

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

MAR 28 1984

In Re:

Case Numbers: U.S. BANKRUPTCY COURT

TELEMARK MANAGEMENT COMPANY, INC.  
THE TELEMARK COMPANY, INC.  
TELEMARK LAND COMPANY, INC.  
HISTORYLAND, INCORPORATED  
THAW, INC.

EF11-81-00747  
EF11-81-00748  
EF11-81-00749  
EF11-81-00750  
EF11-81-00751

Wisconsin Corporations, d/b/a  
Telemark Enterprises,

Debtors.

FINDINGS OF FACT  
CONCLUSION OF LAW  
AND  
ORDER FOR MEMORANDA OF LAW

The United States of America Internal Revenue Service (I.R.S.), represented by James C. Ratzel of the United States Attorney's Office for the Western District of Wisconsin, having filed Motions to Dismiss or Convert the above captioned matters; and the above named debtors, represented by Michael D. Schwartz of Stern, Levine, Schwartz, Lifson, Creighton & Bunin, P.A., and by James P. Miley of Larkin, Hoffman, Daly & Lindgren, Ltd., having opposed said motions; and James D. Harnett, attorney for the Wisconsin Department of Revenue, Eugene J. LaFave of Adler & LaFave, attorney for the Condominium Owners (Lodge Owners), and Jeffrey W. Guettinger of Herrick, Hart, Duchemin, Danielson & Guettinger, S.C., attorney for Peoples National Bank, having observed in the courtroom; and hear-

ings having been held; and the Court having heard the testimony of witnesses and the oral argument of counsel and having duly considered the exhibits and memoranda filed herein; and after examination of the entire record and proceedings, and being fully advised in the premises, FINDS:

1. That the debtors in the above captioned matters filed petitions for relief under Chapter 11 of the Bankruptcy Code on April 30, 1981 (on May 14, 1981, the cases were consolidated for joint administration).

2. That the Debtors' Amended Consolidated Plan of Reorganization was confirmed by this Court on December 17, 1982.

3. That the confirmed plan provides for payments to approximately 650 creditors divided into 36 classes of claims and interests.

4. That the confirmed plan provides, in pertinent part (emphasis added):

## VII.

### ADDITIONAL PROVISIONS

#### E. Retention of Jurisdiction.

The Bankruptcy Court shall retain jurisdiction over Telemark Enterprises and its operations and assets subsequent to the time of confirmation of the Plan until such time as the payments called for under the Plan have been made for the purpose of . . .determining and resolving any defaults or similar matters under the Plan,. . .

. . . .  
I. Default

The following shall be events of default in this Amended Plan of Reorganization:

. . . .  
(d) Debtors fail to make any payment as provided in this Amended Plan of Reorganization except such payment or payments as may be agreed to by the creditor or creditors entitled thereto, or fail to pay real estate taxes, sales taxes, withholding taxes, employment taxes, or other taxes.

. . . .  
In the event the Creditors' Committee or People's National Bank of Hayward declares Debtors to be in default by reason of events of default as described in subparagraphs . . . , (d) . . . , written notice thereof shall be given to the Debtors, and Debtors shall have sixty (60) days from the date of receipt of such written notice to cure said default,  
. . . .

In the event of a default which has not been cured within said sixty (60) day period, the Creditors' Committee or the People's National Bank of Hayward shall have the right upon a minimum of fifteen (15) days' written notice to apply to the Bankruptcy Court for relief from the automatic stay provisions of the Bankruptcy Code (11 USC §362). The Debtors hereby agree that the only defenses which may be raised to the application for relief from stay are that a default has not occurred or that the default had been cured or waived prior to the filing of the Application and hearing by the Bankruptcy Court.

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<sup>1</sup>(Footnote by the Court) The I.R.S. has two distinct interests in the affairs of the debtors: First, as a pre-confirmation or "plan" creditor, it is concerned with receiving payment as provided in the plan and with payment of all post-confirmation taxes to protect the debtors' assets, see Finding 22. Second, as a post-confirmation creditor, it is concerned with payment of post-confirmation federal taxes as the collector of those taxes.

It is the I.R.S. interest as a plan creditor that is the subject of subparagraph (d).

5. That, on November 1, 1983, this Court held a hearing on the I.R.S.'s first Motion to Convert or Dismiss. And that, at said hearing, the debtors argued that they had not received 60 days notice of default as required by the confirmed plan.

6. That, on November 9, 1983, I.R.S. District Director L. M. Phillips wrote to the debtors' president, Anthony Wise, and to the attorneys representing the debtors:

Pursuant to Section VII, paragraph 1, subparagraph (d) of the Amended Consolidated Plan of Reorganization this letter shall constitute notice and declaration of default by the debtors with respect to the Confirmed plan. The incidents of default are as follows:

1. Failure to make the \$3,500.00 monthly payments required by Section IV of the plan to the Class L creditor, Internal Revenue Service, for the months of March 1983 through November 1983;
2. Failure to pay the administrative tax claim of \$1,126.74 plus accruals of \$ 176.26 to November 4, 1983, for a total of \$1,303.00, as required by Section III of the plan; and
3. Failure to pay post-confirmation employment taxes, interest and penalties totaling \$277,451.26 due and owing for the first, second and third quarters of 1983, with interest computed to November 4, 1983. The detail of the amounts due is set forth on the attached Schedule A.<sup>2</sup>

Please be advised that, in the event of a failure to cure the above defaults within sixty (60) days as set forth

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<sup>2</sup>(Footnote by the Court) There is evidence to suggest that no "Schedule A" was mailed.

in the plan, the Internal Revenue Service will proceed before the Bankruptcy Court for appropriate relief.

7. That debtors' Memorandum of Law in Opposition of the United States of America's Motion to Dismiss or Convert the Chapter 11 Bankruptcy Proceedings (filed Dec. 23, 1983) provides, on page 3 (emphasis added):

On November 14, 1983, the Debtor and the undersigned attorney on behalf of the Debtor received by certified mail a notice from the United States of America, Internal Revenue Service specifying in compliance with Section VII, paragraph 1, subparagraph (d) of the Amended Consolidated Plan of Reorganization that a default had occurred and specifically delineating the default therein. The letter was in compliance with that provision of the Amended Consolidated Plan of Reorganization and allows the Telemark organization until January 14, 1983 to cure its default provisions or the United States of America, Internal Revenue Service has the right to file a motion to dismiss or convert the Consolidated Chapter 11 Bankruptcy proceedings. The notice to dismiss or convert and/or relief from the automatic stay must be given by fifteen (15) days written notice.

8. That, on February 6, 1984, the I.R.S. filed its second Motion to Dismiss or Convert under 11 U.S.C. sec. 1112(b)(1976). And that, in supporting documents, the I.R.S. alleged that the debtors had failed to make plan payments and that said failure was cause to convert or dismiss under sec. 1112(b)(7) & (8)--the supporting documents did not allege that the debtors had failed to pay post-confirmation taxes.

9. That debtors requested of the I.R.S. a 30 day extension to cure the plan payment defaults in the sum of approximately \$50,354.87, being 14 ordinary payments of \$3,500 and an administrative fee of \$1,354.87. This request was not granted by the I.R.S.

10. That an evidentiary hearing relative to the I.R.S.'s Second Motion was held on March 14, 1984.

11. That, at said Second Motion hearing, evidence was presented regarding unpaid plan payments and unpaid post-confirmation taxes and regarding the ability of the debtors to pay same in the future.

12. That the only delinquent payments under the plan, it was testified, were the above I.R.S. payments and Court approved extension payments to the State of Wisconsin.

13. That post-confirmation taxes became due in 1983 in the sum of approximately \$507,000, of which the approximate sum of \$149,000 was paid, leaving an unpaid balance of approximately \$358,000.

14. That there is no evidence that the I.R.S. has requested Creditor Committee action in regard to any of said delinquencies or that such a request was unreasonably denied. Cf. 19 Am.Jur.2d Corporations sec. 528(1965)(derivative action).

15. That the first quarter withholding taxes for 1984 in the

approximate sum of \$160,000 are due April 1, 1984, of which \$23,879 has been paid, and the debtors are unable to pay the balance due at this time.

16. That said debtors have not made a profit in the past nine years.

17. That the debtors' daily payroll varies from \$6,000 to \$24,000 per day.

18. That the managing president of the debtors, a 99% stock owner, believes the debtors are beginning to see daylight and can work out of bankruptcy "like Chrysler".

19. That the debtors' new director of sales and marketing, Denise Koalska, testified that her new marketing plan has increased sales for January and February, 1984, with bookings of \$669,000 compared with \$250,000 for the same period in 1983.

20. That the Bertelson Company of Eau Claire has prepared a new planning and control system for the debtors, now in operation, which was testified to by Mr. J. T. O'Malley, C.P.A., of said firm.

21. That representatives of the Telemark employees and shop owners were present at said hearing, and the Court noted that they were present to oppose said motion and to support said extension of time.

Discussion

22. Construction and Validity of Plan Default Provisions.

That defining default to include a failure to pay post-confirmation taxes is a legitimate provision designed to permit plan creditors to act to prevent continuing losses when there is objective evidence of debtor insolvency.

23. That requiring Creditors' Committee<sup>3</sup> action to trigger and implement default remedies is a legitimate<sup>4</sup> provision designed to protect the debtors' operation from excessive, disruptive post-confirmation bankruptcy litigation. See generally Finding 3.

24. That the 60 day grace period is a legitimate provision designed to protect the debtors in the event of seasonal cash flow problems in the resort business.

25. Automatic Stay Reference. That 11 U.S.C. sec. 362(c) (1982) provides, in pertinent part:

. . .

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

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<sup>3</sup> Reference to "Creditors' Committee" includes the Peoples National Bank of Hayward. The Court assumes that the co-equal status of said Bank was the result of a superior bargaining position when the plan was drafted.

<sup>4</sup> See 11 U.S.C. sec. 1103(c)(5) (1982) (committee may perform such services as are in the interest of those represented).



(2) the stay or any other act under subsection (a) of this section continues until the earliest of--

. . .

(C) if the case is a case . . . under chapter . . . , 11, . . . of this title, the time a discharge is granted or denied.

And that 11 U.S.C. sec. 1471 (1982) provides, in pertinent part:

. . .

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

. . .

(d)(1) 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, . . .

26. That it is unclear whether the plan default provisions are valid and, if they are valid, whether said provisions prohibit sec. 1112(b) motions.

27. That if said provisions do not prohibit sec. 1112(b) motions, it is unclear whether the I.R.S. and the debtors may proceed to litigate a sec. 1112 motion without the affirmative assent of the Creditors' Committee. See Findings 4 and 23.

28. That further briefing is necessary as to the following questions:

A. Does the plan keep alive the section 362 automatic stay?

B. Is the only remedy of the I.R.S. to apply to lift the stay and foreclose its mortgage as to the "plan" defaults?

C. Have the notice requirements of the plan default provisions been complied with?

D. Does this Court have jurisdiction over the post-confirmation plan taxes?

E. Are the post-confirmation taxes before this Court in that they were not alleged to be in default in the motion before the Court?

#### CONCLUSION OF LAW

That it is necessary for this Court to obtain the benefit of additional argument prior to resolving the issues set forth above and proceeding to the merits of the motion at bar.

#### ORDER

IT IS ORDERED THAT the United States of America Internal Revenue Service and the above named debtors file memoranda of law

with this Court on the issues set forth above, on or before April 28, 1984, with the right to file reply briefs on or before May 11, 1984.

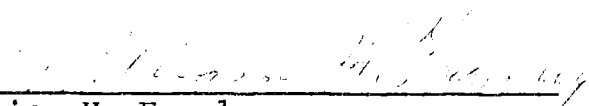
IT IS FURTHER ORDERED THAT the Court request Mr. Harnett, Mr. LaFave, Mr. Guettinger and any attorneys representing the employees and shop owners and any attorneys representing other Telemark creditors and the Creditors' Committee to file briefs within the same time limits.

IT IS FURTHER ORDERED THAT the Court will consider individual applications to file amicus curiae briefs.

IT IS FURTHER ORDERED THAT the Court will by later order appoint an attorney or firm of attorneys to file an amicus curiae brief or briefs herein on all of said issues at the expense of the parties as hereafter determined.

Dated: March 28, 1984.

BY THE COURT:

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William H. Frawley  
Bankruptcy Judge