

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Chapter 7

ASHLEY CREEK ACRES, LLP,

Bky. Case. No. 04-30777

Debtor.

OBJECTION TO TRUSTEE'S NOTICE OF SALE

TO: The United States Trustee, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415; Nauri Jo Manty, Bankruptcy Trustee, 3780 Burgundy Drive, Eagan, MN 55122; Ashley Creek Acres, LLP, 1906 Eleanor Avenue, St. Paul, MN 55116, and its attorney, Paul F. Leutger, 2536 Burnham Road, Minneapolis, MN 55416; and First District Association, Attn.: Clint Fall, 101 Swift Avenue South, Litchfield, MN 55355 and its attorney, Joel J. Dahlgren, 80 South Eighth Street, Suite 4200, Minneapolis, MN 55402-2205.

I. INTRODUCTION

Roger Imdieke, hereby submits this objection to the trustee's Notice of Sale of Cumulative Equity Retentions by First District Association (hereinafter referred to as "Retains") to First District Association (hereinafter referred to as "FDA"), as follows:

A. The proposed sale by the trustee is contrary to the duties of the trustee under 11 U.S.C. §704 as this sale is for a lower bid than the Objector's bid and not in the best interest of parties in interest.

1. The trustee, Nauri Jo Manty, initiated a bidding process on or after Roger Imdieke's initial written offer to purchase the Retains on March 29, 2004.

2. During the bidding process, after several bids, FDA offered to purchase said Retains for \$24,000.

3. Roger Imdieke made the highest bid offer of \$26,000 to acquire the right to payments of the Retains.

4. FDA's Articles of Incorporation do not preclude transfer of the rights to receive payments of the Retains, but only provide that shares of stock shall not be transferable, except with the approval and consent of the governing Board of FDA.

B. FDA is not a good faith purchaser required under 11 U.S.C. §363, as it upset the bidding process by asserting that the interest of the estate cannot be assigned or transferred without the approval and consent of the Governing Board of FDA, and declared itself the only party that may purchase the interest, and then submitted an offer below the fair market value of the assets/Retains.

C. The trustee has the power to transfer the Retains and/or assign the rights to payments of the Retains pursuant to 11 U.S.C. §704(1), to Roger Imdieke, the highest bidder, for the sum of \$26,000.

D. Alternatively, it is in the best interests of the estate and parties in interest that the Retains not be sold to FDA but, if the Retains cannot be transferred at fair market value to the highest bidder, then the trustee should hold open the estate and receive the Retains as distributed in the ordinary course of business by FDA.

II. FACTS

The Debtor filed a Petition for Relief under Chapter 7 of Title 11 U.S.C. on February 12, 2004. The Debtor operated a dairy, which sold milk to FDA. In its schedules, the Debtor lists, "Cumulative Equity Retentions by First District Association ...", as an asset valued at \$100.00 by the Debtor. The trustee lists in her Notice of Sale "possible payments" of the Retains by FDA commencing in the year 2009 and extending through year 2013.

By letter dated March 29, 2004, Roger Imdieke made an initial offer of \$15,000 to purchase all rights of Ashley Creek Acres, LLP, to receive payments from FDA. A true and correct copy of correspondence dated March 29, 2004 to Nauri Jo Manty containing such offer is attached hereto marked EXHIBIT A and incorporated herein by reference. Mr. Imdieke was then informed by the trustee that FDA had submitted a higher bid than Mr. Imdieke's initial bid to acquire the Retains. The final bids received by the trustee from the parties were as follows:

May 27, 2004 - First District Association -- increased its bid from \$20,000 to \$24,000,

and

June 3, 2004 - Roger Imdieke -- increased bid from \$22,000 to \$26,000.

A true and correct copy of the emails of offers to the Trustee are attached hereto marked EXHIBIT B and incorporated herein by reference.

On or about July 21, 2004, the trustee's office notified Roger Imdieke that FDA's attorney and manager notified the trustee that she cannot sell the Retains to nonmembers of FDA. Thereafter, the Trustee served out the Notice of Sale setting forth the proposed estate's sale of the Cumulative Equity Retentions by FDA to the Board of Directors of FDA for the sum of \$19,476.25. The trustee's office explained in a telephone conference with Mr. Imdieke's

attorney that the proposed sale price was arrived at by FDA's accountant, based upon some type of tax calculations.

Mr. Imdieke has requested that the trustee assign to him, for his bid offer of \$26,000, all rights to receive any payments made by FDA for the Retains. Mr. Imdieke has not requested to purchase the stock interest the estate acquired in FDA. FDA has recognized assignments of interests in the rights to receive payments by its stockholders. Security interests in Retains are regularly granted by stockholders and perfected by lenders. Approval by the Board of Directors of FDA is not required for such transfer or assignment.

III. LAW AND ARGUMENT

The Ashley Creek Acres, LLP bankruptcy estate is comprised of all the following property, wherever located, and by whomever held:

(1) ... in all legal or equitable interests of the Debtor in property as of the commencement of the case. 11 U.S.C. §541(a).

The Debtor's Cumulative Equity Retentions by First District Association, including all patronage equity credits, became property of the bankruptcy estate upon Ashley Creek Acres, LLP's filing its bankruptcy petition. See: Calvert v. Bongard's Creameries, 62 Br. 526 (Bankr. D. Mn., 1986).

The Trustee, after notice and hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate. 11 U.S.C. §363(b)(1).

The Trustee shall –

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest; ... 11 U.S.C. §704(1).

FDA's Articles of Incorporation do not restrict the transfer of patronage equity credits or, more importantly, the right to receive payments in the nature of patronage equity credits. The Articles of Incorporation simply provide, in Article VI,

Shares of stock shall not be transferable, except with the approval and consent of the governing Board of the Association. ... The Association shall have a first lien upon all shares of its capital stock and all patronage equity credits for any indebtedness of the holders or owners thereof, and shall have the right of offset for the discount value thereof against such indebtedness....

Although Sections 363(b)(1) and 704 do not expressly authorize the trustee to sell property contrary to the restrictions imposed by State and Contract Law, Calvert v. Bongard's Creameries, 835 F.2d 1222, 1225 (8th Cir., 1987), the facts in the present case do not restrict the

Trustee's ability to transfer or assign the rights to receive payments of Retains held by FDA. These facts distinguish this case from Bongard's, Id. Under Bongard's' Bylaws, patrons could not assign or transfer any interest in the revolving fund, without the consent of the Board of Directors. No such similar restriction exists in the FDA Articles provided to this objecting party by FDA's attorney.

Further, it is not necessary to transfer stock certificates for the Trustee to dispose of these potential future payments. The Trustee has an offer from Roger Imdieke to "purchase all rights of Ashley Creek Acres, LLP to receive payments from First District Association as patronage retains, dividends or similar interests." The estate can simply sell the right to receive payments to Mr. Imdieke under an Order of this Court approving said sale, and receive immediate payment therefor of Mr. Imdieke's bid price. The estate can then complete distribution of its assets at this time, deliver to Mr. Imdieke an assignment of the right to receive the future retain payments, and close the estate. Section 554(c) allows the court to order administration of the retains asset in this manner, and the estate may then be closed. 11 U.S.C. §554(c). Alternatively, the estate could remain open for the limited purpose of delivering any checks received in the future by the estate to Mr. Imdieke, without further cost or expense to the estate or creditors.

Our local courts have recognized the right to assign interests in patronage equities, such as the Retains involved in this case. Although Calvert v. Bongard's Creameries, Id., recognized the Creameries' specific Bylaw restrictions on the rights to transfer the patronage certificates, two subsequent cases recognize that the rights to receive payments of the patronage certificates at Bongard's could be transferred or assigned. In two opinions subsequent to Calvert, Judge Kressel recognized the validity of the transfer of an enforceable security interest in the patronage certificates of Bongard's Creameries. See Breuer v. State Bank of Young America (In re: Kohls), Bky. #4-86-849; Adv. #4-86-303 (1987), and State Bank of Young America v. Berquist (In re: Thaemert), Bky. #4-86-538; Adv. #4-88-150 (1988). In concluding State Bank of Young America had perfected security interests in patronage retains at Bongard's, in both cases, Judge Kressel states in Thaemert, distinguishing it from Calvert, as follows: "The issue before the Bankruptcy Court [in Calvert] was whether Bongard's Board of Directors could be compelled to consent to the trustee's transfer of the revolving funds account to a third party." Both the Bankruptcy Court and the 8th Circuit held that the Board was not obligated to recognize or consent to such a transfer. The additional statement, in both the Bankruptcy Court, and the 8th Circuit opinions, that the trustee could not transfer the certificates without the consent of Bongard's Board was an overly broad reading of Article VII, Section 5 of the Bylaws, and was dictum. In re: Thaemert, at 6. In this case, although the FDA Bylaws do not preclude transfer of the Retains, even if they did, it would not preclude the trustee from transferring the right to receive the payments or assignment of those rights to a third party.

FDA is not a "good faith purchaser" required under §363. See 11 U.S.C. §363(m) (providing that validity of sale to good faith purchaser cannot be disturbed on appeal, unless order authorizing sale has been stayed). FDA submitted a prior bid to the trustee for \$24,000 to acquire the same rights in interest that it is presently offering to buy for \$19,476.25. Further, FDA asserts that the sale cannot be consummated to any party without the consent of the FDA Board of Directors. Then, FDA says that it will only approve a sale to itself. These facts

establish that FDA has not bargained in good faith and cannot be a "good faith purchaser". Therefore, the Court should not approve the sale of the Retains to FDA.

Alternatively, if the Court concludes the estate cannot assign or transfer the right to payment of the Retains to a party other than FDA, then, the best interests of the parties in interest would require the trustee to await and receive payments and distribute them to creditors as and when received from FDA. This would insure that the estate receives fair value where liquidation and reduction to money by the estate prior to distribution cannot maximize the value of the property of the estate. In Four B. Corp. v. Food Barn Stores, Inc., 107 F.3d 558, 564 (8th Cir., 1997), the Eighth Circuit stated that during bankruptcy sales, "The court must also remain mindful of the ubiquitous desire of the unsecured creditors, and a primary objective of the Code, to enhance the value of the estate at hand." Siting, Metropolitan Airports Comm'n. v. Northwest Airlines, Inc. (In re: Midway Airlines, Inc.), 6 F.3d 492 (7th Cir., 1993). The court, in Four B., quoting Munro Dridock, Inc. v. M/V Heron, 585 F.2d 13, 14 (1st Cir., 1978), stating, "The policy [if inspiring confidence in sales under the supervision of the court] must be weighed against the purpose to be achieved by these judicial sales, which is to benefit the creditors and debtor." Four B. Corp. v. Food Barn Stores, Inc., Id. at 165. In this case, the best and highest offer was substantially higher than the proposed sale price. Further, it better represents the fair market value of the asset than the FDA offer being proposed. Therefore, it would appear that the interests of the estate would dictate the sale to Mr. Imdieke at his higher offer.

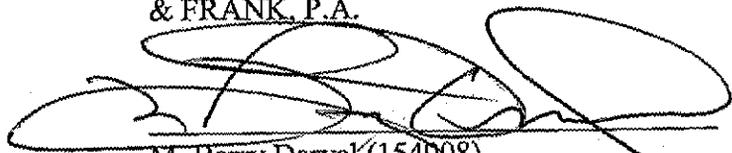
IV. CONCLUSION

For these reasons, Roger Imdieke respectfully requests that this Court deny the Trustee's request for sale of the Debtor's Cumulative Equity Retentions by First District Association to First District Association, and approve the assignment of all rights to receive payments from FDA as patronage retains or equity credits to Mr. Imdieke at his bid offer of \$26,000.

Dated: August 20, 2004.

Respectfully submitted,

DARVAL, WERMERSKIRCHEN
& FRANK, P.A.



M. Barry Darval (154908)
1601 East Highway 12
PO Box 1175

Willmar, Minnesota 56201
ATTORNEYS FOR DAIRY PROGENY
MANAGEMENT

AND

FOLEY & MANSFIELD, P.L.L.P.

Thomas J. Lallier (163041)
250 Marquette Avenue South
Suite 1200
Minneapolis, MN 55401
(612) 338-8788

March 29, 2004

MS NAUNI JO MANTY
BANKRUPTCY TRUSTEE
3780 BURGUNDY DRIVE
EAGAN MN 55122

Re: Ashley Creek Acres, LLP
Chapter 7 Bankruptcy No.: 04-30777

Dear Ms. Manty:

This represents Roger Imdieke. On behalf of Mr. Imdieke, I have been authorized to make an initial offer of \$15,000.00 to purchase all rights of Ashley Creek Acres, LLP to receive payments from First District Association, Litchfield, Minnesota, as patronage retains, dividends, or similar interests. This offer is conditioned upon and subject to the assignability of these rights by the estate and bankruptcy court approval thereof.

My client will not be available from Monday, March 29, 2004 to Sunday, April 4, 2004. I will be out of my office from Wednesday, March 31, 2004 until Sunday, April 4, 2004. You may still reach us by contacting my assistant, Diana Anderson, who will contact us by cell phone.

Should you have any questions, please call.

Very truly yours,

DARVAL, WERMERSKIRCHEN & FRANK P.A.

M. Barry Darval

MBD/dja

pc: Roger Imdieke

EXHIBIT A

Barry Darval

From: "Nancy L. Jaeckels" <NLJaeckels@riderlaw.com>
To: "Barry Darval" <barry@dwfpa.com>
Sent: Wednesday, June 16, 2004 10:17 AM
Subject: RE: Ashley Creek Acres Equity Retentions

Barry - I did forward this bid information on to Clint Fall and I am just waiting to hear back from him regarding First District's bid. If I don't hear today, I will contact Clint tomorrow and see if they are planning to go any further. Thank you.

Nancy L. Jaeckels
Trustee Administrator
Rider Bennett
333 South Seventh Street
Suite 2000
Minneapolis, MN 55402
612-335-3930

-----Original Message-----

From: Barry Darval [mailto:barry@dwfpa.com]
Sent: Thursday, June 03, 2004 10:32 AM
To: Nancy L. Jaeckels
Subject: Re: Ashley Creek Acres Equity Retentions

Roger Indieke has authorized me to increase our offer from \$22,000 to \$26,000.00 under the terms and condition set forth in my March 29, 2004, letter to Nauri Jo Manty for the ACA patronage dividends/retains at First District. Please let me know if this offer is accepted. Thank you.

----- Original Message -----

From: "Nancy L. Jaeckels" <NLJaeckels@riderlaw.com>
To: <barry@dwfpa.com>
Sent: Thursday, May 27, 2004 11:11 AM
Subject: Ashley Creek Acres Equity Retentions

> Barry - here is the bid I received from First District. Please let me know if your client would like to up his bid. Thank you,

> Nancy L. Jaeckels
> Trustee Administrator
> Rider Bennett
> 333 South Seventh Street
> Suite 2000
> Minneapolis, MN 55402
> 612-335-3930

>
>
>

> -----Original Message-----

> **From:** Clint Fall [mailto:CFall@firstdistrict.com]
> **Sent:** Thursday, May 27, 2004 10:33 AM
> **To:** Nancy L. Jaeckels
> **Subject:** FW:

>
>
>
>

> -----Original Message-----

EXHIBIT B
(4 pages)

> From: Clint Fall
> Sent: Thursday, May 27, 2004 10:21 AM
> To: 'nljaeckles@riderlaw.com'
> Cc: Allen Rothstein
> Subject:
>
> Hi Nancy,
>
> The First District Board has approved increasing our proposal from
> \$20,000.00 too \$24,000.00 for the old Ashley Creek Equity. Is it
> possible that we may receive some form of confirmation of other bids as
> we make adjustment to ours? This was a request from my Board.
>
> Have a good day,
> Clint
>

Barry Darval

From: "Nancy L. Jaeckels" <NL.Jaeckels@riderlaw.com>
To: <barry@dwfpa.com>
Sent: Thursday, May 27, 2004 11:11 AM
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Rider Bennett
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612-335-3930

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Have a good day,
Clint

Barry Darval

From: "Barry Darval" <barry@dwfpa.com>
To: "Nancy L. Jaeckels" <NLJaeckels@riderlaw.com>
Sent: Thursday, June 03, 2004 10:31 AM
Subject: Re: Ashley Creek Acres Equity Retentions

Roger Imdieke has authorized me to increase our offer from \$22,000 to \$26,000.00 under the terms and condition set forth in my March 29, 2004, letter to Nauni Jo Manty for the ACA patronage dividends/retains at First District. Please let me know if this offer is accepted. Thank you.

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From: "Nancy L. Jaeckels" <NLJaeckels@riderlaw.com>
To: <barry@dwfpa.com>
Sent: Thursday, May 27, 2004 11:11 AM
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> Nancy L. Jaeckels
> Trustee Administrator
> Rider Bennett
> 333 South Seventh Street
> Suite 2000
> Minneapolis, MN 55402
> 612-335-3930

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> **Sent:** Thursday, May 27, 2004 10:33 AM
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> **Cc:** Allen Rothstein
> **Subject:**

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> we make adjustment to ours? This was a request from my Board.

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> Clint

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re:

Chapter 7
Bky. No. 04-30777

Ashley Creek Acres, LLP,

Debtor.

UNSWORN CERTIFICATE OF SERVICE

I, M. Barry Darval, declare under penalty of perjury that on August 20, 2004, I mailed true and correct copies of Roger Imdieke's Objections to Trustee's Notice of Sale and Dairy Progeny Management, LLP's Objections to Trustee's Notice of Sale by first class mail, postage prepaid to the United States Trustee, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415; Nauni Jo Manty, Bankruptcy Trustee, 3780 Burgundy Drive, Eagan, MN 55122; Ashley Creek Acres, LLP, 1906 Eleanor Avenue, St. Paul, MN 55116, and its attorney, Paul F. Leutger, 2536 Burnham Road, Minneapolis, MN 55416; and First District Association, Attn.: Clint Fall, 101 Swift Avenue South, Litchfield, MN 55355 and its attorney, Joel J. Dahlgren, 80 South Eighth Street, Suite 4200, Minneapolis, MN 55402-2205, the last known addresses of said parties.

Executed on: August 20, 2004

Signed: /e/ M. Barry Darval
Darval, Wermerskirchen & Frank, P.A.
1601 East Highway 12
PO Box 1175
Willmar, MN 56201
(320) 235-1876
ATTORNEYS FOR DAIRY PROGENY
MANAGEMENT AND ROGER IMDIEKE