UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: BKY 98-40721

CONSUMERS REALTY & DEVELOPMENT CO., INC., MEMORANDUM ORDER ALLOWING CLAIM NUMBER 23, IN PART

Debtor.

At Minneapolis, Minnesota, January 12, 1999.

The above-entitled matter came on for hearing before the undersigned on the Debtor's objection to Claim Number 23 filed by Sandra Goetze and Suburban Builders, Inc. Michael Meyer appeared for Consumers Realty & Development Co., Inc. (Debtor); Michael Iannacone appeared for Sandra Goetze and Suburban Builders, Inc. (Sandy, Suburban Builders, or Claimants). Having heard and considered the evidence, the arguments, and the briefs, I make the following:

FINDINGS OF FACT

1. Debtor was incorporated in 1973 by its sole shareholder, Steven Grohoski (Grohoski). Grohoski is Sandy's brother. Debtor is engaged in the real estate development business. Like many sole shareholders, Grohoski operated Debtor as his private property, with little regard for the niceties of corporate governance. Further, he kept the books and records of the company, paying little attention to the niceties of GAAP accounting.

2. Sandy and her husband Delbert Goetze (Delbert) owned Suburban Builders, a company engaged in the construction business. Precisely how much business the company actually did is not at all clear.

3. In January 1990, Suburban Builders advanced $52,500 to Debtor. In return, Debtor made and delivered its promissory note in the principal sum of $52,500 dated January 11, 1990, payable to Suburban Builders (Note 1). Note 1 was due on January 11, 1993 and bore interest at the rate of ten percent per annum. Shortly thereafter, Sandy and Delbert individually advanced an additional $205,000 to Debtor. In return, Debtor made and delivered its promissory note in the principal sum of $205,000 dated February 12, 1990, payable in specified monthly payments commencing March 12, 1990 with a balloon payment due on February 12, 1995 (Note 2). Note 2 was payable to "Delbert G. Goetze and Sandra J. Goetze, husband and wife" and bore interest at the rate of twelve percent per annum. Note 2 referenced the fact that it was to be secured by a mortgage on certain realty. Grohoski had promised

Sandy that he would secure the indebtedness with a mortgage, but he never did so. Accordingly, both Notes 1 and 2 were unsecured obligations of the Debtor. While Debtor, currently under new ownership, alludes to a close familial relationship between Sandy and Grohoski, as well as Grohoski's tarnished reputation for credibility in any matters concerning the new owners,(1) there is no evidence suggesting that Notes 1 and 2 were not, in fact, valid corporate obligations.

4. Debtor fell on hard times and, on February 13, 1992, not having paid Notes 1 and 2(2) or many other corporate business obligations, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the 1992 case). The predecessor to the law firm of Christoffel & Elliott, and more particularly Christopher Elliott, served as counsel for the Debtor throughout the case. On Schedule F, Debtor listed as fixed, liquidated, and undisputed a debt owed to "Sandra & Delbert Goetze, d/b/a Suburban Builders in the sum of $280,500.00." Schedule F listed a total of $803,480.41 unsecured, nonpriority creditors, including the debt to Sandy and Delbert and a $372,500 debt purportedly owed to Steven and Sharron Grohoski.

5. On July 3, 1992, while Delbert and Sandy were still married, Claim No. 19 was timely filed in the 1992 case. Grohoski prepared the Proof of Claim form. Sandy merely signed it in the box marked "Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)." The Proof of Claim identified "Sandra and Delbert Goetze" as the creditors owning the claim. In the box indicating where notices were to be sent, Grohoski had typed "Sandra and Delbert Goetze, d/b/a Suburban Builders, 19525 Jasper Terrace, Lakeville, Minnesota, 55044." The claim was in the amount of $280,500 and was classified as an unsecured nonpriority claim. Appended to the proof of claim were copies of Notes 1 and 2. As of February 12, 1992, the total amount due on Notes 1 and 2, with accrued interest, was approximately $297,000.00. The figure of $280,500 is, therefore, somewhat less than what was actually owed. Suburban Builders did not file a separate claim on its own behalf in the 1992 case.

6. Sandy and Delbert were divorced while the 1992 case was pending. Continuing a pattern of representing themselves in legal matters, Sandy and Delbert drew up their own dissolution papers, although an attorney was hired for the sole purpose of appearing at the final hearing. The dissolution agreement, signed in March of 1993, was drafted by Sandy. Among other things, it determined the rights of the parties to the couple's assets. In somewhat garbled language, it awarded to Sandy "the Steven Grohoski" and split the stock in Suburban Builders equally between

Sandy and Delbert. Sandy testified, however, that, garbled as the language was, Sandy was to be awarded any claim Debtor owed to Sandy and Delbert; she was to be awarded Suburban Builders, Inc.; and that "whatever" was owed to Suburban Builders at the time of the dissolution was to be split equally between Delbert and Sandy. Delbert's testimony was less than clear. He testified that he thought he was entitled to some part of whatever might be paid by debtor, though he was not clear how much and he was not too sure what he was owed or why. He and Sandy both further testified that the parties had agreed that Sandy would be responsible for taking whatever steps were necessary to pursue payment from Debtor.

7. Shortly following the dissolution of the Goetze's marriage, by order dated April 5, 1993, I confirmed Debtor's Second Plan of Reorganization. The plan provided that Class H would consist of "all Allowed Claims not specifically identified in any other class, the unsecured portion of any Allowed Secured Claim not specifically contained in any other Class, and the Claim of any other Creditor not specifically included in any other Class." These were, of course, general unsecured claims, including Claim No. 19. Class H also would include the claim of Steven and Sharron Grohoski in the sum of $382,500. The Plan further provided, however, that Steven and Sharron's claim would be waived entirely or subrogated. In earlier hearings on this case, Grohoski has agreed that he and Sharron were not to receive any payment on their claims unless and until all other unsecured creditors were paid 100% of their claims. Under the terms of the Plan, holders of Class H claims were to receive the total sum of $350,000; Grohoski was to contribute $12,000, payable on the effective date of the plan, with subsequent payments due as follows:

December 31, 1993	$25,000.00
December 31, 1994	$113,000.00
December 31, 1995	$35,000.00
December 31, 1996	$80,000.00
December 31, 1997	$85,000.00

Payments to each creditor were to be made on a pro rata basis according to the total amount of all Allowed Claims in the Class. The Plan went on to include specific provisions regarding default:

> If the Debtor is unable to make any one of the Scheduled Plan Payments to the Class H Creditors, the Debtor shall pay eighty (80) percent of the Net Cash Flow from the twelve (12) month period prior to the Scheduled Payment Date upon which the Scheduled Plan Payment cannot be paid to the Class H Claimants. Net Cash Flow

> is defined under Article I of the Plan of Reorganization. As described in Section VII of the Disclosure Statement the president of the Debtor is currently not paid a salary from the Debtor. To the extent there is sufficient cash derived from the post-petition operation of the Debtor, after plan payments, the president of the Debtor will be paid a salary as indicated in the Debtor's cash flow statements attached as Exhibit A. The amount of such payment of Net Cash Flow shall be determined within sixty (60) days after the Scheduled Payment Date. Any unpaid amount shall be added to the next Scheduled Plan Payment.
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> The Debtor will not be in default of its Plan Obligations unless the Debtor is unable to make at least eighty (80) percent of the Scheduled Plan Payments on two consecutive scheduled payment dates. Notwithstanding the previous sentence, it shall be an Event of Default if the Debtor does not make the Scheduled Plan Payment on December 31, 1997.
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> Upon entry of the Order of Confirmation, the timely payment of Plan Obligations shall constitute the only payment obligation of the Debtor to creditors and interest holders.

The Plan made no explicit or implicit provision for payment of interest on the amounts due to Class H claimants. It did provide that an event of default would be deemed to have occurred "if the Debtor fails to make a Scheduled Plan Payment on account of a Plan Obligation . . . , thirty days after receipt by the Debtor of written notice of Default." Until such notice of default had been sent by certified mail, a creditor was not entitled to enforce Plan obligations in state or federal court.

8. The Debtor did not object to Claim Number 19. It did object to several other claims. As a consequence of an omnibus order dated June 3, 1993, issued after Debtor objected to a long list of claims, the total amount of allowed Class H claims in the 1992 case was $441,164.84.(3) Accordingly, pursuant to the provisions of the Plan, creditors in Class H were entitled to be paid 79.33542% of their allowed unsecured claims. Applying this percentage figure, Claim Number 19 was entitled to be paid $222,535.85.

9. Following confirmation, Debtor made only sporadic and selective payments to creditors. Apparently, Grohoski basically chose to ignore the

terms of the confirmed Plan of Reorganization. He was strapped for cash, paid whomever he thought he needed or wanted to pay, and paid some creditors in full in spite of the fact that they were only entitled to be paid less than 100% of their allowed claims in the 1992 case. For example, the Debtor's C.P.A., who continued to provide service, was paid in full. Debtor failed and refused, however, to pay the administrative expense claim of Christoffel & Elliott. The history of the dispute over ownership of Debtor which resulted from the failure to pay Christoffel & Elliott is chronicled in my prior order of October 14, 1998, which has been incorporated in this order.(4) Suffice it to say that Christoffel & Elliott obtained a judgment against the Debtor for unpaid fees. On February 14, 1994, it purchased all of the shares of the Debtor at a foreclosure sale; on March 15, 1994, it took action to officially remove Grohoski from any position with the Debtor; and for four years thereafter a legal battle raged between Christoffel & Elliott and Grohoski over ownership and control of the Debtor. During those four years, over the opposition of Christoffel & Elliott, Grohoski continued to operate the business of the Debtor and to control its books and records, as well as the payments it made to creditors. In early 1998, a state appellate court finally declared Christoffel & Elliott to be the rightful owner of the company, nunc pro tunc.

10. As indicated, between April 4, 1993 and early 1998, rather than making scheduled payments under the plan in the 1992 case, Grohoski had Consumers pay only selected creditors with claims in the 1992 case. At Sandy's insistence, four separate checks were issued on Debtor's checking account:

Date	Payee	Amount	Memo
May 17, 1995	Delbert Goetze	10,000	"part pay. Note pay (Sub.Bldrs) dated 9/14/94"
May 18, 1995	Sandra Goetze	10,000	"prin. red. Int. dtd 9/1/94 (Sub. Bldrs)"
May 22, 1995	Sandi J. Goetze	5,000	"Part.prin.pay.Int. dtd 9/1/94 Sub. Bldrs."
Oct. 1, 1996	Delbert G. Goetze	4,000	"Part int. pay (pre-pet)"

While at times during this claims objection dispute there was some question about whether

Delbert had received the last payment, neither Delbert nor Sandy ever contested receiving the first three listed payments. Sandy testified she understood these payments were to be applied against Suburban Builders' pre-petition debt, i.e., Note 1; Delbert didn't have much of a clue, although he thought he was owed some money; Grohoski did not testify; and Debtor's current management was not in control of the books when the payments were made and thus had no first-hand knowledge of what the payments were supposed to be for. No explanation was offered for the memo notations and they cannot be deciphered without oral explanation. No documentary evidence was introduced to support Sandy's testimony.

11. These four payments did not satisfy Sandy. She continued to press Grohoski for payment, and she has testified that he kept promising the debt would be paid, presumably when Debtor had the wherewithal to make payments. In October, 1997, counsel retained by Sandy (not purporting to represent Delbert) gave notice of default under the 1992 Plan, although, when asked, he was unable to specify the precise amount owed to her. On January 4, 1998, Sandy joined with two other creditors to file an involuntary Chapter 7 petition against Debtor (the 1998 case). She listed her claim as $265,500, a sum which is reached by subtracting the two payments she admits receiving ($15,000) from the allowed claim in the 1992 case ($280,500). The case was subsequently converted to Chapter 11, an Order for Relief was entered on February 5, 1998, and a Plan which will pay unsecured creditors 100% of their allowed claims, plus interest,(5) was confirmed.

12. On July 17, 1998, Claim Number 23, signed by Michael J. Iannacone, for Claimants "Sandra Goetze and Suburban Builders, Inc." was filed in the sum of $366,531.89 as an unsecured nonpriority claim. Attached to the claim form is this explanation:

> This claim arises from two promissory notes, one dated February 12, 1990 in the amount of $205,000.00 and a second note dated January 11, 1990 for $52,500.00. The balance of each note as of the first bankruptcy petition filing date, February 12, 1992 was $202,263.45 and $63,460.27. A claim was erroneously filed in the wrong amount of $280,500.00. The claim in the amount of $280,500.00 was allowed in the first bankruptcy case. It is claimant's position that the confirmation of the first case was obtained by fraud and, as a result thereof, the claim against the debtor continues based upon the pre first bankruptcy petition promissory notes, that is $205,000.00 plus 12% interest of $52,500.00 and 10%

> interest from the date of each note. Attached is an itemization of the amount of the claim, if interest is only allowed at $280,500.00 at zero interest, 6% statutory interest or the judgment interest rate.

No documents were appended in support of the claim. There was no specificity regarding the "fraud" allegation. The appended calculation did show that the $366,531.89 claim amount is arrived at by calculating interest at 6% on $280,500.00 from February 12, 1992 to February 5, 1998, giving credit for the $25,000 in payments admittedly made in May 1995, and ignoring the last $4,000 payment in 1996 while noting that "Debtor may claim additional $4,000 was paid in 1996." There is an alternative calculation for a claim on a much higher amount if the alleged "fraud" upsets the plan and the 1992 case is ignored entirely.

13. Debtor has objected to Claim No. 23 on three basic grounds:

a. Amount: Debtor claims that the claim is, at most, allowable in the amount of $193,535.85. This figure is arrived at by subtracting $29,000 in postconfirmation payments from the figure arrived at by adjusting Claim Number 19 ($280,500) down to $222,535.85 ($280,500 x .7933542).

b. Interest: Debtor asserts that it did not agree to pay interest on the allowed claims in the 1992 case and no statute or other rule of law would support a claim for payment of interest.

c. Ownership: Debtor asserts that Suburban Builders has no claim against the Debtor that survives the discharge order in the 1992 case. It further asserts that Claim Number 23 is owned jointly by Delbert and Sandy. Since Delbert did not file a claim in this case and Sandy filed a claim purporting to represent him without complying with Rule 2019, Debtor asserts the entire claim should be disallowed, or at most she should be entitled only to $96,767.94, that is 50% of $193,535.85.

CONCLUSIONS OF LAW

A. Burden of Proof

A proof of claim filed in a bankruptcy proceeding is deemed allowed unless a party in interest objects. 11 U.S.C. Section 502(a) (1994); see Gran v. IRS (In re Gran), 964 F.2d 822, 827 (8th Cir. 1992); In re Oriental Rug Warehouse Club, Inc., 205 B.R. 407, 409 (Bankr. D. Minn. 1997). A properly filed proof of claim constitutes prima facie evidence of the validity and the amount of the claim. Fed. R. Bankr. P. 3001(f); see Oriental Rug, 205 B.R. at 409. If an objection is filed, the objector must come forward

with evidence rebutting the claim or the claim will be allowed. See Gran, 964 F.2d at 827; Oriental Rug, 205 B.R. at 410. However, if the objecting party produces such evidence, the burden of proof shifts to the claimant to produce evidence of the validity of the claim. See Gran, 964 F.2d at 827; Oriental Rug, 205 B.R. at 410. "In other words, once an objection is made to the proof of claim, the ultimate burden of persuasion as to the claim's validity and amount rests with the claimant." Oriental Rug, 205 B.R. at 410 (citing In re Harrison, 987 F.2d 677, 680 (10th Cir. 1993); In re Allegheny Int'l, Inc., 954 F.2d 167, 173-74 (3rd Cir. 1992)). Debtor has met its burden, which shifts the burden to the Claimants. Each must prove by a preponderance of the evidence that it holds an enforceable claim against the Debtor and the amount of that claim.

B. Issue No Longer in the Case

Before addressing the issues that remain in dispute, one matter needs clarification. This is the assertion that, because confirmation of the Plan in the 1992 case was obtained fraudulently, the Plan can be ignored. This issue seems to have been abandoned by Claimants but, in an abundance of caution, I will briefly explain why it is meritless.

When pressed to explain their position, Claimants asserted their view in a Response to Debtor's Objection:

> Article II of the confirmed Plan provides that the general administrative expenses would be paid in full upon confirmation of the plan. This is obviously false since the failure to pay the administrative expenses, particularly those payable to CE&A, resulted in the chaos concerning the ownership of this corporation since 1994 through 1997. Page 11 of the confirmed Plan provides that Steven G. Grohoski should make the first payment in the amount of $12,000 to Class H creditors. Said payment was not made ever and was not made on the effective date.

The Claimants went on to charge that, because Christoffel & Elliott was counsel for the Debtor in the 1992 case, and Debtor didn't pay its obligations under the 1992 Plan, Debtor (now owned by Christoffel & Elliott) should be estopped to object to claims allowed in the 1992 case.

This is, of course, a meritless argument, and it was not pressed in the brief submitted by Claimants prior to the hearing or in its post-trial letter briefs. Quickly and cleanly, even if fraud had occurred in obtaining confirmation of

the plan, it is well beyond the 180 day limitation period for vacating the confirmation order issued on April 5, 1993. See 11 U.S.C. Section 1144. Moreover, when fleshed out on the merits, the claim of fraud is totally without basis. Failure to pay obligations incurred under a plan of reorganization, without more, is simply not a basis for revoking a confirmation order. Moreover, counsel for Debtor is not a surety. Claimants' seasoned bankruptcy counsel had the good sense not to pursue this meritless assertion when the day for proof arrived.

C. The Amount of the Claim

The first factual issue to be addressed, then, is the amount to be allowed on the claim, exclusive of interest. At the hearing I indicated on the record that the allowed amount of the claim, exclusive of interest, and regardless of ownership, would be $193,535.85. That figure was arrived at by dividing $350,000 by $441,164.84; multiplying that percentage figure against the allowed amount of the claim in the 1992 case; and subtracting $29,000. This part of the opinion explains my reasoning, which is quite simple.

Claimants make two arguments: 1) they are entitled to 100% on the allowed Claim 19 in the 1992 case and 2) no deduction should be made for the $29,000 in payments made to Sandy and Delbert. In support of their first argument they point to the facts that, postconfirmation, Grohoski kept promising Sandy that Debtor would pay the full amount of the debt; that some creditors with claims in the 1992 case were paid more than the amount allowed based on the percentage factor; and that Debtor continued to carry the full amount of the claim ($280,500, with subsequent reductions as the $29,000 in payments were made in 1995 and 1996) on its internal, unaudited books and records. They also point to the fact that a Report filed by the Debtor signed by Christoffel & Elliott as counsel for the Debtor after confirmation, properly interpreted, stated that all allowed or allowable unsecured nonpriority claims would be paid in full.

In response, Debtor urges that the plan controls. I agree. The effect of confirmation of the Plan in the 1992 case was to discharge the entire preconfirmation debt and replace it with a new indebtedness as provided in the confirmed plan. In re Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985); see also Donaldson v. Bernstein, 104 F.3d 547, 554 (3d Cir. 1997). The Plan is a new contract that was binding on the Debtor, Sandy, and all other creditors. 11 U.S.C. Section 1141(a); Harstad v. First Am. Bank (In re Harstad), 155 B.R. 500, 510 (Bankr. D. Minn. 1993), aff'd, 39 F.3d 898 (8th Cir. 1994); see also Hillis Motors, Inc. v. Hawaii Automobile

Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993) (citing Official Creditors' Comm. of Stratford of Texas, Inc. v. Stratford of Texas, Inc. (In re Stratford of Texas, Inc.), 635 F.2d 365, 368-69 (5th Cir. 1981). In other words, except as set forth in the confirmed plan, any debts owed by Debtor to Sandy, Delbert or Suburban Builders which arose before April 5, 1993, were discharged and are now unenforceable as a matter of bankruptcy law. See, e.g., McSherry v. Trans World Airlines, Inc., 81 F.3d 739, 740 (8th Cir. 1996); Harstad v. First Am. Bank, 39 F.3d 898, 904 (8th Cir. 1994).

The claim of Sandra and Delbert Goetze was classified as a Class H claim under the confirmed plan. Class H claims included "all Allowed Claims not specifically identified in any other class, the unsecured portion of any Allowed Secured Claim not contained in any other Class and the Claim of any other Creditor not specifically included in any other Class." The treatment of Class H claims under the confirmed plan is not ambiguous. The holders of Class H claims were entitled to receive their pro rata share of $350,000 payable over five years. In this case, the total amount of Allowed Claims in Class H was $441,164.84. Accordingly, the $280,500 allowed claim of Sandy and Delbert was entitled to be paid only 79.33542% of its full amount, or $222,535.85. The holders of allowed Class H claims are bound by the plan. Their claims are still discharged, except as set forth in the plan, even though the Debtor failed to perform as agreed under the Confirmed Plan. See In re N.S. Garrott & Sons, 48 B.R. 13, 16 (Bankr. E.D. Ark. 1984); see also American Bank & Trust Co. v. United States (In re Barton Indus., Inc.), 159 B.R. 954, 961 (Bankr. W.D. Okla. 1993); In re Depew, 115 B.R. 965, 967-68 (Bankr. N.D. Ind. 1989).

The Claimants' responsive arguments are simply without support. Whatever Grohoski told his sister Sandy about his desire or even belief that he could pay her in full, if indeed he said that, is really irrelevant.(6) The plan is unambiguous and it controls. Statements Grohoski might have made which ignored the plan were 1) almost certainly made at a time when he had no authority to make them, since he had been removed from office,(7) 2) without binding effect as a contract, being unsupported by any consideration, and 3) at most, vague and unreliable.(8) How the company internally accounted for the debt postconfirmation might be relevant, except for the fact that the books were prepared by Grohoski who played fast and loose with the confirmed plan and with the books; they were never audited; and the CPA's compilation and the receiver's report based on such compilations is not reliable evidence of the debt, given the identity of the person making the initial entries.(9) Finally, Christopher Elliott adequately and ably

explained the entries in the postconfirmation report to my satisfaction.

In short, there is no basis in law or in fact for asserting that Claimants are entitled to the full amount of the claim filed in the 1992 case. Further, the $29,000 in payments made to Sandy and Delbert must be deducted from the amount owed. Claimants' evidence to the contrary consisted solely of Sandy and Delbert's self serving, after-the-fact testimony that these payments were really intended to be made on the discharged Suburban Builders debt evidenced by Note 1 and were not to be applied against the amount owed on the allowed claim in the 1992 case. I find these statements both unreliable and unpersuasive. They are not supported by documentary evidence, and they are clearly self serving. They do not comport with the fact that both Notes were attached to the Claim Number 19 and clearly merged together in one claim filed solely in the name of Sandy and Delbert. Both Sandy and Delbert were clear about wanting to get paid, but much of their testimony was not very clear. On this point, the more likely scenario is that Grohoski paid Sandy and Delbert on the debt he knew Consumers owed arising out of the 1992 case, that which had been allowed in the plan. Moreover, the checks were not made payable to Suburban Builders. Rather, they were made and given to Sandy and Delbert, separately. Finally, to the extent Grohoski kept books and records, Consumers recorded the payments as deductions against the overall combined debt.(10)

In conclusion the amount of the allowed claim in this case is $193,535.85 (($280,500 x .7933542) - ($29,000) = $193,535.85).

D. Interest is Not Allowed

Claimants also seek interest on the allowed amount of their claim. They assert in their post-trial letter briefs that interest began to accrue the date Debtor first missed a plan payment in the 1992 case and continued to accrue until the effective date of the 1998 Plan, or at least until entry of the order for relief in the 1998 case. I conclude that Claimants are not entitled to interest except to the extent it is provided for in the confirmed 1998 Plan.

The Bankruptcy Code provides for three categories of interest: (1) interest accrued prior to filing the bankruptcy petition (prepetition interest); (2) interest accrued after the filing of a petition but prior to the reorganization plan's effective date (pendency interest); and (3) interest to accrue under the reorganization plan (plan interest). Key Bank Nat'l Ass'n v. Milham (In re Milham), 141 F.3d 420, 422-23 (2d Cir. 1998); In re Liberty Warehouse Assocs. Ltd. Partnership, 220 B.R. 546, 548 (Bankr. S.D.N.Y 1998). I will deal with these three categories in

reverse order.

First, Debtor does not dispute, and the 1998 Plan provides, that Claimants are entitled to plan interest because the estate is solvent. Thus, Claimants are clearly entitled to interest on the allowed of amount of their claim following the effective date of the 1998 Plan. Of course, this conclusion has no real bearing on the ultimate issue here, that is, in what amount will their claim finally be allowed. The next two categories of interest relate directly to that issue.

Claimants are not entitled to pendency interest, i.e., interest between the filing of the involuntary petition and the effective date of the 1998 Plan. The Code generally does not allow for this type of interest because interest stops accruing upon the filing of the petition. See Milham, 141 F.3d at 423. The only exception to the general rule allows pendency interest for oversecured creditors. 11 U.S.C. Section 506(b) (1994). Since Claimants are not secured, let alone oversecured, they clearly have no right to pendency interest.

This leaves prepetition interest, i.e., interest between the effective date of confirmation of the Plan in the 1992 case and the filing of the involuntary petition in the 1998 case. Prepetition interest is generally allowable to the extent and at a rate permitted under nonbankruptcy law. Milham, 141 F.3d at 423. In other words, in order to obtain prepetition interest, Claimants must show that there is an independent statutory or contractual basis for its accrual. Id.; In re Pettibone Corp., 134 B.R. 349, 351 (Bankr. N.D. Ill. 1991) (allowing "[p]re-petition interest otherwise due as a matter of contract or law").

In looking for a contractual basis for interest, the confirmed plan in the 1992 case is the applicable "contract" as it is the current basis for Debtor's obligation to Claimants. In re Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985) ("The effect of confirmation is to discharge the entire preconfirmation debt, replacing it with a new indebtedness as provided in the confirmed plan."); Donaldson v. Bernstein, 104 F.3d 547, 554 (3d Cir. 1997); Hillis Motors, Inc. v. Hawaii Automobile Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993) (stating that a confirmed plan "should be construed basically as a contract"). It is clear that the 1992 Plan did not provide for pre-default interest, as it stated that "the timely payment of Plan Obligations shall constitute the only payment obligation of the Debtor to creditors and interest holders (emphasis added)." Nowhere in the Plan Obligations was provision made for interest to be made prior to or even in the event of default on Class H claims. In other instances where the Plan provided for interest on a claim, it did so clearly, as with every class except

Classes H and I. In addition, the Plan provided for reduced payments in the case of default, not for the triggering of an obligation to pay interest. Therefore, Claimants lack any contractual basis for asserting the accrual of pre-default or even post-default interest. See, e.g., Nelson v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.), 216 B.R. 175, 179 (E.D. Va. 1997) ("The absence of a clear entitlement in the Plan to a particular monetary benefit leads to the presumption that the writers of the Plan did not intend to bestow it upon claimants. The burden thus is on the Claimants seeking to locate a financial remedy in the Plan to convince the Court it both can and must be found there."); see also, Clapp v. Norwest Bank Hastings, N.A. (In re Clapp), 57 B.R. 921, 926 (Bankr. D. Minn. 1986) ("There is nothing in this Plan that suggests that the Debtor had any intention of paying post-petition interest or attorney's fees on Norwest's claim . . . . While a plan could provide for payment of post-petition interest and attorney's fees with respect to unsecured claims, that possibility alone is not a compelling reason to engraft such a provision onto a confirmed Chapter 11 plan that does not specifically so provide. Furthermore, in this case, the Plan on its face clearly precludes such interest and fees.")

Instead, Claimants assert a statutory basis for their claim to interest. Claimants maintain that Minnesota law provides for six percent interest on all legal indebtedness; and, thus, they should receive a six percent rate of interest on their unpaid claims. See Minn. Stat. Ann. Section 334.01 (1995). Debtor responds by arguing that 1) the state law upon which Claimants rely is inapplicable, and 2) in any event, the 1992 Plan preempts state law on the subject.

Minn. Stat. Section 334.01 provides that "[t]he interest for any legal indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing." The issue of whether this state law applies is a bit complex as applied to these facts. The authorities are clear. The right to interest is purely one of contract, requiring a promise to pay. E.g., American Druggist Ins. v. Thompson Lumber Co., 349 N.W.2d 569, 573 (Minn. Ct. App. 1984). The 1992 Plan did not provide for interest to be paid on sums which were due, and accordingly pre-default interest is not available. Lund v. Larson, 24 N.W.2d 827, 829 (Minn. 1946). To be distinguished, however, is post-default interest on a liquidated sum, i.e., interest as damages. Id. at 829. "The damage resulting from delay in making payment is the value of the use of the money, which is arbitrarily measured by statute at the legal rate of interest." Id. Accordingly, if the debt was in fact liquidated, Minnesota state law provides for interest at the legal rate,

calculated in accordance with the provisions of Minn. Stat. Section 334.01, from the date of default to the date the involuntary petition was filed.

The problem, however, is in determining when a default occurred for purposes of triggering the statute. It certainly wasn't the date the 1992 Plan was confirmed, or even the date Debtor first missed a payment. The Plan specifically provided that Debtor would not be considered in default "unless the Debtor is unable to make at least eighty (80) percent of the scheduled plan payments on two consecutive scheduled payment dates." The earliest that could have happened would have been December 31, 1994, triggering the commencement of accrual of damages for post-default interest sixty days thereafter. Almost certainly, however no default occurred under the 1992 Plan until "thirty days after receipt by the Debtor of written notice of Default," which did not occur until October 9, 1997. And, Debtor points out, the right to interest as damages in even that small amount may be further complicated by Minn. Stat. Section 549.09, Minnesota's pre- and post-judgment interest statute. This statute allows for prejudgment interest in certain instances and subject to certain exceptions. But, since Claimant's counsel admitted an inability to quantify the debt owed to his client (indeed, it has bounced from number to number during the course of this case), the application of this statute may be in doubt.

Happily, however, I need not decide these issues because federal bankruptcy law trumps any Minnesota Statute that can be construed to allow the interest Claimants seek. The Bankruptcy Code explicitly provides that "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . ." 11 U.S.C. Section 1141(a) (1994). Therefore, the terms of the 1992 Plan govern any award of interest to Claimants. Ocasek v. Manville Corp. Asbestos Disease Compensation Fund, 956 F.2d 152, 154 (7th Cir. 1992). It is also well settled that the Supremacy Clause dictates that when state law is contrary to federal bankruptcy law, the bankruptcy law provisions prevail. Id.; Jones v. Keene Corp., 933 F.2d 209, 214 (3d Cir. 1991). As a creature of federal law, the provisions of a confirmed plan trump conflicting state law. Jones, 933 F.2d at 214. Therefore, because the 1992 Plan did not provide for interest, Claimants cannot rely upon contrary state law for the assertion that they are owed interest on their claims.

In rare instances, interest has been allowed when a plan is silent on the subject. However, the 1992 Plan's provision that the "Plan Obligations shall constitute the only payment obligation" and the Plan's further specific provision for a remedy in case of default which

did not include payment of interest, effectively eliminate the possibility of interest. In any event, those cases that allow interest are distinguishable from the present case. For instance, in Sunbeam-Oster Co. v. Lincoln Liberty Ave., Inc. (In re Allegheny Int'l, Inc.), 145 B.R. 823 (W.D. Pa. 1992), the District Court affirmed an award of interest because, although the plan did not expressly permit or prohibit interest and the court could find no case law on point, it felt the equities supported an award of interest. However, the equitable considerations in that case were that the debtor had purposely delayed the claim resolution process in a way that unfairly prejudiced one creditor. Id. In contrast, the court in Nelson, 216 B.R. at 185, found that the equitable powers of the court could prompt the disallowance of prepetition interest based on a state statute, where the plan did not expressly allow or disallow interest to the complaining class of claimants but did specifically allow interest to other classes, and such allowance could have resulted in similarly situated claimants being treated unequally.

The Plan in this case is not actually silent on what should happen in the case of default as was the case in Allegheny. It specifically provided that timely principal plan payments were the creditors' quid pro quo and it specifically stated that, if Debtor couldn't make its scheduled Plan payments, Debtor's penalty was a temporary reduction in the amount of payments to be made. Most importantly, equity does not support awarding interest to the Claimants in this case. Grohoski favored certain creditors and Sandy and Delbert were among the chosen few to receive payments after the 1992 case. To award them interest when other creditors have yet to receive any payment would certainly be inequitable because it would sanction Grohoski's practice of ignoring the Plan and would treat Sandy and Delbert better than other similarly situated creditors.(11) Thus, even if state law provided a vehicle for awarding interest or the 1992 Plan could be seen as ambiguous on the allowance of interest, which I doubt, this court can and will disallow prepetition interest based on such a state statute.

E. Who Owns the Claim

This final factual matter is complicated in this case only by the fact that the parties were never very precise about what they were doing. I find and conclude that Sandy Goetze owns the claim and is entitled to be paid on it and that Suburban Builders has no interest in the claim.

1. The Claim of Suburban Builders, Inc.

While Suburban Builders is listed as a co-claimant on Claim Number 23, it has no enforceable claim against the Debtor. Whatever debts were owed to the corporation prior to April 5, 1993, have been discharged.

Under Section 502(a) of the Bankruptcy Code, even a claim that is filed and objected to must be allowed unless it falls within the exceptions noted in that Code section. 11 U.S.C. Section 502(a) (1994). The most significant, and broadest, exception is that relied on by Debtor. A claim may not be allowed if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. Section 502(b)(1).

As indicated earlier, Section 1141 of the Bankruptcy Code addresses the effect of confirmation of a Chapter 11 Bankruptcy Plan. While somewhat cryptic, this section capsulizes the effect of confirmation of a plan quite emphatically. First, in subsection (a) it provides that, with certain exceptions not significant here, "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim . . . of such creditor . . . is impaired under the plan and whether or not such creditor . . has accepted the plan." 11 U.S.C. Section 1141(a). Under subsection (b), unless otherwise provided in the plan or in the order confirming the plan, confirmation "vests all of the property of the estate in the debtor." Id. Section 1141(b). Subsection (c) generally voids liens or claims on property dealt with by the plan unless preserved in the plan or in the order confirming it. Id. Section 1141(c). And, most importantly for our purposes, subsection (d)(1) provides that:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, . . . whether or not--
>
> (i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;
>
> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan . . . .

Id. Section 1141(d)(1)(A).

The case law emphatically supports the proposition that, except where due process notice rights are implicated, Section 1141(d)(1) means

what it says. All preconfirmation claims are discharged unless provided for in the plan or in the order confirming the plan. See, e.g., McSherry v. Trans World Airlines, Inc., 81 F.3d 739, 740 (8th Cir. 1996) (claim for wrongful discharge arose preconfirmation; no claim filed; claim discharged); Sequa Corp. v. Christopher (In re Christopher), 28 F.3d 512, 515-16, 519 (5th Cir. 1994) (postpetition, preconfirmation creditor's claims discharged even though creditor was not listed or required to be listed as a creditor, filed no papers, and received no official notice, where creditor knew of bankruptcy and failed to file a claim); King's Terrace Nursing Home & Health Related Facility v. New York State Dep't of Social Servs. (In re King's Terrace Nursing Home & Health Related Facility), 184 B.R. 200, 202 (S.D.N.Y. 1995) (intentional failure to file a claim; prepetition debt discharged). As the Eighth Circuit clearly said in McSherry:

> With exceptions not relevant here, confirmation of a debtor's bankruptcy plan discharges debts arising prior to the date of confirmation. The Bankruptcy Code . . . defines "debt" as "liability on a claim." "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."
>
> Because the plan was confirmed on August 12, 1993, plaintiff's claim [which was not filed because the claimant believed it was not matured] was discharged on that date unless it arose after confirmation.

McSherry, 81 F.3d at 740 (citations omitted); see also Trapp v. R-Vec Corp., 359 N.W.2d 323, 328 (Minn. 1984). It should be noted that the creditor is bound by the plan and the debt discharged even if the debtor fails to perform on the plan. See, e.g., In re N.S. Garrott & Sons, 48 B.R. 13, 16 (Bankr. E.D. Ark. 1984); see also American Bank & Trust Co. v. United States (In re Barton Indus., Inc.), 159 B.R. 954, 961 (Bankr. W.D. Okla. 1993); In re Depew, 115 B.R. 965, 967-68 (Bankr. N.D. Ind. 1989).

Suburban Builders did not file a claim in the 1992 case. Claim Number 19 in that case was filed by Sandra and Delbert Goetze; Schedule F listed a debt due to Sandra and Delbert Goetze; and the claims register showed a claim filed by Sandra and Delbert Goetze. The mention of a "d/b/a" in the mailing box of Claim Number 19, in Schedule F, and in the claims register is not the equivalent of making Suburban Builders a creditor. The conclusion is clear. It was the parties'

intention to merge the obligations on Note 1 and 2 into one debt owed to Sandy and Delbert individually. As sole shareholders of the corporation they had every right to do that. Moreover, as indicated earlier, they later acted like Suburban was out of the picture. Thus, if they thought at all about what they were doing postconfirmation, they seemed to be thinking that confirmation created a joint personal debt to Sandy and Delbert. It was not until Suburban Builders filed a claim with Sandy in the 1998 case that they acted otherwise.

2. Sandy's Claim

Sandy has, however, established to my satisfaction by a preponderance of the evidence that she is the 100% owner of Claim Number 23; i.e., that Debtor owes Sandy the entire allowed amount of the claim. The factual finding is consistent with the supporting evidence that 1) while the claim was originally joint, Sandy was awarded the claim against Debtor by way of the garbled wording of the dissolution papers, and 2) Sandy pursued payment vigorously, filed the involuntary petition, and filed a claim that did not list Delbert as having an interest. The fact that Debtor made two payments to Delbert and that both he and Sandy testified that she was responsible for preserving his claims is some evidence of joint ownership, but it is not controlling. Simply stated, viewing the demeanor of both witnesses at trial and considering their lack of legal training when drafting their dissolution papers and when dealing with Sandy's scoundrel of a brother, I am not at all surprised that payments went to Delbert.

Debtor makes a number of responsive arguments in support of his position that Sandy owns an undivided half interest in the claim only and, at most, she can receive only 50% of the allowed amount of the claim, while Delbert, who did not file a claim, is out of luck.(12) I accept the fact that under state law one co-owner may not pursue collection on a claim without joinder of the other co-owner. I further accept a presumption of co-ownership while the parties were married and at the time Claim Number 19 was filed. But, this presumption is met and defeated by the couple's testimony about what they did with the claim: Delbert gave it to Sandy, by way of badly worded documentation to be sure. These were ordinary lay people crafting an ordinary lay deal with consequent messy results.

Ownership of a bankruptcy claim can be altered through a divorce decree, and that's what the evidence showed occurred. Fed. R. Bankr. P. 3001. Sandy should have noted the assignment when she filed the voluntary petition. Fed. R. Bankr. P. 1003(a). And, if she were actually filing a claim

on behalf of another, Sandy would have had to disclose that fact. Fed. R. Bankr. P. 2019. But, the penalty for failing to comply with Fed. R. Bankr. P. 1003(a) is not disallowance of a claim. And, since Sandy was representing only herself when filing the claim, Fed. R. Bankr. P. 2019 has no application.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Claim Number 23 filed on behalf of Suburban Builders is disallowed in its entirety.
2. Claim Number 23 filed on behalf of Sandra Goetze is allowed in the amount of $193,535.85.
3. Claimants' request to amend Claim Number 23 is disallowed.

_____
Nancy C. Dreher
United States
Bankruptcy Judge

(1) On October 14, 1998, I issued an order denying the claim of the Consumers Realty & Development Co., Inc. Profit Sharing Trust, Claim Number 24. To the extent it provides support for the findings in the case, it is incorporated in this Memorandum Order. That order contains certain reasons why I find much of what Grohoski is alleged to have said with respect to this case unbelievable.

(2) Debtor made only seven of the monthly payments on Note 2 between March 1990 and February 1992. No payments were ever made on Note 1.

(3) Apparently, at one point Claimants took issue with certain claims included in this calculation, but they presented no such evidence at the hearing.

(4) See footnote 1, supra.

(5) At this point, under new management and Grohoski having been actually ousted, Debtor is solvent.

(6) In prior proceedings I have noted his problem with credibility. See footnote 1, supra. It has been amply demonstrated that Grohoski, the eternally optimistic but bumbling real estate promoter, believed he could pay everyone in full, including himself, although the company was floundering. A promise made by an overly enthusiastic owner to pay creditors "what they are owed" does not rise to the level of a binding corporate obligation.

(7) Any admissions made prior to April 5, 1993 would mean nothing as the Plan would control. No admission following February 14, 1994 was binding on this Debtor.

(8) Sandy's testimony on this aspect of the case was itself quite vague, merely being to the effect that she regularly hounded her brother for payment, and he kept saying that she "was going to get all [her] payments no matter what."

(9) Here, too, I cannot ignore what I know from other aspects of this case. Steven Grohoski's claims were also carried on the books and records of the company, although they were clearly obliterated for all practical purposes in the Plan in the 1992 case. Moreover, when asserted in this 1998 case, they were settled for a pittance.

(10) The compiled financial records for the year ending December 31, 1996, for example, reflect $251,500 owing on the combined debt, $29,000 less than the amount of the allowed claim of $280,500.

(11) Throughout these proceedings, Claimants and their counsel have urged that Debtor should pay their claim because it is inequitable not to pay the bills. Superficially, this argument has some appeal. But, it's never "fair" for creditors not to get paid what they are owed because the Debtor doesn't have the money to pay and, in that sense, bankruptcy is an inherently unfair process. It is equity between similarly situated parties that bankruptcy law seeks to achieve, in recognition that the "pot" available for payment is only so large.

(12) After the conclusion of the hearing and without leave of court, Claimants attempted to amend their claim in order to include Delbert. Debtor responded that Delbert could not attempt to file a late proof of claim in this manner. Because I conclude that Sandy is the sole owner of the claim, there was no necessity to amend Claim Number 23 in order to deal with the ownership issue. The addition of Delbert's name to the proof of claim form does not affect the outcome of this claim dispute, as I have determined that Sandy owns the claim. The amendment at this late stage is disallowed.