

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:)
)
Advanced Medical Products, Inc.,)
)
)
Debtor.)
_____)

Case No. 99-02548-W

Chapter 11

FILED
at _____ O'clock & _____ min. _____
MAY 10 1999
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (3)

ENTERED
MAY 10 1999
V. L. D.

**ORDER AUTHORIZING SALE OF ASSETS
FREE AND CLEAR OF ALL LIENS, ENCUMBRANCES AND INTERESTS
PURSUANT TO 11 U.S.C. §§363(b)(1) AND (f)**

This matter involves a motion by Advanced Medical Products, Inc. ("AMP"), the debtor and debtor-in-possession in this case, to sell substantially all of its assets to a related company, Biosensor Corporation ("Biosensor"), free and clear of all liens, encumbrances and interests, except for certain liabilities assumed as part of the purchase price, pursuant to 11 U.S.C. §§363(b)(1) and (f). AMP has filed a proposed Plan of Reorganization ("Plan"), and the sale to Biosensor is incorporated in the Plan's provisions, but the sale is to occur prior to confirmation of the Plan. As such, the proposed sale is a "pre-confirmation" sale which is to occur early in this case. AMP urges that the pre-confirmation sale is necessary to avoid continuing and substantial loss of the value of the assets, and to provide the best prospect of a payment to unsecured creditors in the case. Given the relationship of the parties, the early stage of the case, the uncertainty of payment to unsecured non-priority creditors, and the absence of a confirmed plan, the Court has concerns regarding the sale. However, in as much as the sale does not include any causes of action the bankruptcy estate may have against other parties, does not release Biosensor or its related parties from any cause of action by or in connection with the sale or events leading up to it, considering the financial situation existing in this case, including AMP's lack of funding to continue operations if the sale is not

gw -1 of 12 -

authorized, and, in the absence of any unsecured creditors committee, upon the consent to the sale by the United States Trustee, the Court finds and concludes that a sound business purpose exists warranting authorization of the sale at this time. Therefore, AMP's motion for authorization of the sale should be granted.

AMP filed its motion for authorization of the sale on March 23, 1999, the same date on which it filed its Chapter 11 petition. AMP also filed the Plan with the accompanying Disclosure Statement on that date. In the motion, AMP proposes to sell all of its assets to Biosensor; provided, however, that the sale does not include, but expressly excludes, any preference and avoidance actions, and all other causes of action existing at the commencement of this case and/or accruing after the filing of this case, except for actions relating to the collection of accounts receivable. (Actions relating to the collection of accounts receivable are included in the sale.) Biosensor's purchase price for the assets is stated as an assumption of liabilities and cash payments to or on behalf of AMP. Specifically, Biosensor is to assume the indebtedness owed by AMP to Emergent Asset Based Lending, LLC ("Emergent") and to Bernard Klawans ("Klawans"), AMP's two secured creditors; Biosensor is to assume the accrued vacation time of AMP employees; Biosensor is to assume liability for sales commissions that would be due to salesmen upon payment of AMP's receivables;¹ Biosensor will assume liability for customer warranties owed by AMP; Biosensor will pay \$18,000.00 cash for AMP to use in payment of the tax claim asserted by the State of Florida; and Biosensor will pay \$50,000.00 cash to AMP for use in addressing the unsecured priority and non-priority claims against AMP. In addition, Biosensor and Braemar, Inc. ("Braemar") will waive any right they may have to share in the distribution of funds to unsecured creditors.

¹ Under AMP's terms with its salesmen, the salesmen who receive sales commission are not deemed to have earned and to be entitled to payment of the commission until the sale proceeds are collected. Hence, the collection of AMP receivables will result in sales commission becoming due.

Two objections were filed to the sale, one by the United States Trustee and the other by Delbert A. Freeman ("Freeman"), as a shareholder of AMP and as a potential bidder on the assets to be sold. The objection filed by the United States Trustee states that certain information about the sale and related party transactions should be provided, and that AMP must make the required showing for authorization of a pre-confirmation sale of all, or substantially all, of its assets. Freeman's objection incorporates the United States Trustee's objection, and states that further information is needed before approval of the sale.

The Court conducted a hearing on the sale on April 28, 1999. At the hearing, AMP presented the testimony of Ronald G. Moyer, its Chief Executive Officer ("CEO"), in support of the sale. No witnesses were presented in opposition to the sale. Based upon the evidence and testimony presented at the hearing on April 28, 1999, and the filings made relating to the proposed sale, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. AMP manufactures and markets various solid state electronic medical diagnostic devices supported by several proprietary "D.O.S." and "Windows" based software programs that operate on personal computers. Current products consist of a family of ambulatory electrocardiogram monitors and ambulatory blood pressure monitors.

2. Carolina Medical, Inc. ("Carolina Medical") owns 55.3% of the stock of AMP. Carolina Medical is wholly owned by Biosensor.

3. AMP contracted with Braemar to manufacture AMP's products, which AMP purchased from Braemar for resale to AMP's customers and for use in repairs and maintenance of its products. Braemar is wholly owned by Carolina Medical.

gw 3

4. Mr. Moyer is the CEO of AMP, Biosensor, Carolina Medical and Braemar. Mr. Moyer testified that each of the companies has its own President who is responsible for day-to-day operations of the company; these company Presidents report to Mr. Moyer as CEO.

5. The shares of both AMP and Biosensor are publicly traded.

6. Numerous transactions occurred by and between AMP, Braemar, Biosensor and Carolina Medical prior to the filing of this case. Although AMP has included information on the related party transactions in its Addendum to its Disclosure Statement, a review of the transactions to determine whether avoidance or other causes of action may exist in connection with these transactions has not yet been made by an independent party on behalf of the bankruptcy estate. As a required condition for AMP's sale to Biosensor, AMP stipulated for the record that any and all causes of action that may exist relating to these transactions are excluded from the sale to Biosensor, that no release is given to Biosensor or any of the related parties by or in connection with the sale, and that any causes of action that may exist are expressly reserved for the bankruptcy estate or any party with standing under applicable law, except for those relating to the collection of accounts receivable.

7. AMP sustained substantial operating losses in 1998 and in 1999. It has continued to operate at a loss since the filing of this case.

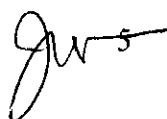
8. Emergent provided pre-petition financing to AMP under a "revolver" loan secured by AMP's accounts receivable, inventory, equipment and other assets. Under the terms of the loan, AMP was allowed to borrow an amount equal to 80% of eligible accounts receivable (as defined in the loan documents) and 30% of eligible inventory (also defined in the loan documents), with the inventory amount capped at \$60,000.00, not to exceed a total loan amount of \$750,000.00. Both

JW-4-

Emergent and AMP agree that the loan was in default at the filing of this case by AMP's breach of certain covenants in the loan documents.

9. Pursuant to Orders of the Court entered on March 31, 1999 and April 15, 1999, AMP has been authorized to obtain post-petition financing from Emergent upon the terms and provisions stated in such Orders. The post-petition lending by Emergent is upon terms substantially the same as under the pre-petition loan documents, except for protective measures granted to Emergent relating to the bankruptcy filing and an adjustment of the borrowing ratios. AMP currently is allowed to borrow an amount not to exceed 77.5% of eligible accounts receivable and 30% of eligible inventory, with the inventory amount capped at \$60,000.00. The two Orders include a budget of allowed expenditures by AMP.

10. The two post-petition financing Orders entered on March 31, 1999 and April 15, 1999 also include provisions concerning the Klawans claim and provisions for emergency funding by Biosensor pending the hearing on the sale on April 28, 1999. Specifically, the two Orders grant Klawans a second priority lien on post-petition inventory and accounts receivable to the extent of any diminution of Klawans' pre-petition secured claim resulting from AMP's use of Klawans' collateral under the provisions of the Orders. In addition, the Orders authorize AMP to obtain post-petition credit from Biosensor pursuant to 11 U.S.C. §364(c)(3) in the form of loan advances from Biosensor, not to exceed \$100,000 in aggregate, as necessary to fund AMP's allowed expenses (as provided in the two Orders) in the event that AMP is unable to obtain post-petition advances from Emergent under the terms of the Orders in the amount needed to pay allowed expenses. Any such

A handwritten signature in black ink, appearing to be "JWS", is located at the bottom center of the page.

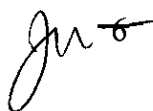
loan advances from Biosensor are to be secured by a junior lien, subordinate in priority and payment to the liens of Emergent and Klawans, on AMP's inventory, accounts and equipment.²

11. At the filing of this case, the outstanding balance due to Emergent on its secured loan was approximately \$278,000.00, and the outstanding balance due on the Klawans' claim was approximately \$150,000.00. As of April 27, 1999, the outstanding amount due to Emergent was approximately \$173,000.00, the outstanding amount due to Klawans was unchanged, and no amount was due to Biosensor for post-petition lending.

12. Since the filing of this case, AMP's collections of its accounts receivable have exceeded its projections, but its new sales have been significantly below its projections. As a result, AMP's indebtedness to Emergent has been reduced to a lower level than projected, but AMP's accounts receivable also have been reduced and AMP's cash situation has tightened. As accounts receivable have decreased, AMP's borrowing capacity under the Emergent loan to fund its operations has decreased.

13. AMP does not have adequate funding to continue its operations indefinitely. The remaining availability of credit under the Emergent loan is limited, and Biosensor has stated its unwillingness to provide funding to AMP after the hearing on April 28, 1999, except as may be necessary for a short time to prevent the termination of AMP's business pending the closing of the sale to Biosensor.

² The Order of March 31, 1999 also provides that, in the event any loan advances are made by Biosensor under the Order, AMP shall file a "Notice of Biosensor Post-Petition Loan Advances" with the Court and serve copies of it on the United States Trustee, Emergent's counsel and other parties entitled to notice of the loan advances, and that such filing and service shall be made no later than the next business day after the date on which the loan advances are made. Any and all such notices shall state the date, the amount and the purpose of the specific loan advance and the cumulative total of all post-petition loan advances made by Biosensor to AMP. The Order of April 15, 1999 incorporates this provision.



14. AMP calculates the adjusted "book" value of its assets to be \$759,000.00 as of March 23, 1999, and \$624,000.00 as of April 27, 1999. The reduction in the value of the assets is the result of the reduction in accounts receivable during this time. AMP estimates a much lower value for the assets if they were to be sold to a company that would relocate the business operation to another state, and an even lower value if the assets were sold in a "fire sale" liquidation, such as by bulk sale auction. These estimated values include only the assets that AMP proposes for sale; the estimated values do not include any preference or other avoidance actions, or any other causes of action that AMP's estate may possess against other parties (except for actions relating to the collection of accounts receivable, which are included).

15. AMP provided notice of its proposed sale to Biosensor to the creditors and parties in interest in this case by serving upon them copies of the Notice of Sale of Property Free and Clear of Liens and of Hearing filed on March 25, 1999 ("Notice of Sale and Hearing"), and notice of the Plan, and the Disclosure Statement, along with copies of other Orders and documents, by mail on March 26, 1999. AMP states that the mailing list of creditors, shareholders and parties in interest used for service of these documents totals approximately 2,000 names and addresses.

16. On April 12, 1999, AMP also served by mail copies of Notice of Sale and Hearing on thirty-four (34) companies that AMP identified as being within its industry and which AMP states that it believes comprise the likely pool of potential purchasers of its assets. With the Notice of Sale and Hearing to this group, AMP's counsel included a letter explaining that the Court would conduct a hearing on the proposed sale on April 28, 1999, that the notice was provided in the event that the recipient might be interested in submitting a competing bid for the assets, and that AMP would send more information, including a copy of its Plan and Disclosure Statement, to the recipient, if that party would like to have such information.

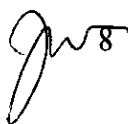
A handwritten signature in black ink, appearing to be "JW-T", is located at the bottom center of the page.

17. No offers to purchaser AMP's assets were filed or made other than Biosensor's offer. Mr. Moyer testified that AMP had received several inquiries regarding the sale, and that he had been advised that one or more companies were considering whether or not to make an offer for the assets, but AMP received no other offers for the assets.

18. Under AMP's current financial circumstances, AMP is not able to continue operating its business through the time needed to conduct a confirmation hearing on AMP's proposed Plan. It appears that, absent a sale of the assets at this time, AMP will have to terminate its operations.

CONCLUSIONS OF LAW

AMP maintains that its proposed sale to Biosensor is necessary to prevent the closing of AMP's business and the substantial loss of the value of its assets. The proposed sale is a pre-confirmation sale, and a pre-confirmation sale of all or substantially all of the assets of a Chapter 11 estate requires a heightened review by the Court. The proponent of the sale, whether it be a debtor-in-possession or a trustee, must show that proper justification exists for the sale to be made prior to confirmation of a plan, and that proper notice of the proposed sale has been provided to the creditors and parties in interest in the case. The sale proponent must satisfy the "sound business purpose" test. See In re Taylor, 198 B.R. 142, 156-157 (Bankr. D.S.C. 1996). AMP presented evidence at the hearing on April 28, 1999, and in its filings made relating to the sale, to address the required elements of the sound business purpose test. The Court notes that the relationship of the parties and the timing of the sale give rise to concerns about the sale. However, based upon the provisions preserving all causes of action for the estate (other than actions for collection of accounts receivable), and, upon AMP's satisfaction of the sound business purpose test, the Court concludes that the sale should be authorized.

A handwritten signature in black ink, appearing to be "JW8", located at the bottom center of the page.

The sound business purpose test for approval of a pre-confirmation sale has four elements. The debtor-in-possession or trustee must prove that: (1) a sound business reason or emergency justifies a pre-confirmation sale; (2) the sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable. In re Taylor, 198 B.R. 157; In re WBO Partnership, 189 B.R. 97, 102 (Bankr. E. D. Va. 1995) (explaining and adopting the sound business purpose test); and In re The Lady H. Coal Company, Inc., 193 B.R. 233 (Bankr. S. D. W. Va. 1996) (also adopting the sound business purpose test).

With regard to the first element of the test, AMP asserts that a sound business reason for the pre-confirmation sale of the assets exists in this case because: (1) both prior to and after the filing of this case, AMP has suffered significant operating losses; (2) these operating losses have eroded, and would further erode, AMP's assets; (3) AMP lacks a source of funding to continue operations beyond the period allowed for its proposed sale of the assets to Biosensor; (4) the unresolved status of AMP's distressed financial situation has resulted in reduced sales, thereby increasing operating losses; and (5) the time needed to obtain confirmation of the Plan would result in a "fire sale" liquidation of the assets. AMP states that, by proceeding with a sale at this time, AMP hopes to realize enough value from the assets to make a payment to unsecured creditors.

AMP has presented evidence to support these assertions. The value of AMP's assets has decreased during this case, and, although the secured indebtedness to Emergent has also decreased, the reduction in assets - accounts receivable - has the effect of reducing available funding under the Emergent loan to a level insufficient to sustain continued operations by AMP. It appears that AMP has no other sources of funding, and that AMP would soon close its operations if the assets are not sold now. In such event, AMP's assets would lose their going concern value and would likely have

A handwritten signature in black ink, appearing to be "JW" with a flourish at the end.

significantly reduced value for the estate. Although it is uncertain whether the \$50,000.00 payment by Biosensor for AMP's unsecured creditors is sufficient to provide a payment to unsecured non-priority creditors, the closing of AMP's business operations would result in even less value from those assets to be sold.

In reviewing the second element of the sound business purpose test, these same circumstances lead to the conclusion that the sale has been proposed in good faith.³ Mr. Moyer testified at length concerning AMP's assets and liabilities, its current financial situation, the manner in which the sale price to Biosensor had been determined, and the analysis made of likely values for the assets under alternative means of selling AMP's assets. He also testified concerning the information provided to other potential purchasers of the assets, including a meeting with Freeman the week prior to the hearing. The Court concludes that the sale is proposed in good faith.

The third element of the sound business purpose test requires that adequate and reasonable notice of the sale has been provided to interested parties. Copies of the Notice of Sale and Hearing, and notice of the Plan and the Disclosure Statement were served upon the creditors, shareholders and parties in interest by mail on March 26, 1999. Accordingly, the creditors and shareholders received notice and information about the sale approximately thirty (30) days prior to the hearing on it. As a means of reaching potential purchasers for the assets, AMP compiled a list of thirty-four (34) companies in AMP's business as comprising the likely pool of potential purchasers of AMP's assets. Mr. Moyer described these companies as "competitors" of AMP. AMP provided notice and information concerning the proposed sale to these companies on April 12, 1999. This second form


³ This conclusion is not the same as a finding that Biosensor is a good faith purchaser under 11 U.S.C. §363(m). Given the relationship of the parties and the timing of the sale, such a finding would not be appropriate in this case. The Court makes no finding on whether Biosensor is or is not a good faith purchaser under 11 U.S.C. §363(m).

A handwritten signature in black ink, appearing to be "JM" followed by a flourish and the number "10".

of notice, when added to the notice to creditors and shareholders at the beginning of the case, constitutes adequate and reasonable notice of the sale to interested parties.

The final element of the sound business purpose test is the required showing that the purchase price is fair and reasonable. As noted above, Mr. Moyer testified at length concerning the valuation of assets and the manner in which the purchase price to Biosensor was determined. Mr. Moyer also testified concerning AMP's estimated values for the assets if sold to another purchaser. It appears that the sale price to Biosensor approximates AMP's adjusted "book" value for the assets. It should be noted that despite notice of the sale to approximately 2,000 creditors, shareholders and parties in interest, and the separate notice to the thirty-four (34) companies in AMP's business, no other offers were made for the assets. Freeman, who is both a shareholder and a potential purchaser of the assets, objected to the sale but declined to make an offer for the assets at this time. Accordingly, the Court concludes that the purchase price is fair and reasonable in this case.


The United States Trustee has stipulated that in its view AMP has satisfied the sound business purpose test for approval of the pre-confirmation sale to Biosensor. Although the Court has some degree of discomfort in authorizing a pre-confirmation sale to a related party at this early stage in this case, the circumstances warrant the sale. In authorizing the sale, the Court relies upon, and incorporates as a condition to the sale, the provision that, other than actions for the collection of accounts receivable, all causes of action existing at the commencement of this case and/or accruing after the filing of this case are excluded from the sale, and that such causes of action are expressly reserved for the benefit of the bankruptcy estate or any party with standing under applicable law and that no release is given to Biosensor or any of the related parties by or in connection with the sale or events leading up to it. On this basis, the sale to Biosensor is authorized.

A handwritten signature in black ink, appearing to be the initials 'JM' followed by a stylized flourish.

CONCLUSION

For the foregoing reasons, it is ORDERED, ADJUDGED AND DECREED that AMP is hereby authorized to sell its assets, excluding any and all causes of action other than actions for the collection of accounts receivable, to Biosensor pursuant to 11 U.S.C. §363(b)(1) upon the terms discussed hereinabove, and that such sale shall be free and clear of all liens, encumbrances and interests, except for those secured claims and liabilities which are expressly assumed as a part of Biosensor purchase price for the assets, pursuant to 11 U.S.C. §363(f).

AND IT IS SO ORDERED.



JOHN E. WAITES
United States Bankruptcy Judge

Columbia, South Carolina
May 10, 1999

JN -12

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:

MAY 10 1999

Beal for Emergent

UST

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

jcmt indur

VANNA L. DANIEL

Deputy Clerk