 or otherwise as [the court] considers proper for the security of the rights of the
21 adverse party.' FRCP 62(c). While the power to maintain the status quo pending
22 appeal 'should always be exercised when any irreparable injury may result from
23 the effect of the decree as rendered' (Hovey v. MacDonald, 109 U.S. 150 at 161, 3
24 S.Ct. 136, 27 L.Ed. 888 (1883)), both Federal and California Courts hold that 'the
25 power should be sparingly used and reserved for the exceptional situation.'
26 People v. Emeryville, 69 Cal.2d 533, 72 Cal. Rptr. 790 (1961).

27 The accepted standards for discretionary stays are described in Schwartz v. Covington, 341 F.2d
28 537 (9th Cir. 1965):

1. Appellant is likely to succeed on the merits of the appeal;
2. Appellant will suffer irreparable injury;

26 ¹In fact, at the hearing concerning the sale of assets, Combs/Eder conceded that their
27 Motion for Adequate Protection was probably moot, yet they have once again presented
28 arguments concerning adequate protection as a part of the various briefs that they have filed prior
to the hearing today on June 10, 2004.

3. No substantial harm will come to the appellee; and
4. The stay will do no harm to the public interest.

Wymer, supra.

Combs/ Eder have failed to meet the Wymer test on a number of grounds. First, they have failed to articulate their probability of success on the merits. Because they do not accurately set forth the posture of this case, it makes their probability of success even more remote. Moreover, it is extremely difficult to set aside a sale order in a Chapter 7 proceeding. As noted previously, it is the statutory duty of the Trustee to liquidate the assets in a prompt manner. In this case, the Debtor had stopped its business operations prior to the conversion of the case, and Combs/Eder had noted on the record at the hearing on conversion that it made no sense to keep the Debtor in a Chapter 11 proceeding when it was simply losing money while operating. Combs/Eder have set forth no set of facts or law that somehow reflect or show that the auction sale should not have occurred in the manner that it did.

Another prong of the Wymer test is that Combs/Eder show that they will suffer irreparable injury. The ability to succeed in other litigation as to Renaissance or on other claims does not reflect how they have been irreparably injured as to the sale of assets at which they were given an opportunity to bid, even though a newly created entity was actually going to be the ultimate purchaser of the assets and, presumably, pay directly, or through Combs/Eder, the balance of the purchase price as enunciated by Combs/Eder in their offer or bid to purchase estate assets. Combs/ Eder had obviously contacted other investors to assist them with the purchase of assets that formed the basis of the Combs/Eder bid. Combs/Eder simply did not have the highest or best offer for the estate assets, which the Court described in its findings of facts and conclusions of law at the end of the sale hearing. However, the inability to present the highest or best offer for the sale assets does not create irreparable injury. If it did, every unsuccessful purchaser at a bankruptcy estate auction would have an appropriate basis to appeal a sale order. Such is not the state of the law.

Renaissance has articulated at the hearing on conversion, at the sale hearing, and in its responsive pleading on the Motion for Stay why it required an immediate sale of the estate assets

1 to it, if it were the successful purchaser, and why it intended to proceed expeditiously with a
2 closing on the matter. On a Motion for Stay, it is the responsibility of Combs/Eder to reflect how
3 Renaissance and the bankruptcy estate, as the likely appellees, are not substantially harmed by
4 granting the stay. As noted by the Trustee and Renaissance, the closing as to the sale of the
5 estate assets has already occurred. Renaissance is proceeding with the manufacture of Luscombe
6 aircraft, and any stay of the sale order would have an impact on Renaissance's operations,
7 including its agreement with the airport authority in Missouri, which has not been addressed by
8 Combs/Eder. As to the estate, Combs/Eder have provided no mechanism to protect the creditors
9 of this estate if a stay were granted. Each day that the assets are unable to be sold is a detriment
10 to the creditors, since they will not realize a prompt liquidation of the estate assets and a
11 distribution on their claims according to their priorities under the Bankruptcy Code.

12 As to the public interest prong, Combs/Eder conceded at oral argument on June 10, 2004,
13 on their Motion for Stay, that no creditors had (1) independently questioned the sale procedure by
14 the Trustee, (2) sought to set aside the sale order, or (3) joined in their Motion for Stay. It is
15 difficult for Combs/Eder to meet a showing that a stay would be in the public interest when the
16 public interest promotes the certainty and finality of bankruptcy estate sales so that the Trustee
17 may fulfill his statutory requirements, as noted above, to liquidate the assets in a prompt manner
18 and make an appropriate distribution to creditors.

19 The Trustee and Renaissance also point out that Combs/Eder have failed to meet the
20 slightly different test as to a stay pending appeal as set forth in the decision of Southwest Voter
21 Registration Education Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003) (en banc, per
22 curiam); Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998). As noted in Southwest, Fed.
23 R. Bankr. P. 8005 governs a motion to stay a Bankruptcy Judge's order on appeal. Appellants
24 seeking a discretionary stay under Rule 8005 "must meet the terms of a test virtually identical to
25 that for a preliminary injunction." (1) a likelihood of probable success on the merits and the
26 possibility of irreparable injury; or (2) that serious questions going to the merits are raised and
27 the balance of hardships tips sharply in its favor.

28 Since Combs/Eder have failed to show any probability of success as to the merits of an

1 appeal, on a sliding scale, they must make a strong showing of irreparable injury to meet the first
2 prong of the test. As noted previously, they have made no showing of irreparable injury. They
3 can simply proceed with the litigation that may still be pending in Georgia, or other locations,
4 and obtain a money judgment as to any damages. As to the second prong, this Court does not
5 believe that even serious questions have been raised on the merits as to the Court's sale order, but
6 Combs/Eder have made no showing that when considering the hardships of Renaissance and this
7 estate versus those of Combs/Eder, that somehow "the balance of the hardships tips sharply in
8 favor of Combs/Eder."

9 Based upon the foregoing,

10 IT IS ORDERED that Combs/Eder's Motion for a Stay Pending Appeal is DENIED.

11 DATED this 10th day of June, 2004.

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14 **HONORABLE SARAH SHARER CURLEY**
15 Chief U. S. Bankruptcy Judge
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1 COPY of the foregoing mailed
2 this _____ day of June, 2003 to:

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16 By _____
17 Deputy Clerk

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