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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Southeastern Steel Company,

Debtor.

C/A No. 00-09225-W

ORDER

Chapter 11

THIS MATTER comes before the Court for hearing on confirmation of the Second Amended Plan of Reorganization filed by the Chapter 11 Debtor, Southeastern Steel Company ("Debtor"), on October 26, 2001. There are two objections to confirmation: those filed by First Union National Bank ("First Union") and Carbis, Inc. ("Carbis"). This Order addresses one of the issues raised by First Union in its objection: whether its claims are fully secured or partially secured, on which the applicability of certain other objections depends.

Debtor objects to any present assertion by First Union that it is undersecured in as much as First Union filed secured claims that were the subject of an objection by Debtor and were resolved by a Consent Order of October 15, 2001. In its Plan, Debtor treats First Union as a fully secured creditor. Debtor argues that First Union is prohibited by said Order from seeking a further valuation of its claims and security. In addition, Debtor argues that, under the doctrines of judicial estoppel, estoppel, laches, and unclean hands, First Union should be barred from changing its previously asserted position. Although never admitted into the records of this Court, Debtor has received an appraisal performed by agents of First Union, which Debtor asserts indicates First Union is fully secured as of October 31, 2001. This appraisal has been referenced in numerous prior hearings. Debtor asserts that it is prejudiced by any change in position on this issue by First Union in that any further delay to confirmation or additional expense associated

with Debtor having to undertake its own appraisal would be detrimental to Debtor's ability to reorganize.

In response, First Union admits that it has not previously raised the valuation issue by way of a motion as indicated by Federal Rule 3012 of Bankruptcy Procedure but asserts that no prior order nor First Union's prior conduct bars it from doing so as part of the confirmation process.

Both parties rely on Stone Hedge Properties v. Phoenix Capital Corporation (In re Stone Hedge Properties), 191 B.R. 59 (Bankr. M.D. Pa. 1995), aff'd 162 F.3d 1152 (5th Cir. 1998) as dispositive in analysis of this issue. In Stone Hedge, a creditor motioned to value its claim pursuant to Rule 3012 and to have its disputed claim temporarily allowed for voting purposes pursuant to Rule 3018, and the debtor disputed the validity of the creditor's claim in a separate adversary proceeding. After filing proofs of claim representing it was secured as well as submitting its own proposed plan and disclosure statement representing that it was secured, the creditor then maintained it was undersecured. In addition to disputing the valuation figures the creditor used to illustrate its status as undersecured, the debtor alleged the creditor was estopped from pursuing undersecured status after its numerous prior representations of being fully secured. The court rejected the estoppel argument because (1) the Court had entered no final judgment or order concerning the creditor's claim status pursuant to 11 U.S.C. §506¹, (2) parties can argue inconsistent positions depending on the purpose of valuation, and (3) the case had not yet reached the point where the court confirmed the plan; accordingly, the parties could assert alternate positions. The court next addressed the propriety of the temporary allowance of the

¹ Further references to the Bankruptcy Code shall be by section number only.

claim. The court permitted the creditor to vote as secured according to the extent of the collateral's value; however, it denied the creditor the ability to vote as an unsecured creditor. The court reached this conclusion by reasoning that the history of the case indicated that no one would anticipate the creditor having an unsecured status. The court then considered valuation testimony and valued the collateral. To the extent the creditor's claim was unsecured, the court denied the creditor's motion to allow this portion temporarily for voting purposes.

In the Court's view, Stone Hedge indicates that, because this case is not at the final hearing on confirmation, First Union is entitled to a valuation determination upon proper motion. Indeed, the Stone Hedge court permitted the creditor to a valuation hearing despite the creditor repeatedly asserting a fully secured position.²

This Court is inclined to permit a valuation hearing to determine the value of the collateral securing First Union's claims. Although Debtor argues that First Union should not be allowed to raise the valuation of its claims and security for purposes of confirmation at this point in the case because of the doctrines of judicial estoppel, estoppel, or unclean hands, the Court disagrees. Valuation at one point in a case is not necessarily binding throughout the case as valuation issues can arise in various contexts. See Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In the Matter of T-H New Orleans Ltd. P'ship), 116 F.3d 790, 797 (5th Cir. 1997) (holding that a creditor who argued it was entitled to post-petition interest pursuant to §506(b)

² The Court notes that First Union actually voted its claims both as fully secured and as fully unsecured with the provision that it believed its claims could be divided into secured and unsecured portions. To the extent its claims were unsecured, First Union sought to apply this portion to a Class 6 vote. Debtor responded by filing a Motion to Strike First Union's Class 6 Unsecured Ballots, or, in the Alternative, First Union's Class 5 Secured Ballots. The parties agreed that such motion would be continued to the same hearing as any valuation hearing set by the Court.

because it became oversecured prior to a plan's confirmation was not limited to a single valuation date). For example, the issue of valuation can be raised to establish equity, allow claims, determine adequate protection, and confirm plans; accordingly, valuation of collateral and a creditor's claim should be flexible and not limited to a single point in time. See id. at 797-98. The principle of valuation as a fluid concept is illustrated in In re Remington Forest, C/A No. 95-76069, at 19-22 (Bankr. D. S.C. Jun. 18, 1996) where, although the Court reached one valuation conclusion for purposes of determining a creditor's §362 motion, the Court conducted a separate valuation analysis at confirmation to determine the secured and unsecured status of the creditor. It is possible, as First Union argues, that its secured position has deteriorated in recent months due to Debtor's operating losses so as to leave it now only partially secured.

Not only is valuation a fluid concept, but the Court also notes that the parties' Consent Order entered October 15, 2001 does not expressly bar the proposed determination of the collateral's value for purposes of a confirmation hearing held months later. Although the Order determines the amount of First Union's claims, it does not represent an agreement that claims would be treated as fully secured for purposes of confirmation so as to bar the valuation issue. Instead, it addresses the grounds of Debtor's objection to claims, establishes the amount of the claims, and reserves the issues of attorneys' fees, post-petition interest, expenses, and the effect of the state court litigation.

Debtor also argues that laches should bar First Union from raising the valuation issue at this point, but the Court also disagrees with this argument. If a case has a valuation issue, the correct time to determine valuation is where this case currently stands -- on or about confirmation. See Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank (In the Matter of Sandy

Ridge Dev. Corp.), 881 F.2d 1346, 1354 (5th Cir. 1989) (quoting In re Texas Extrusion Corp., 844 F.2d 1142, 1165 (5th Cir. 1988)). The reason why confirmation is the proper time to assert this issue is because the value of a lien or its collateral can fluctuate in some circumstances, and indeed, First Union argues that the value of its collateral has suffered rapid deterioration due to the continuation of operating losses in recent months. Consequently, it questions whether it remains fully secured.

Because prior to the hearing on December 4, 2001 the Court was advised by both Debtor and First Union that discovery was incomplete and that they would propose a scheduling order that contemplated a final confirmation hearing to be held in mid- to late January, Debtor may not be prejudiced by delay if the Court undertakes a valuation hearing prior to the final confirmation hearing. The Court also notes that the valuation of First Union's claims may impact the objections raised regarding cramdown, the absolute priority rule, and even feasibility issues under §1129.

Under the following conditions, the Court will hold a hearing to determine whether First Union's claims are fully secured or partially secured for purposes of confirmation of Debtor's Plan:

(1) First Union must file a Motion to Value Claims pursuant to Federal Rule 3012 of Bankruptcy Procedure on or before December 12, 2001 and simultaneously serve Debtor, Debtor's counsel, the United States Trustee, Unsecured Creditors' Committee Counsel, Carbis's counsel, and any other interested party by telefax or overnight delivery;

(2) In anticipation of this motion, Debtor shall make its books, records, and property under lien to First Union available for reasonable inspection and appraisal by First Union during

the period of December 10-14 and file with the Court and serve a report of the opinion of its agents or experts on value on the above-listed parties by telefax, overnight delivery, or hand delivery by December 18, 2001;

(3) Debtor, Unsecured Creditors' Committee, or any other party in interest may file an objection to First Union's Motion to Value and file with this Court and provide to First Union, its counsel, and the above-listed parties, by telefax, overnight delivery or hand delivery, a report of the opinion of value of its agents or any expert on or before January 7, 2002.

A continued confirmation hearing that will address the sole issue of the valuation of First Union's claims for purposes of confirmation shall be held on January 11, 2002 at 9:00 a.m. before the undersigned.

A proceeding under any different timetable may cause delay and prejudice to Debtor's reorganization.

All other confirmation issues and objections shall be considered at the final confirmation hearing on January 24, 2002.

AND IT IS SO ORDERED.

Columbia, South Carolina,
December 7, 2001.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

DEC 10 2009

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

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