In the United States Bankruptcy Court

for the Northern District of Iowa

NATIONAL CATTLE CONGRESS, INC.	Bankruptcy No. 93-61986KW
Debtor.	Chapter 11

ORDER RE PARTIAL RESOLUTION OF JAMCO'S OBJECTION TO CONFIRMABILITY OF DEBTOR'S PLAN

On December 1, 1995, the above-captioned matter came of for hearing. Present at the hearing were John M. Titler on behalf of Debtor, John W. Holmes and Gordon B. Conn Jr. on behalf of Jamco, Thomas L. Fiegen on behalf of the Unsecured Creditors Committee and Janet Reasoner on behalf of the United States Trustee. By agreement of the parties, the only issue being considered at this hearing was whether the Debtor's plan constitutes or is based upon a per se violation of state and federal antitrust laws for the limited purpose of a partial resolution of Jamco's objection to confirmability of the plan under 11 U.S.C. 1129(a)(3). After receiving briefs and arguments of counsel, the Court took the matter under advisement.

STATEMENT OF THE CASE

Debtor has presented a plan of reorganization under chapter 11. Debtor's plan is funded pursuant to an agreement between itself and the Meskwaki Indian tribe ("Master Agreement"). The Meskwaki operate a casino style gaming operation in Tama, Iowa, approximately 45 miles from Waterloo, Iowa, the location of Debtor's parimutuel gaming operation. The plan, as currently presented is an amended version ("Amended Plan") of an earlier plan ("Original Plan"). The basic elements of the Original Plan, relating to the treatment of creditors, are unchanged in the Amended Plan. The most significant change in the Amended Plan is the substitution of an amended Master Agreement between Debtor and the Meskwaki ("Amended Master Agreement") for the original Master Agreement.

Jamco, an unsecured creditor, has presented a competing plan. Jamco objects to Debtor's plan, asserting that the plan fails to satisfy numerous elements of the confirmability criteria contained in 1129(a). A major objection by Jamco to the confirmability of Debtor's plan is that Jamco maintains that the relationship between Debtor and the Meskwaki, whom Jamco argues are competitors, and the agreement between them constitutes a violation of state and federal antitrust laws. Jamco argues that the alleged violation prohibits Debtor's plan from being confirmable under 1129(a)(3) which prohibits a court from confirming a plan if the plan is proposed by any means forbidden by law.

Jamco's objection on this point was made to the Original Plan. Jamco asserted that the Master Agreement was a per se violation of section 1 of the Sherman Act. 15 U.S.C. 1. Subsequent to the filing of such objection, Debtor filed its Amended Plan which is funded under the Amended Master Agreement. Jamco continues to assert that the Amended Plan is founded upon a per se illegal contract or conspiracy under state and federal antitrust laws. While Jamco acknowledges that the Amended Master Agreement under the Amended Plan deleted or altered the provisions which it claimed to have been the most obvious violations of the antitrust laws, it maintains that when the Amended Master Agreement is viewed in the context of the parties prior behavior and agreements, the Amended Master Plan still constitutes a per se violation of the Sherman Act.

CONCLUSIONS OF LAW

Section 1129(a)(3) Analysis

Section 1129(a)(3) of the Bankruptcy Code provides,

(a) The court shall confirm a plan only if all of the following requirements are met:

(3) **The plan has been proposed** in good faith and **not by any means forbidden by law**. (emphasis added)

The purpose of this provision is to insure that the proposal of the plan is not done in a way which is forbidden by law. In re Sovereign Group, 88 B.R. 325, 328 (Bankr. D.Colo. 1988). Section 1129(a)(3) is not necessarily concerned with whether the substantive provisions violate existing law. See, Id. Jamco acknowledges that a finding by a confirming Bankruptcy court that a plan is not proposed by any means forbidden by law for the purposes of 1129(a)(3), does not give the plan a "clean bill of health" with regards to all laws with which the plan's provisions may conflict post-confirmation. See, In re Food City, 110 B.R. 808, 812 (Bankr. W.D. Tex. 1990). It further acknowledges that courts have confirmed plans whose substantive provisions violate nonbankruptcy law. See, e.g., Sovereign, 88 B.R. 325 (plan which restructured partnership in violation of state partnership act found not to fail 1129(a)(3) standard); Food City, 110 B.R. 808 (plan containing a provision which may have violated state and securities laws did not fail 1129(a)(3)); and In re General Development Corp., 135 B.R. 1002 (Bankr. S.D. Fla. 1991) (plan which issued stock to State of Florida in violation of state constitution did not fail 1129(a)(3)). Jamco largely relies upon dicta in Food City to argue that if the provisions of Debtor's plan are blatantly illegal, the illegality infects the very bona fides of the plan, and as such, the plan would fail the 1129(a)(3) requirement even if Debtor's proposal of the plan was not done by illegal means. See, Food City, 110 B.R. at 814.

The Court admits to considerable concern whether it is appropriate for the Court to review the substantive provisions of Debtor's plan to determine whether violations of the antitrust laws exist given the clear focus of the language of 1129(a)(3) on the proposal of the plan rather than the substance of the plan. However, for the limited purpose of making a ruling which will partially resolve Jamco's 1129(a)(3) objection, the Court assumes, without deciding, that if the plan is based upon a contract which is a per se violation of the Sherman Act, Debtor's plan would fail the confirmability requirement of 1129(a)(3) under the dicta of Food City. Food City, 110 B.R. at 814.

Antitrust Law

Section 1 of the Sherman Antitrust Act provides, "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . , is declared to be illegal. 15 U.S.C. 1. Although the explicit language of the statute appears to prohibit any contract which restrains trade, courts have interpreted the Sherman Act to prohibit only those contracts which impose unreasonable restraints on trade. Graphic Products Distributors v. ITEK, 717 F.2d. 1561, 1566 (11th Cir. 1983).

Courts utilizes two methods of analysis to determine whether an action or contract violates the Sherman Act. Five Smiths v. National Football League Players Assoc., 788 F. Supp. 1042, 1045 (D. Minn. 1992). The first method is the "Rule of Reason" analysis. The rule of reason requires the court to make elaborate factual findings as to the particular contract and situation being analyzed in order to evaluate whether the contract or action constitutes an unreasonable restraint on trade. The areas of inquiry generally involve the history of the industry, the relevant geographic and product/service markets, the likelihood of harm to the public interest and whether there is a legitimate business reason for the contract.

Id. To create an evidentiary record for this type of fact finding requires the presentation of complex and detailed expert opinion.

The second method of analysis is denominated the "Per Se Rule". Under the per se rule, a contract or action is presumed to be an unreasonable restraint of trade as a matter of law if the court concludes that the contract would have such a pernicious effect on competition that there is no need to have an elaborate rule of reason factual inquiry to determine whether the contract or action has any redeeming virtue. Id.

Jamco's Argument

Jamco characterizes the agreement between Debtor and the Meskwaki as an agreement between competitors to allocate the territories in which each of them will or will not compete in the legal gambling market. This type of agreement is called a horizontal market allocation. Jamco cites numerous cases which find horizontal market allocation agreements to be per se violations. Jamco contends that the Amended Master Agreement allocates to the Meskwaki a monopoly on the legal gambling market in the Waterloo area. A monopoly which Jamco concedes the Meskwaki currently hold even without the benefit of such agreement. Jamco bases its argument on the fact that Debtor is the only entity in the area currently holding a parimutuel gaming license. As such, Jamco asserts that they are the only potential competitor of the Meskwaki in the expanded gaming or casino gaming market, if a referendum passes in Black Hawk County authorizing casino gaming.

Evidence Extrinsic to Debtor's Amended Plan

In order to support its assertion that a per se illegal contract or conspiracy exists, Jamco invites the Court to look beyond the explicit provisions of the Amended Plan and Amended Master Agreement, and to consider evidence of the parties' prior interactions and unapproved agreements. This evidence includes the form of minutes of Debtor's Board of Director's meetings, a July 19 letter of intent between the parties, and the parties' original Master Agreement. Jamco argues that there is rarely explicit evidence of an illegal agreement and cites cases in which circumstantial evidence was used to infer the existence of an illegal contract or conspiracy. See Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); American Tobacco Co. v. United States, 328 U.S. 781 (1946); ES Development, Inc. v. RMW Enterprises, 939 F.2d 547 (8th Cir. 1991); and Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965).

The Court declines to consider such extrinsic material as circumstantial evidence for two reasons. First, none of the cases cited by Jamco find a per se violation. Circumstantial evidence may be necessary and appropriate to establish the existence of a contract or conspiracy in a situation where the agreement is understandably clandestine. Such evidence is inappropriate for consideration, however, for the purpose of establishing the existence of a contract or conspiracy which is asserted to be a per se violation.

Second, as already noted, this Court is concerned whether a review of the substantive provisions of Debtor's plan for potential antitrust illegalities is appropriate under 1129(a)(3). To the extent that it is appropriate to review the plan for blatant illegalities, the scope of such review will be restricted to the face of the plan itself and the explicit agreements which Debtor proposes to enter into under such plan. In other words, the scope of the 1129(a)(3) analysis here will be restricted solely to the question of whether Debtor's Amended Plan, on its face, constitutes a per se antitrust violation.

Incorporation By Reference

Jamco argues that the Amended Master Agreement, which all parties concede to be a part of Debtor's Amended Plan, specifically incorporates by reference a certain letter of intent between Debtor and the Meskwaki, dated July 19, 1995 ("Letter of Intent"). Jamco points to the following language on page 1 of the Amended Master Agreement to support this conclusion. "This agreement is intended to set forth in detail the terms outlined in a letter of intent which is dated July 19, 1995."

The Iowa Supreme court recently addressed the issue of incorporation by reference in the context of contracts. See Kokjohn v. Harrington, 531 N.W.2d 99 (Iowa 1995). In Kokjohn the Court acknowledged that it had yet to specifically

address what is required for a contract to incorporate an extrinsic document by reference and how the incorporating contract ought to be interpreted. Id. at 100. The Court reviewed other jurisdictions' treatment of the doctrine of incorporation and concluded that the common thread throughout all of the cases is the requirement that the reference in the incorporating document to the extrinsic document be **clear** and **specific**. (emphasis added) Id. at 101.

In Kokjohn, the language used in the incorporating document not only specifically referred to the extrinsic document but explicitly made it clear that the "terms and conditions of the [extrinsic document] shall apply" to the interpretation of the incorporating document. Based upon the specific facts in Kokjohn and other jurisdictions' tests for incorporation, this Court concludes that when the Iowa Supreme Court established a requirement using the words "clear" and "specific", it established a test with two distinctive elements. First, whether the incorporating document makes it "clear" that the parties intend to make the terms and conditions of the extrinsic document part of the incorporating document, See Batter Bldg. Materials Co. v. Kirschener, 110 A.2d 464, 468 (1954) (cited by Iowa Supreme Court in its review of other jurisdictions' tests). And second, whether the incorporating document "specifically" identifies the extrinsic document which the parties intend to incorporate so that it distinguishes it from other extrinsic documents.

In applying the Kokjohn test to the language of the Amended Master Agreement, the identification of the July 19 Letter of Intent is sufficiently specific so as to pass the "specific" element of the test. However, the language of the Amended Master Agreement does not evidence an intent of the parties to have the terms and conditions of the Letter of Intent apply to the Amended Master Agreement. To the contrary, the language appears to evidence an intent that the details of the Amended Master Agreement supersede the terms of the agreement outlined in the Letter of Intent. As such, the Court rejects Jamco's incorporation by reference argument and finds that the Letter of Intent is not a part of the Amended Master Agreement or Debtor's Amended Plan. Because the Court is restricting its review to the face of Debtor's Amended Plan, the Court does not decide and expresses no opinion as to whether the provisions of the letter of intent constitute an antitrust violation.

Analysis of Debtor's Amended Plan

Jamco maintains that despite the deletion and alteration of certain provisions of the original Master Agreement, the Amended Master Agreement still constitutes an agreement by which Debtor agrees to eliminate itself as a competitor to the Meskwaki in the expanded gambling market. Jamco points to paragraphs 7, 9 and 10 of the Amended Master Agreement as evidence of this arrangement. Paragraph 7 grants to the Meskwaki an exclusive option to a contract to manage Debtor's parimutuel gaming operation as well as any expanded gaming which may take place in the future. Paragraph 9 requires Debtor to employ a lobbyist to promote the mutual interests of the parties on federal, state and local issues affecting the gaming operations. Paragraph 10 prohibits Debtor from three activities; negotiating with other parties to help Debtor to reorganize in bankruptcy; negotiating with other parties regarding a management arrangement; and negotiating or receiving funds from any other gaming interest.

The Court finds that neither paragraphs 7, 9 and 10 nor any other provision in the Amended Plan or Amended Master Agreement explicitly prohibits Debtor from pursuing expanded gaming. There are no provisions which punish Debtor for doing so to such a degree so as to be a de facto prohibition on pursuing such expansion. Nowhere on the face of Debtor's plan does Debtor agree not to enter into the expanded gambling market nor is Debtor prevented from doing so. As such, the Court can not agree with Jamco's characterization of Debtor's plan as a horizontal market allocation agreement.

Granting of Control as Effective Agreement Not to Compete

Jamco asserts that the exclusive management contract and appointment of Meskwaki designees to Debtor's Board of Directors, both of which are provisions of the Amended Plan, effectively give the Meskwaki control of Debtor's gaming operation. Jamco maintains that the Meskwaki will undoubtedly use this control to prohibit the expansion of gaming upon Debtor's premises. Jamco asserts that the grant of these rights is tantamount to an agreement to have the Meskwaki

effectively eliminate Debtor from the expanded gaming market. Jamco maintains that this is the only logical reason for the Meskwaki's investment of $9 million to fund Debtor's plan. The Court need not speculate as to the motives of the Meskwaki in becoming involved in Debtor's rehabilitation as there is an insufficient record upon which to make such a conclusion. Thus, it is inappropriate to conclude that the Meskwaki will inevitably use, what Jamco has characterized as, their control of Debtor to prohibit the expansion of gaming at Debtor's Greyhound Park.

Even if the Court were to accept Jamco's conclusions, it would be inappropriate to characterize this "control scenario" as a per se antitrust violation. While the per se rule provides a means for expedient determinations, it is only used in relatively narrow circumstances where the court has sufficient experience with the activity in question so as to be able to recognize whether the activity is plainly anticompetitive and lacking in redeeming value. Broadcast Music v C.B.S., 441 U.S. 1, 8 (1979). A particular course of action is found to be a per se violation only after courts have determined such action to be unreasonably anticompetitive under a rule of reason analysis. See U.S. Trotting Assn. v Chicago Downs, 665 F.2d 781 (7th Cir. 1981). There is a general presumption that the rule of reason is the appropriate method to analyze a contract for antitrust violations. Broadcast Music, 441 U.S. at 8. The market allocation agreement cases which Jamco cites are not based upon "control scenario" speculation. Without a showing of sufficiently analogous precedent, it would be inappropriate for the Court to make a per se determination. No opinion is expressed whether the "control scenario" constitutes an antitrust violation. For the purposes of this ruling, it is sufficient to conclude that it does not constitute a per se violation.

WHEREFORE, for the purpose of a partial resolution of Jamco's objection to the confirmability of Debtor's amended plan under 1129(a)(3), the Court finds that Debtor's plan is not a per se violation of the antitrust laws.

SO ORDERED this 11th day of December, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge