

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION**

In re	§	
	§	Case No. 08-10249
PROPEX INC.,	§	
PROPEX HOLDINGS INC.,	§	Case No. 08-10250
PROPEX CONCRETE SYSTEMS	§	
CORPORATION,	§	Case No. 08-10252
PROPEX FABRICS INTERNATIONAL	§	
HOLDINGS I INC.,	§	Case No. 08-10253
PROPEX FABRICS INTERNATIONAL	§	
HOLDINGS II INC.,	§	Case No. 08-10254
	§	
Debtors.	§	
	§	Chapter 11
	§	
	§	Jointly Administered Under
	§	Case No. 08-10249

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
PROPEX INC., ET AL. TO THE DEBTORS' SECOND MOTION FOR AN ORDER
EXTENDING THE EXCLUSIVE PERIODS DURING WHICH ONLY THE
DEBTORS MAY FILE A PLAN OF REORGANIZATION AND
SOLICIT ACCEPTANCES THEREOF**

The Official Committee of Unsecured Creditors (the "Committee") of Propex Inc. ("Propex") and its affiliated debtors and debtors in possession (collectively with Propex, the "Debtors"), by and through its undersigned counsel, hereby files this objection (the "Objection") to the Debtors' Second Motion for an Order Extending the Exclusive Periods During Which Only the Debtors May File a Plan of Reorganization and Solicit Acceptances Thereof (the "Motion"). In support of its Objection, the Committee respectfully submits the following:

PRELIMINARY STATEMENT¹

By the Motion, the Debtors seek to extend their Exclusive Periods for another two months to prevent the Committee or any other party in interest from filing their own plan of reorganization and to use their exclusive right to file a plan to gain negotiating leverage with respect to such parties. These tactics are inappropriate and are not permitted under the Bankruptcy Code and well-established case-law, especially when the debtor, as is the situation here, does not need any additional time to develop and file its own plan of reorganization. Specifically, and as set forth in further detail below, the Debtors do not need more time to prepare their business plan, which is finalized and was circulated to the Committee and the DIP Lenders more than two months ago. Nor do the Debtors need more time to determine what their footprint will be upon emerging from bankruptcy, as the Debtors have already decided which real property leases to assume and have already obtained an order from this Court authorizing such assumption. Indeed, as trumpeted in the Motion, the Debtors have even circulated a term sheet with respect to a plan of reorganization and did so more than six weeks ago. That the Debtors have subsequently failed to make any progress in advancing their proposal is further evidence that the Debtors should no longer have exclusive control over the plan process. Finally, if the Motion is denied, the Debtors will not be prejudiced in any way. They will still have the right, as they do now, to file a plan. The only difference is that other parties in interest will have that right as well. Accordingly, with only five months remaining until the DIP Financing expires,² now is

¹ Capitalized terms used in the Preliminary Statement are defined later in the Objection. Each capitalized term used in the Objection shall unless otherwise defined have the meaning ascribed to such term in the Motion.

² Under the DIP Financing Agreement, the “Scheduled Maturity Date” occurs on January 23, 2009 (i.e., in approximately five months); provided, however, that if prior to such date, the Court has commenced a confirmation hearing and certain other conditions are satisfied, then the Scheduled Maturity Date is extended another 90 days to April 23, 2009.

the time to level the playing field and allow any interested party to file a plan of reorganization so that creditors, whose recoveries are at stake, can decide the future of the Debtors.

COUNTER-STATEMENT OF FACTS

1. On January 18, 2008 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Eastern District of Tennessee, Southern Division (the "Court").

2. On January 25, 2008, the United States Trustee appointed the Committee.³ On January 30, 2008 and January 31, 2008, the Committee selected its legal and financial advisors.

3. The Debtors' exclusive periods (the "Exclusive Periods") under section 1121 of the Bankruptcy Code to (a) file a plan of reorganization and (b) solicit votes thereon were originally scheduled to expire, respectively, on May 19, 2008 and July 16, 2008. On May 14, 2008, this Court entered an order [Docket No. 409] (the "Extension Order"), extending the Exclusive Periods for an additional three months to August 21, 2008 and October 20, 2008, respectively. The instant Motion seeks to further extend these Exclusive Periods for an additional two months to October 20, 2008 and December 19, 2008, respectively.

4. On or about June 9, 2008, the Debtors circulated a "Draft Presentation of 5yr Business Plan" (the "Original Business Plan"). On or about June 24, 2008, the Debtors circulated an updated version of the Original Business Plan (the "Updated Business Plan") and together with the Original Business Plan, the "Business Plan").

³ The Committee consists of the following five entities: Wilmington Trust Company; Pension Benefit Guaranty Corporation; Total Petrochemicals USA, Inc.; BP Corporation North America Inc.; and SMH Capital Advisors, Inc.

5. On July 3, 2008, the Debtors circulated a presentation entitled, “Plan of Reorganization Discussion Materials” (the “Proposed POR Term Sheet”).

6. On July 29, 2008, the Debtors filed the instant Motion.

OBJECTION

I. Debtors Are Not Permitted to Exploit Their Exclusive Periods to Monopolize the Plan Process.

7. Section 1121 of the Bankruptcy Code expressly limits the amount of time in which a debtor has the exclusive right to file a plan of reorganization and solicit acceptances thereof. Specifically, section 1121 provides that, subject to certain exceptions, the debtor has the exclusive right to file a plan for only the first 120 days of the bankruptcy proceeding. 11 U.S.C. §1121(b). If the debtor files a plan within that 120 day period, then the exclusive period is extended to 180 days in order to provide the debtor with an opportunity to solicit acceptances of its proposed plan. 11 U.S.C. §1121(c). However, after these initial periods expire – as they did many months ago for the Debtors – a debtor may only extend its exclusive periods upon a showing of “cause” up to a maximum of 18 months after the petition date with respect to filing a plan, and up to 20 months after the petition date with respect to soliciting and obtaining acceptance of any such plan. 11 U.S.C. § 1121(d).

8. Congress expressly limited the debtor’s exclusive periods for good reason. See, e.g., In re Timbers of Inwood Forest Assocs., Ltd., 808 F.2d 363, 372 (5th Cir. 1987) (the limitations imposed under section 1121 “represent[] a congressional acknowledgement that creditors, whose money is invested in the enterprise not less than the debtor’s, have a right to a say in the future of that enterprise”), aff’d, United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988); see also Lake in the Woods, 10 B.R. 338, 344 (E.D. Mich. 1981) (“The legislative history of Section 1121 reflects congressional concern with . . . the unfair

leverage enjoyed by either debtors or creditors.”); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 231 (1977) (stating that the previous Bankruptcy Act gave “the debtor undue bargaining leverage, because by delay, [the debtor] can force a settlement out of otherwise unwilling creditors.”).

9. In addition, recent amendments to section 1121, limiting debtors’ exclusive filing period to 18 months, further underscore Congress’ mandate that a debtor not monopolize the plan process. According to Colliers, Congress amended section 1121 “to curtail the debtor’s control and the judge’s discretion in extending the debtor’s exclusive period.” 3 Lawrence P. King, Collier on Bankruptcy ¶1121.L.H[4] (15th ed. revised 2007); see also Ramsay McCullough, Comment, The 18-Month Time Limit on Debtor Exclusivity in Chapter 11 Bankruptcy and Its Effect on the Airline Industry, 16 J. Bankr. L. & Prac. 4 Art. 5, at 13 (2007) (same); H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 411 (2005).

10. Further, and especially important here, it is well-established that the debtor’s burden of proof becomes increasingly more difficult to satisfy each time it seeks to further extend its exclusive periods. See, e.g., In re Dow Corning Corp., 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997) (“the Debtor’s burden gets heavier with each extension it seeks as well as the longer the period of exclusivity lasts; and a creditor’s burden to terminate gets lighter with the passage of time.”) accord In re Mirant Corp., 2004 WL 2250986, *2 (Bankr. N.D. Tex. Sept. 30, 2004) (same). And as a general matter, “[e]xtensions are not to be granted neither routinely nor cavalierly.” In re McLean Indus., Inc., 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987); accord In re Curry Corp., 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992).

II. The Debtors Have Failed to Establish That “Cause” Exists to Support Any Further Extension of Their Exclusive Periods.

11. As noted, after the debtor’s initial exclusive periods expire, they can only be extended upon a showing of “cause.” 11 U.S.C. § 1121(d). While the Bankruptcy Code does not define what constitutes “cause,” courts in this jurisdiction and elsewhere generally rely upon the same set of considerations to determine whether cause exists, including the following factors:

- (a) the necessity of sufficient time to negotiate and prepare adequate information;
- (b) the existence of good faith progress toward reorganization;
- (c) whether the debtor has made progress in negotiating with creditors;
- (d) the length of time the case has been pending;
- (e) whether the debtor is seeking the extension to pressure creditors; and
- (f) whether unresolved contingencies exist.

See, e.g., In re Central Jersey Airport Servs., LLC, 282 B.R. 176, 184 (Bankr. D.N.J. 2002); In re Service Merchandise Co. Inc., 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000). The Debtors concur that the foregoing list is non-exhaustive, and “[s]ometimes certain factors are more important or persuasive than others, and sometimes one or more factors determine the particular result.” Motion at ¶ 11; see also In re Dow Corning Corp., 208 B.R. 661, 669 (Bankr. E.D. Mich. 1997) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229-30 (6th Cir. 1985)).⁴

12. As set forth in detail below, the foregoing factors demonstrate that the Debtors should not be granted a further extension of their Exclusive Periods.

⁴ Other factors used by courts include the size and complexity of the case, whether the debtor is paying its debts as they come due and whether the debtor has demonstrated reasonable prospects for filing a viable plan. See Motion at ¶11. The Committee does not address these factors in this Objection, nor does the Committee believe that the Debtors adequately address these factors in their Motion. The Committee hereby reserves all of its rights to argue that these factors do not support the relief requested by the Debtors.

A. The Debtors Have Had Sufficient Time to Negotiate a Plan of Reorganization and Prepare Adequate Information.

13. The Motion spends several pages lauding the efforts the Debtors have made to date in advancing these cases towards confirmation. See, e.g., Motion at ¶¶15-17. Indeed, the Motion even acknowledges that “the Debtors have already submitted a business plan and the concept for a plan of reorganization to the DIP Lenders and the Creditors Committee.” Motion at ¶15. However, upon closer inspection, these milestones support this Objection. That the Debtors have already submitted their Business Plan and term sheet for a plan of reorganization – and, indeed, did so months ago – demonstrates that (i) the Debtors’ operations are stabilized and the basic information necessary to formulate a plan already exists, (ii) the Debtors’ attempts to gain support from the creditors for their plan proposal have failed; and (iii) the only purpose served by an extension of exclusivity is to create leverage in the hopes of forcing creditors to accept the Debtors’ preferred plan of reorganization. With the basic information necessary to formulate a plan already complete, the playing field with respect to negotiations should be level – no party should be forced to negotiate over an inferior plan because it is their only option. With the DIP Financing set to expire in about five months, exclusivity needs to end so that other parties have a real chance to propose a plan before time runs out. The plan process should be monopolized no longer.

14. The Debtors also argue that they need additional time because they have not yet had sufficient time to review contracts for potential assumption or rejection. See, e.g., Motion at ¶7. This argument is equally suspect. The Debtors have already completed the overwhelming majority of their diligence because they have already determined which real property leases to assume, filed their motion to approve such assumptions, and their requested relief has been granted by the Court – facts which the Motion readily acknowledges. See id. Thus, the Debtors

have (perhaps mistakenly) already established the footprint they will assume when they emerge from chapter 11. While it may be true that the Debtors have not yet made a determination with respect to each of their executory contracts (other than their real property leases), it is fair to surmise that the Debtors are close in making this determination, or else they could not have responsibly locked themselves into a specific footprint post-emergence, let alone a finalized Business Plan more than two months ago. In any event, even if the Exclusive Periods are allowed to lapse, the Debtors will have more than enough time to make any final decisions about which remaining executory contracts should be assumed or rejected.

B. The Debtors Have Failed to Progress the Reorganization in Good Faith.

15. As set forth in the Committee's Motion for an Order Directing the Production of Documents and Authorizing the Taking of Deposition Testimony Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure, filed with the Bankruptcy Court on July 21, 2008 [Docket No. 494] (the "2004 Motion"), the Debtors have taken actions which are suspect in relation to the DIP Financing and which violated the DIP Order. There is no need to restate in this pleading the facts set forth in the 2004 Motion, except that they demonstrate that the Debtors have not consistently progressed these cases in good faith. Accordingly, the Court should not reward the Debtors with an exclusivity extension.

C. The Debtors Have Not Made Progress Negotiating With Their Creditors.

16. "One of the most important reasons for extending the debtor's period of exclusivity is to give the Chapter 11 process of negotiation and compromise an opportunity to be fulfilled, so that a consensual plan can be proposed and confirmed without opposition." In re All Seasons Industries, Inc., 121 B.R. 1002, 1006 (Bankr. N.D. Ind. 1990); see also In re Mid-State Raceway, Inc., 323 B.R. 63, 67-68 (Bankr. N.D.N.Y. 2005) ("Exclusivity is intended to promote

an environment in which the debtor's business may be rehabilitated and a consensual plan may be negotiated. However, undue extension can result in excessively prolonged and costly delay, to the detriment of the creditors.") (quoting H.R.Rep. No. 103-835, 95th Cong., 2d Sess., at 36 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3344).

17. When plan negotiations fail to render a consensus, it is therefore appropriate to terminate exclusivity to rebalance the negotiating process. See, e.g., In re Mid-State Raceway, Inc., 323 B.R. 63, 70 (Bankr. N.D.N.Y. 2005) ("[Terminating exclusivity] simply returns the parties to a level playing field after the period of debtor control intended by Congress has expired."); In re All Seasons Industries, 121 B.R. at 1002 (same). Terminating a debtor's exclusive periods permits parties with a more objective view of the debtor's circumstances to file a plan. See, e.g., In re Lehigh Valley Professional Sports Club, Inc., Case No. No. 00-11296DWS, 2000 WL 290187, *4 (Bankr. E.D. Pa. Mar. 14, 2000) ("Shortening the debtor's exclusive period for filing a plan will permit any party in interest, including parties with perhaps a more objective view of the debtor's circumstances, to file a plan."); In re Crescent Beach Inn, Inc., 22 B.R. 155, 161 (Bankr. Me. 1982) (same).

18. Here, the negotiations between the Debtors and the Committee over the past several months have failed to produce a consensus. In fact, they have polarized the Lenders and the Committee to the point that negotiations between the parties are now virtually nonexistent. The Debtors' failure to develop a consensual plan is the product of a number of mistakes they have committed during these cases. First, certain actions by the Debtors have undermined creditor confidence in the Debtors' ability to bring this case to fruition (e.g., the foreign stock pledge issue and entering into new leases without notice and Court approval). Second, upon information and belief, the Debtors' Business Plan contains fundamental flaws, which appear

designed to lessen the value of the Debtors' enterprises and thereby deny unsecured creditors of any meaningful recovery. Third, and consistent with the Business Plan, the Debtors' Proposed POR Term Sheet is unconfirmable, as it undervalues the Debtors' assets, offers significantly less than fair recoveries to unsecured creditors, and assumes the Lenders have a 100% pledge of the Debtors' foreign stock, an assumption that the Committee believes is untrue. As a result, the Debtors can no longer operate as an honest broker between the Committee, the Lenders and other parties in interest. Indeed, the Debtors appear to have written off unsecured creditors in these cases and instead seem to be entirely beholden to the Lenders' demands. Consequently, there is little prospect at this time for a consensual plan of reorganization unless the negotiating dynamics are changed such that creditors are not being forced to make inequitable concessions because they are trapped by a DIP Financing that is set to expire in five months and the Debtors' monopoly with respect to proposing a plan of reorganization. The only hope to build a consensus is to level the playing field by allowing the Debtors' Exclusive Periods to lapse and thereby enable all parties in interest to submit competing plan proposals.

D. The Length of Time the Case Has Been Pending.

19. As set forth above, the Debtors have had more than enough time to file a plan of reorganization. In addition, since the DIP Financing is set to expire in five months, creditors will have no opportunity to propose a completing plan unless the Exclusive Periods are allowed to lapse at this time. This factor, therefore, does not support the Debtors' request for a further extension of the Exclusive Periods.

E. The Debtors Are Using Exclusivity For Improper Purposes.

20. It is well-established that debtors are not permitted to use exclusivity as a tactical device to pressure parties to consent to a plan they consider unsatisfactory. See, e.g., Century

Glove, Inc. v. First American Bank, 860 F.2d 94, 102 (3rd Cir. 1988); In re Hoffinger Industries, Inc., 292 B.R. 639, 643 (8th Cir. BAP 2003) (citations omitted); In re General Bearing Corp., 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992); In re Texaco Inc., 81 B.R. 806, 812 (Bankr. S.D.N.Y. 1988). In fact, this Court has previously denied a debtor's request to extend exclusivity in order to prevent the debtor from employing such tactics. See In re Media Center, Inc., 89 B.R. 685, 687 (Bankr. E.D. Tenn. 1988) (Hon. J. Cook) ("The Court announced it would not further extend the exclusivity period for purposes of allowing [the debtor and its affiliates] to cram down major creditors who had not accepted the debtors' plans.").

21. It is clear that the Debtors are attempting to use their Exclusive Periods for precisely the improper purposes described above. If the Motion is granted, other parties in interest will be barred effectively from filing their own plan until the Debtors' requested extension terminates in late October. By that time, however, the Debtors will default their DIP Financing Agreement, as they concede in their Motion, unless they have filed a plan and accompanying disclosure statement with the Court. Thus, at that time, they will be able to raise the specter of default and the attendant risk of liquidation to force creditors to accept a plan, which otherwise would be entirely unacceptable. It is precisely this kind of leverage and the ability to hold creditors hostage that Congress and the courts disapprove of. Thus, to prevent this proscribed scenario from unfolding, the Court should deny the Motion and thereby allow the Debtors and their creditor constituencies to negotiate from equal positions.

F. Whether Unresolved Contingencies Exist.

22. While the Committee concurs that a number of unresolved contingencies exist, many of these, including possibly the most important one – namely, the Putative Foreign Stock Pledge – are a product of the Debtors' own making. Certainly, the Debtors should not be

rewarded with a further extension of their Exclusive Periods as a result of contingencies and other problems for which they are themselves responsible.

III. Allowing the Exclusive Periods to Lapse Will Not Prejudice the Debtors.

23. The Debtors will not be harmed if exclusivity lapses. Courts have consistently rejected the notion that exclusivity should be extended solely to give debtors more time to file a plan. See, e.g., In re R.G. Pharmacy, Inc., 374 B.R. 484, 488 (Bankr. D. Conn. 2007) (“The fact that the debtor no longer has the exclusive right to file a plan does not affect its concurrent right to file a plan. Denying the motion only affords creditors their right to file a plan; there is no negative affect [sic] upon the debtor’s coexisting right to file its plan.”) (citations omitted) (emphasis original); In re Grossinger’s Assoc., 116 B.R. 34, 36 (Bankr. S.D.N.Y. 1990); In re Mother Hubbard, Inc., 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993) (holding that termination of exclusivity is not prejudicial to the debtor); In re Southwest Oil Co. of Jourdanton, Inc., 84 B.R. 448, 454 (Bankr. W.D. Tex. 1987).⁵ The risk that another party may file a plan while the debtors are developing their plan is a risk that Congress intended. See, e.g., In re All Seasons Industries, Inc., 121 B.R. 1002, 1005 (Bankr. N.D. Ind. 1990) (“The risk is, of course, that while it is developing its plan, another party in interest will file a plan. However, that is as Congress intended.”) (citations omitted); In re Southwest Oil Co., 84 B.R. at 454.

24. Here, the Debtors’ ability to engage in plan negotiations, even if the Court denies the Motion, is not prejudiced. If anything, the Debtors will benefit if their Exclusive Periods are not continued and other parties are allowed to propose competing plans of reorganizations. This

⁵ The fact that a debtor may wish to prevent creditors from interfering with its reorganization and proposal of a plan is not “cause” within the meaning of section 1121(d) to allow exclusivity to continue. See In re Parker Street Florist, 31 B.R. at 207.

rebalancing could very well help to jumpstart plan negotiations, which as set forth above, are currently moribund.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) deny the Motion in its entirety and (ii) grant the Committee such other relief as is just, proper and equitable.

Respectfully submitted this 15th day of August 2008.

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