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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of
Akron Thermal, Limited Partnership for
Authority to Issue Three (3) Promissory
Long-Term Notes.

Case No. 09-414-HT-AIS

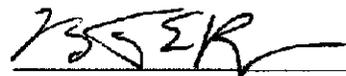
In the Matter of the Application of
Akron Thermal, Limited Partnership
for an Emergency Increase in its Rates
and Charges for Steam and Hot Water
Service.

Case No. 09-453-HT-AEM

STATEMENT OF SUPPLEMENTAL AUTHORITY

Akron Thermal, Limited Partnership ("Akron Thermal"), the applicant in the above-captioned proceedings, hereby submits, as a statement of supplemental authority, the "Opinion Granting Trustee's Emergency Motion for Approval of Forbearance Agreement" entered September 1, 2009 by United States Bankruptcy Court for the Northern District of Ohio, Eastern Division in *In re: Akron Thermal, Limited Partnership*, Case No. 07-51884 (Bankr. N.D. Ohio). Because the opinion was just issued, it was not available at the time final briefs were submitted in this matter. However, because the opinion, a copy of which is attached, clearly bears on certain issues raised in these proceedings, Akron Thermal believes it important to bring this supplemental authority to the Commission's attention.

Respectfully submitted


Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3900

IT IS SO ORDERED.

Dated: 04:16 PM August 31 2009


MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO.: 07-51884
)	
AKRON THERMAL, LIMITED)	CHAPTER 11
PARTNERSHIP,)	
)	JUDGE MARILYN SHEA-STONUM
Reorganized Debtor.)	
)	OPINION GRANTING TRUSTEE'S
)	EMERGENCY MOTION FOR
)	APPROVAL OF FORBEARANCE
)	AGREEMENT

This matter is before the Court on the Emergency Motion (the "Motion") of David Wehrle ("Trustee"), in his capacity as Trustee of the Creditors' Trust created pursuant to the confirmed Second Amended Plan of Reorganization for Akron Thermal, Limited Partnership, as amended ("Plan") for the purpose, *inter alia*, of making payments to the unsecured creditors in Class 3.2 of the Plan. In the Motion, the Trustee requests the entry of an order approving a forbearance agreement ("Agreement") with respect to the Creditors' Trust Note

("Note") which funds, in part, the Creditors' Trust. [Docket #705]. The Trustee noted that this matter was commenced because the City had asserted a lack of such authority in hearings before the Public Utilities Commission of Ohio. The City was the only party to file a Response and Objection [docket #712]. The Trustee filed a Reply [docket #713] and a Supplement to its Reply [docket #714].

The Trustee believes his powers and duties under the Creditors' Trust, as created by the Plan, include the right to forbear if it will enhance the likelihood of collecting the "Trust Assets," of which the Note is one, and he is seeking Court approval of the Agreement on the basis that it does not modify the Plan and that it is consistent with and necessary to serve the intent and purpose of the Plan and Trust. The City argues that the Agreement represents the Trustee's cloaked attempt to improperly modify the Plan. Specifically, the City argues that the Plan is unambiguous and does not contain a provision that gives Trustee the power or authority to enter into the Agreement. The City further contends that the Agreement is not in the best interest of the unsecured creditors.

During hearings that took place on July 29 and July 30, 2009 the Court heard the testimony of the Trustee and the arguments of counsel. After the close of arguments the Court took the matter under advisement.

FACTUAL BACKGROUND

1. THE CREDITORS' TRUST

The Plan provides for the formation of the Creditors' Trust for the purposes of, *inter alia*, "collecting, liquidating and administering the Trust Assets" and "making all distributions provided for under the Plan in respect of Allowed Class 3.2 Claims." Plan, ¶ 10.1. Under the

Plan, “[t]he Trustee is authorized and empowered to perform any and all acts necessary or desirable to accomplish the purposes of the Trust, *on the terms provided in the Trust Agreement.*” Plan, ¶ 10.2. (Emphasis added). Thus, the Court will turn to the provisions of the Trust Agreement (Plan, Exhibit 10.2) regarding the Trustee’s power.

The Trust Agreement states that “[t]he Trustee is hereby authorized and empowered to perform any and all acts necessary or desirable to accomplish the purpose of the Trust.” Plan, Exhibit 10.2, ¶ 6. The purpose of the Creditors’ Trust is “collecting, liquidating and administering the Trust Assets ... in an expeditious but orderly manner, ... and mak[ing] timely distribution to holders of Allowed General Unsecured Claims....” Plan, Exhibit 10.2, ¶ 1. With respect to the authority of the Trustee, the Trust Agreement further provides, in a non-exclusive list, that the Trustee:

Shall protect and enforce the rights in and to the Trust Assets by any method deemed appropriate including, without limitation, by judicial proceedings or pursuant to any applicable bankruptcy, insolvency, moratorium or similar law and general principles of equity;

Shall collect all Trust Assets, including, without limitation, the Trust Funding Payments and all assets that holders of allowed General Unsecured Claims are entitled to receive under the Plan.

Plan, Exhibit 10.2, ¶ 6 (Emphasis added).

The Note is a Trust Asset. Plan, ¶ 1.87.

The Trust Agreement provides that the Court shall have jurisdiction over matters concerning the Creditors’ Trust, including the “interpretation ... of its provisions, the disposition and distribution of Trust Assets, and the determination of all amendments ... with respect to ... Trust Assets.” Plan, Exhibit 10.2, ¶ 19; see also Plan, ¶ 15.1 (providing for the

retention of jurisdiction over matters related to the Creditors' Trust).

2. THE AGREEMENT

As noted above, the Trustee filed the Motion on an emergency basis because the City challenged the Trustee's authority to enter into the Agreement in proceedings pending before the Public Utilities Commission of Ohio ("PUCO") on the Reorganized Debtors' application for an emergency increase in its rates ("Application"). On April 30, 2009, the Reorganized Debtor's contract with its largest customer, the University of Akron ("University") expired and the University elected not to renew or extend its contract. The loss of the University's contract will have a serious impact on the Reorganized Debtor's financial condition. The Reorganized Debtor filed its Application with the PUCO on May 29, 2009 in an effort to mitigate the consequences of the loss of the University as a customer. The case was consolidated with certain other pending proceedings, including the case filed on May 18, 2009 seeking PUCO approval of the promissory notes, including the Note. The City has intervened in the PUCO proceedings and opposes the rate increase.

The written testimony of two PUCO staff members recommended denial of the Application based on the assessment that the Reorganized Debtor's annual cash flow projections under the rates proposed in the Application appear to be insufficient to meet the annual debt service obligations associated with the Note in the approximate amount of \$75,000. The Agreement will improve the Reorganized Debtor's cash flow projections. The Agreement among the Reorganized Debtor, the Trustee, the State of Ohio, and Thermal Ventures, II, L.P. will result in, *inter alia*, a forbearance with respect to \$60,000 annually of the amounts otherwise payable under the Note with the forbearance amounts to be paid at the

end of the term of the Note. The Agreement would extend the term of the Note an additional year, but does not change the amount due and owing or other terms of the Note. In response to the City's intervention in the PUCO proceedings and challenge to the Trustee's authority, the Trustee seeks an order from this Court approving the Agreement.

JURISDICTION

The City argues that the Court is without jurisdiction to hear this matter because it arises after the confirmation and substantial consummation of the Plan. This Court's jurisdiction comes from 28 U.S.C. §§ 157 and 1334 and General Order No. 84 entered in this district. The Court has jurisdiction over matters arising under title 11, arising in a case under title 11 or related to a case under title 11. Although a bankruptcy court's jurisdiction is narrow after confirmation of a plan of reorganization, a bankruptcy court does have jurisdiction over matters where there is a close nexus to the bankruptcy plan or proceeding. *See In re Thickstun Bros. Equipment Co., Inc.*, 344 B.R. 515, 521 (6th Cir. B.A.P. 2006). Typically, the necessary nexus exists in matters affecting "the interpretation, implementation, consummation, execution or administration of the confirmed plan." *See Id.* citing *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154 (3rd Cir. 2004). This matter involves the interpretation of the Plan and Trust Agreement, created pursuant to the Plan, and no provisions of the Plan or Trust Agreement limit the Court's jurisdiction to hear this matter. Therefore, the Court has jurisdiction under 28 U.S.C. §§ 157(a) and 1334.

The City also argues that even if the Court has jurisdiction, this matter is not a core proceeding and the Court should submit proposed findings of fact and conclusions of law to the district court pursuant to 28 U.S.C. § 157(c). The Trustee argues that this matter goes to

the heart of matters concerning distribution to creditors of the estate. "The Plan and Trust were established for the purpose of administering claims. That is the essence of estate administration." In addition, the Trustee argues that this dispute did not exist prior to the bankruptcy case and would not exist independent of title 11, under which the Plan creating the Creditors' Trust was confirmed. Therefore, the Trustee argues this is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(A) and (B).

Core proceedings are those proceedings which invoke a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. *Michigan Employment Security Commission v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1144 (6th Cir. 1991). Section 157(b)(2) provides a non exclusive list of core proceedings including subsection (O) which provides that "proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor ... relationship" are core proceedings. 28 U.S.C. § 157(b)(2)(O). Both the form and the substance of the proceeding is relevant in determining whether the proceeding is core or not. *In re Wolverine Radio Co.*, 930 F.2d at 1144.

The matter at issue here bears directly upon interpretation of the Creditors' Trust, the Trust Agreement and Note created by the Plan as the vehicle for providing distribution to the Chapter 11 Debtor's unsecured creditors. It is a dispute over the authority of the Trustee under the Trust Agreement, as created by the Plan, to forbear in order to enhance the likelihood of collecting the "Trust Assets" and making distributions to unsecured creditors. It is a dispute that did not exist prior to the bankruptcy case and would not exist independent of the Plan confirmed under title 11. It is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

See, e.g., In re Wolverine Radio Co., 930 F.2d at 1144-45 (finding a dispute is a core proceeding because the issues involved arose because of a bankruptcy proceeding, including the confirmation of a plan); *In re Case*, 937 F.2d 1014 (5th Cir. 1991) (finding that a post-confirmation dispute over a promissory note provided for in the debtor's reorganization plan was a core proceeding).

APPROVAL OF THE AGREEMENT

Having determined that this a core proceeding over which the Court has jurisdiction, the Court must now address the substance of the Trustee's request.

1. GOVERNING LAW

The laws of the State of Ohio govern the construction of the Plan and any agreements documents and instruments executed in connection with the Plan, unless a rule of law or procedure is supplied by federal law or unless otherwise specifically stated. Plan, ¶ 16.6.

Section 20 of the Trust Agreement provides that it shall be governed by, and construed in accordance with, the laws of the State of Ohio. Plan, Exhibit 10.2, ¶ 20.

Section 6.6 of the Agreement states that it "shall be construed, interpreted, and governed by the law of the State of Ohio..."

Therefore, this Court will look to the laws of the State of Ohio in order to resolve this issue.

2. OHIO LAW

The administration of a trust involves methods of accomplishing the purposes of the trust. *Dalota*, 79 Ohio St. 3d at 106-07. The details of administering a trust is left to the

trustee(s) under the court's guidance. *Gearhart v. Richardson*, 109 Ohio St. 418, 435 (1924).

The powers and duties of a trustee are controlled by the terms of the trust instrument. *Dalioia* at 102 (1997).

The circumstances that might justify a change in the terms of a trust are addressed by statute in Ohio:

Ohio Rev. Code Ann. § 5804.10

(B) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under sections 5804.11 to 5804.16 of the Revised Code or to approve or disapprove a trust combination or division under section 5804.17 of the Revised Code. The settlor may commence a proceeding to approve or disapprove a proposed modification or termination under section 5804.11 of the Revised Code. The settlor of a charitable trust may maintain a proceeding to modify the trust under section 5804.13 of the Revised Code. (Emphasis added)

Ohio Rev. Code Ann. § 5804.12

(A) The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor's probable intention.

(B) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration.

(C) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. (Emphasis added)

Ohio Rev. Code Ann. § 5804.12 was enacted in 2006 and is analogous to § 412 of the Uniform Trust Code. It broadens the court's ability to apply the longstanding doctrine of equitable deviation to terminate or modify a trust. See Ohio Rev. Code Ann. § 5804.12, Official Comment. Under the doctrine of equitable deviation, if changed conditions have made the performance in accordance with the terms of the trust impossible, illegal, impracticable, or inexpedient, or where the purposes of the trust would otherwise be substantially impaired, the Court may direct or authorize the trustee to deviate from the terms of the trust. See *Carnahan v. Johnson*, 127 Ohio App. 3d 195, 201 (12th Dist. Madison County 1998); *Dalioia v. Franciscan Health System of Central Ohio, Inc.*, 79 Ohio St. 3d 98, 106 (1997); *Craft v. Shroyer*, 81 Ohio App. 253, 271-72 (2nd Dist. Montgomery County 1947). In considering whether or not to permit such deviation, the Court must keep in the forefront of its analysis the fundamental tenet of trust law that "[a] trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust." Ohio Rev. Code Ann. § 5804.04.

DISCUSSION

It is a matter of record in prior proceedings that the University had the ability to satisfy its own steam needs if necessary and that its contract with Akron Thermal would expire in April 2009. Thus an analysis under Ohio Rev. Code Ann. § 5804.12(A) is not applicable because it was a foreseeable occurrence that the University would not renew its contract. Therefore, the analysis will focus on the provisions of Ohio Rev. Code Ann. § 5804.12(B).

The Trustee views the proposed Agreement as a *de minimus* alteration to certain details of the Trust Agreement as necessary to accomplish and effectuate the purpose of the

Trust, i.e. to collect, liquidate, and administer the Trust Assets. The Agreement proposes to change only the timing of a fraction of the annual payment amount and does not affect the total amount of the cumulative payments, other terms, or the date on which the payments will commence. While the City is a beneficiary of the Trust, its primary interest is not receiving payments from the Trust, but as the Reorganized Debtor's landlord who seeks termination of the lease. The Court concludes that the Agreement does not make substantial changes to the Trust Agreement and is consistent with the Trustee's duties under the Plan to obtain maximum distribution to the beneficiaries of the Trust.

The Trustee testified that if the Reorganized Debtor fails to get the rate increase that it seeks from the PUCO, its financial resources will be greatly diminished and it will not be able to make the payments under the Note. Without the Agreement, the Reorganized Debtor will not likely be able to satisfy the PUCO concerns. Therefore, continuation of the Note on its existing terms would be impracticable and likely impair the Creditors' Trust's administration and purpose. Mr. Wehrle also testified that the Creditors' Trust will recover much more under the Note than it would in a liquidation setting, including additional interest in exchange for the short delay in receipt of payment. Thus, the Agreement is certainly in the best interest of the unsecured creditors. There is simply no evidence to the contrary.

The City argued that changing the payment schedule and term of the Note does not involve the collection, liquidation or administration of the Trust Assets, and that the Trustee is therefore not authorized to enter into the Agreement. The City also contends that the Agreement is not in the best interest of the beneficiaries of the Note. However, the City has not directed this Court's attention to any Ohio authorities or to any testimony in support of

those arguments.

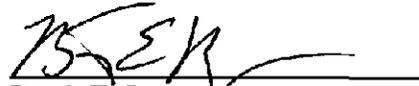
CONCLUSION

Based on the foregoing, this Court finds that the Trustee's charge to collect, liquidate, and administer the Trust Assets includes the authority to forbear on the Note and enter into the Agreement. Here, forbearance under the terms of the Agreement insures and maximizes the Trustee's ability to collect on the Note, which in turn is in the best interest of the beneficiaries, *i.e.*, unsecured creditors. Any delay in receipt of payment is preferable to receiving nothing at all. Accordingly, the Agreement satisfies the conditions of Ohio Rev. Code Ann. § 5804.12(B) as well as general principles of equity necessary to protect the Note. The Trustee's Motion is **HEREBY GRANTED**.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties by electronic mail this 1st day of September 2009.


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