IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	**CHAPTER 11**
	)	
AEROSOL PACKAGING, LLC	)	**CASE NO. 06-67096-MHM**
a Georgia limited liability company,	)	
d/b/a AEROSOL SPECIALTIES,	)	
	)	
Debtor.	)	
	)	
BLUE RIDGE INVESTORS, II, LP,	)	**CONTESTED MATTER**
	)	
Movant,	)	
	)	
vs.	)	
	)	
WACHOVIA BANK, N.A. and	)	
AEROSOL PACKAGING, LLC,	)	
	)	
Respondents.	)	
	)	

RESPONSE OF WACHOVIA BANK, NATIONAL ASSOCIATION TO MOTION REQUESTING (I) DETERMINATION OF VOTING RIGHTS AND ALLOWANCE OF BALLOT CAST BY BLUE RIDGE INVESTORS, II, L.P. AND BRIEF IN SUPPORT THEREOF, (2) VALUATION OF COLLATERAL, AND (3) HEARING

COMES NOW, WACHOVIA BANK, NATIONAL ASSOCIATION ("Wachovia"), by and through its undersigned counsel, and hereby files its Response of Wachovia Bank, National Association (the "Response")[1] to the "Motion Requesting (I) Determination Of Voting Rights And Allowance Of Ballot Cast By Blue Ridge Investors, II, L.P. And Brief In Support Thereof,

[1] Wachovia only responds to the Motion as it relates to voting rights. Because Wachovia voted for the Plan (which provides Wachovia a fixed payout), Wachovia has no interest in the valuation issue or in the valaution of the Debtor in connection with confirmation of the Plan. Consequently, Wachovia does not respond to the balance of the Motion.

(2) Valuation Of Collateral, And (3) Hearing".(the "Motion"), filed on or about December 1, 2006. For its Response, Wachovia hereby respectfully represents as follows:

Background

1.

Aerosol Packaging, LLC, a Georgia limited liability company, d/b/a Aerosol Specialties (the "Debtor"), filed this case under Chapter 11 of title 11, United States Code (the "Bankruptcy Code") with this Court on June 21, 2006 (the "Filing Date"). The Debtor remains in possession under Sections 1107 and 1108 of the Bankruptcy Code.

2.

Wachovia was the Debtor's prepetition secured lender. Pursuant to the certain loan documents, Wachovia provided to the Debtor a revolving line of credit and certain amortizing term loan facilities. To secure all of the obligations of the Debtor to Wachovia, Wachovia held on the Filing Date a properly perfected, first priority security interest in and to all of the Debtor's assets including, without limitation, all of the Debtor's prepetition inventory, accounts receivable, equipment[2] and general intangibles.

3.

In connection with the initial provision of financing by Wachovia to the Debtor, the Debtor and Blue Ridge Investors II Limited Partnership, a Delaware limited partnership ("Blue Ridge") made in favor of Wachovia that certain Subordination Agreement, dated December 5, 2002 (as amended to date, the "Subordination Agreement"), pursuant to which, inter alia, Blue Ridge subordinated its claims and liens to those of Wachovia, agreed to turn over to Wachovia any and all recovery that Blue Ridge received from the Debtor until Wachovia was paid in full in

[2] Wachovia's interest in equipment may be subject to one (1) prior interest of another lender in one (1) particular piece of equipment.

cash, and provided Wachovia certain other rights with regard to Blue Ridge and the Debtor's obligations to it. A true and correct copy of the Subordination Agreement is attached to the Motion.

4.

The Debtor filed its chapter 11 petition herein on June 21, 2006. As of the Petition Date, the Debtor was obligated to Wachovia in the amount of $2,827,555.08, such sum being made up of approximately $2.46 million in principal and interest, approximately $245,000 in accrued statutory attorneys' fees (pursuant to O.C.G.A. § 13-1-11), $114,000 in accrued but unpaid forbearance fees, and certain late fees. Blue Ridge has filed a Proof of Claim in this case for amounts in excess of $3 million. The Debtor has recently filed an objection to Blue Ridge's claim, and has filed an Adversary Proceeding against Blue Ridge seeking, inter alia, to have such claim equitably subordinated and/or recharacterized as equity.

5.

On September 29, 2006, the Debtor filed its "First Amended Plan of Reorganization" and its associated "Disclosure Statement for Debtor's First Amended Plan of Reorganization" (the "First Disclosure Statement").

6.

Hearings on the adequacy of the First Disclosure Statement were held on November 8, 2006 and November 13, 2006. Immediately after the first of these hearings, counsel for Wachovia provided to counsel for Blue Ridge a copy of the Subordination Agreement, and informed counsel for Blue Ridge that Wachovia intended to enforce fully the provisions of the Subordination Agreement. That intention has been reiterated to Blue Ridge on numerous occasions since that time, including on the record in this case.

7.

On November 13, 2006, in response to pending objections, the Debtor filed a "Second Amended Plan of Reorganization" and associated "Disclosure Statement for Debtor's Second Amended Plan of Reorganization" (the "Second Disclosure Statement"). Further hearings were held on the Second Disclosure Statement on November 17, 20 and 21. Ultimately, on or about November 22, 2006, the Debtor filed a "Revised Second Amended Plan of Reorganization" (the "Plan") and a "Disclosure Statement for Debtor's Revised Second Amended Plan of Reorganization" (the "Disclosure Statement"). The Court approved the Disclosure Statement by Order dated November 22, 2006 (the "Disclosure Statement Order"), and the Disclosure Statement was sent out of all creditors entitled to same. In the Disclosure Statement Order, the Court fixed December 13, 2006, as the deadline for voting on the Plan and objecting to the Plan.

8.

Wachovia has voted its claim for the Plan in Class 2. Wachovia has also cast a ballot pursuant to the Subordination Agreement voting the Blue Ridge Class 3A claim for the Plan. After Wachovia filed the aforementioned Class 3A ballot, Blue Ridge appears to have filed a ballot in Class 5.

Response

9.

On December 1, 2006, Blue Ridge filed the Motion. Pursuant to the Motion, Blue Ridge seeks to avoid its contractual obligation under the Subordination Agreement to permit Wachovia, as agent for Blue Ridge, to cast the Class 3A vote on the Plan. The Motion should be denied because it is contrary to the provisions of the Subordination Agreement and the Bankruptcy Code.

10.

The relief sought in the Motion is entirely inconsistent with (and is a breach of)[3] the Subordination Agreement and the basic business deal between Blue Ridge and Wachovia, made in 2002 and reconfirmed twice in writing since that time (including as recently as July 2005). That business deal, as embodied in the Subordination Agreement, has at least two basic elements: (1) Wachovia is entitled to be paid in full in cash before Blue Ridge is entitled to any payment whatsoever on its claim (with the exception of interest paid to Blue Ridge prior to a default by the Debtor), and (2) Blue Ridge is not entitled to take any action against or with respect to the Debtor without to consent of Wachovia until Wachovia has been paid in full in cash (and will take certain actions when requested by Wachovia). The former aspects of the Subordination Agreement are the logical result of subordination, and are not disputed by Blue Ridge. The latter aspects of the Subordination Agreement are the standard requirement of a senior secured lender when requested by a borrower to permit junior secured financing, and reflect the reality that, as here, when there is a problem with the borrower, there is also likely to be a dispute between the parties as to the value of the borrower and the appropriate resolution of the borrower's difficulties. In that context, senior lenders require that the junior lender agree to "sit still", and permit the senior lender to address and resolve the issues with the borrower as they see fit without interference by the junior lender. Included in the obligation is an obligation to follow the instructions of the senior lender, to vote the junior claim as directed by the senior lender, and to permit the senior lender to vote the claim of the junior lender if the junior lender will not follow instructions.

[3] Wachovia reserves any and all of its rights and remedies against Blue Ridge under the Subordination Agreement including, without limitation, the right to recover from Blue Ridge any and all liabilities, losses, costs, expenses, and damages suffered by Wachovia as a result of the intentional and continuing breach of the Subordination Agreement by Blue Ridge.

11.

Although Blue Ridge complains that the enforcement of the clear terms of the Subordination Agreement would prevent it from protecting its interests, it does not deny that it made the agreement, or that permitting Wachovia to vote the Blue Ridge claim is what the agreement requires by its express terms. Blue Ridge is also not without remedy should it make a determination that the path for the Debtor preferred by Wachovia does not maximize the value of the Debtor or the amount of Blue Ridge's recovery. It can, at any time, simply pay Wachovia in full, thereby freeing itself of the agreement that it voluntarily made. Blue Ridge has, however, not chosen to take that path; instead, it asks this Court to recognize the fruits of its blatant breach of its own voluntary agreement.

12.

Blue Ridge bases its request entirely on a single reported case, In re 203 North LaSalle Street Partnership, 246 B.R. 325 (Bankr. N.D.Ill. 2000). The LaSalle case, which holds categorically that a "holder of a claim" may not delegate the right to vote that claim by agreement, is simply wrongly decided. The court in LaSalle bases its decision on the following reasoning:

a) 11 USC § 1126 says that a "holder of a claim" may vote the claim, and thus no one else may vote the claim.

b) Other courts have held that prebankruptcy agreements may not override contrary provisions of the Bankruptcy Code.

c) 11 USC § 510(a), which expressly renders prebankruptcy subordination agreements enforceable, relates only to the enforcement of the "subordination" contained such agreements, and does not require the enforcement of other, related rights.

d) Federal Rule of Bankruptcy Procedure 3018(c), although it permits "authorized agents" to vote a claim, would not permit an agent to vote a claim against the wishes of the principal.

e) Declining to enforce an express agreement regarding voting is consistent with permitting the subordinated creditor to participate in the negotiation and confirmation of a plan, and that is a desirable result.

None of the foregoing reasons in fact support the failure by the court in LaSalle to enforce the knowing, prepetition agreement by the subordinated creditor.

11 U.S.C. § 1126

13.

11 U.S.C. 1126(a) says that a "holder of a claim" may vote the claim. In so stating, it creates a right in the holder of a claim to vote its claim. It does not say, however, expressly or implicitly, that the holder cannot delegate or otherwise bargain those rights away to another. In fact, since the holder of a claim can be, and often is, an entity (as opposed to a living person), the "holder of the claim" in most circumstances must delegate the task to an agent of some kind. In most circumstances, that agent would be an employee, but there is nothing in the language of 11 U.S.C. § 1126(a) that prohibits the delegation of that right to someone else. The Federal Rules of Bankruptcy Procedure, recognizing that reality, implement it.. For example, Federal Rule of Bankruptcy Procedure 9010(c) permits a "creditor" to "perform any act not constituting the practice of law through an authorized agent, attorney in fact, or proxy." Federal Rule of Bankruptcy Procedure 3018, discussed below, is similar. There is simply nothing in the statute that prohibits the delegation or other transfer of the right to vote, as the applicable rules rightly recognize.[4]

[4] Wachovia's exercise of that right in a fashion that is apparently contrary to the current wishes of Blue Ridge is not surprising; absent a disagreement on how the claim should be voted, there would be no need to for an agreement to permit Wachovia to vote the Blue Ridge claim. The effect, if any, of such disagreement on the agency is discussed infra.

Prepetition Waiver

14.

The LaSalle Court correctly notes that courts have refused to enforce agreements that waive rights in bankruptcy. However, what it fails take proper account of is that courts have universally made that determination where the party waiving the rights was the debtor. That is, however, not the case here. Here the agreement is not between a third party and the debtor; it is between two sophisticated nondebtor parties. Further, the right to vote is not being waived; it is simply being transferred from one party to another. Nothing in any of the decided cases cited in LaSalle prohibits an assignment of bankruptcy rights of one nondebtor party to another.

11 U.S.C. § 510(a)

15.

It is interesting to contrast the LaSalle court's treatment of 11 U.S.C. §1126(c), discussed above, with that of its treatment on 11 U.S.C. §510(a). With respect to the former, the Court reads a benign sentence stating the unremarkable proposition that a creditor may vote it claim, and reads its silence as to the ability to delegate or bargain away that right to prevent anyone but the creditor from voting the claim, even if the holder of the claim expressly agrees in writing that such person may do so. By contrast, the Court takes a broad statement in 11 U.S.C. §510(a) that "a subordination agreement is enforceable in [a bankruptcy case] to the same extent that such agreement is enforceable under applicable nonbankruptcy law", and narrows it to say that only the subordination provisions of any such agreement are rendered enforceable in bankruptcy by that section. However, that is not what it says. 11 U.S.C. §510(a) simply states that such an agreement is enforceable between those parties in a bankruptcy case to same the extent enforceable elsewhere. As there is no indication that an agreement to delegate voting rights is unenforceable under applicable nonbankruptcy law, such an agreement should be enforced in a

bankruptcy case. See In re Curtis Center Limited Partnership, 192 B.R. 648 (Bankr. E.D.Pa. 1996)(holding that such an agreement is enforceable under 11 U.S.C. §510(a)).

FRBP 3018

16.

In addressing Federal Rule of Bankruptcy Procedure 3018(c), the LaSalle court recognizes that, like Federal Rule of Bankruptcy Procedure 9010 discussed above, Federal Rule of Bankruptcy Procedure 3018(c) permits a ballot to be signed by an agent of the holder. However, to make the rule consistent with its cramped reading of 11 U.S.C. §1126, the LaSalle court then limits the concept of agency as used in Federal Rule of Bankruptcy Procedure 3018 to its more commonly recognized form, where the agent acts at the direction of and for the benefit of the principal, and finds that the senior creditor must therefore not be an appropriate agent. Nothing in the use of the term in either rule suggests that the term "agent" as used in those rules is so limited. As this Court is no doubt aware, there are other types of agencies (for example, those coupled with an interest), in which it is anticipated from the outset (like here) that the agent will act in a way that is contrary to the then-expressed wishes of the principal.[5] This type of agency is, of course, entirely consistent with 11 U.S.C. §1126, so long as a this Court does not also read the silence on delegation in 11 U.S.C. §1126 as a prohibition.

Bankruptcy Policy

17.

Finally, the LaSalle court finds that its narrow reading of 11 U.S.C. §1126 is consistent with "bankruptcy policy" because permitting a junior creditor to vote its subordinated claim

[5] For example, with regard to nonjudicial foreclosure in Georgia, the lender is made the agent and attorney in fact of the borrower for the purpose of, among other things, executing the deed under power transferring title to the property at foreclosure. That agency is an agency coupled with an interest, and is an agency in every sense of the word. Like in this case as to voting, it is an agency for a limited purpose, and it permits the other party to take an action that the granting party/principal no doubt is opposed to at the time it is exercised.

notwithstanding its own voluntary agreement to the contrary would permit the junior creditor to have a "potential role in the negotiation and confirmation of a plan", which role would not exist if the voting rights could be transferred.[6] It is difficult to see what impairment of "bankruptcy policy" the LaSalle court believes it is preventing. Enforcement of these types of provisions does not impair the bankruptcy process or the creditors generally ; it only affects the rights of one creditor – precisely the creditor who agreed to the impairment as consideration for being able to put in place the junior loan, on which it no doubt anticipated making great profits. Having made this bed, it is not clear what bankruptcy policy the LaSalle court believes is advanced by not requiring the junior creditor to lie in it. What is clear is that permitting a junior creditor, which long ago agreed to accede to the senior creditor in these circumstances, to chart a separate course does not simplify, but rather substantially complicates, the resolution of cases. Rather than promoting a consensual resolution of the debtor's difficulties while at the same time respecting the pre-bankruptcy agreement of the junior creditor, taking the LaSalle course allows a junior creditor to add another party to the table whose interests may have to be accommodated even though that same party agreed to the contrary at the outset.

18.

The proper resolution of this matter is clear and simple. 11 U.S.C. §1126 provides a "holder of a claim" a right to vote, but says nothing about by whom the right might be exercised with the holder's consent or agreement. Applicable bankruptcy rules clarify the issue, defining the types of parties that may exercise the right to vote at the behest or agreement of the holder.

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6 Of course, the same salutary result could be achieved if the junior creditor would simply refuse to delegate those rights in advance. The LaSalle court also does not explain why a sophisticated party should be protected by the court from the detriments of its own bargain. Further, if the junior creditor really believes that its claim has value it can, as noted above, reclaim its ability to participate fully simply by buying out or paying off the senior creditor.

11 U.S.C. §510(a), which renders subordination agreements (not just subordinations) enforceable, further supports the conclusion that voting rights can be delegated by agreement in a subordination context. Finally, bankruptcy policy is not implicated by the enforcement of a prepetition agreement by a single creditor to defer to the wishes of another creditor in connection with the bankruptcy case by, inter alia, permitting the senior creditor to vote the claim of the junior creditor. Although there is in bankruptcy a general disinclination to disenfranchisement, that disinclination should not be operative here, where the party whose participation is being limited is not the debtor and agreed knowingly to this result in advance.

WHEREFORE, Wachovia respectfully requests that this Court:

(i) deny the Motion;

(ii) recognize the Class 3A ballot filed by Wachovia on behalf of Blue Ridge; and

(iii) provide Wachovia with such other and further relief as the Court may deem just and proper.

This 18th day of December, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served upon all parties listed below a copy of the foregoing by e-mail (and by ECF to those parties receiving same), and by causing a true and correct copy of same to be deposited in the United States Mail with sufficient postage affixed thereto, addressed as follows:

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This 18th day of December, 2006.

/s/ Paul M. Baisier
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