

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

**BOUNTY BAY ASSOCIATES,
Debtor.**

BK. NO. 89-20505

DECISION AND ORDER

BACKGROUND

On March 22, 1989 an involuntary petition initiating a Chapter 11 case was filed by one of the partners of the debtor, Bounty Bay Associates (the "Debtor"), a New York general partnership. An Order for relief was entered, and on July 26, 1989 a Chapter 11 trustee was appointed (the "Trustee").

On February 22, 1990 an Order (the "Confirmation Order") was entered confirming a Chapter 11 liquidation plan filed by the Trustee (the "Plan"). Since the Debtor was solvent, the Plan provided for the Trustee to: liquidate all of the real and personal property of the Debtor; pay all of the administrative expenses and claims of creditors in full; and distribute any surplus to the four partners of the Debtor. Any distribution to the partner International Swiss Investors Corp. ("ISI") was to be paid into the Clerk of the Bankruptcy Court due to a Securities and Exchange Commission freeze on all of the assets of ISI. Article V of the Plan specifically provided that any surplus was to be distributed to the partners in accordance with their percentage ownership in the Debtor, to wit: Stuart Dunphrey ("Dunphrey") - 40%; Daniel Dwyer ("Dwyer") - 34.55%; Roger Carroll ("Carroll") - 14.55%; and ISI - 10.9%. Each of the individual partners appeared or was represented by counsel at the hearing on the confirmation of the Plan, and no appeal was taken from the Confirmation Order.

On January 31, 1991, upon the application of Dunphrey and in furtherance of the sale provisions of the Plan, an Order (the "Sale Order") was entered approving the sale of all of the real and personal property of the Debtor to SD Office Equipment Company, Inc. ("SD Office"), a company controlled by

Dunphrey.¹ At the hearing on the proposed sale, which was the last in a series of differently structured sale proposals and orders involving Dunphrey's purchase of the Debtor's assets, each of the individual partners was represented by counsel. No appeal was taken from the Sale Order and the Trustee completed the sale to SD Office.²

As provided in the Plan, the Trustee used the sale proceeds to: pay all of the creditors in full; create a reserve for the payment of administrative expenses; and make at least one distribution to the partners in accordance with the Article V distribution provisions of the Plan (it appears that no actual distribution was made to Dunphrey, but his distribution was accomplished with the agreement of all parties including the Trustee by various credits afforded to SD Office in connection with its payment of the purchase price).

By motion returnable November 16, 1992, Carroll requested an order directing that: 1) the accountants for the Trustee file corrected tax returns for the Debtor; and 2) the Trustee expeditiously proceed to finalize the administration of the estate, including the filing of all applications for professional fees, so that any remaining sale proceeds including a \$100,000 contingent claims escrow (the "Escrow") could be distributed to the partners pursuant to the provisions of the Plan.³

Dunphrey opposes the Trustee distributing any remaining sale proceeds or the Escrow to the partners in accordance with the distributive provisions of Article V of the Plan. He contends that the sale proceeds and Escrow must be distributed in accordance with the provisions of two agreements entered

¹The Confirmation and Sale Orders were granted by the Honorable Edward D. Hayes who retired in January of 1992.

²Although the oral arguments and submissions to the Court by the attorneys for Dwyer and Carroll characterize the transaction as a purchase by Dunphrey of their partnership interests rather than as a sale of partnership assets (which is how it may have been re-reported for tax purposes), in fact, the only closing documents were bills of sale and deeds transferring partnership assets to SD Office.

³The request that the Trustee's accountants file amended tax returns was withdrawn in March, 1993.

into among the partners as of May 20, 1988 -- a Restated Partnership Agreement and a Comprehensive Settlement Agreement. Dunphrey contends that these agreements govern the rights and remedies of the partners among themselves, both contractually and under state law, including the ultimate rights of each partner in and to the surplus sale proceeds which are assets of the partnership. Dunphrey's position is that when the Plan was confirmed neither the Trustee nor the Court was aware of the Restated Partnership Agreement or the Comprehensive Settlement Agreement and that the rights of the partners under these agreements and New York State Law were not fully considered or finally determined. Dunphrey further contends that no distribution should or can be made to the partners until their respective capital accounts and the ultimate rights and remedies among and between the partners to any surplus are finally resolved by the Bankruptcy Court or by the State Court in the pending New York State Supreme Court action (the "State Court Action"). The State Court Action was commenced in May of 1992 by Dunphrey to obtain a determination by the State Court of the respective rights and remedies of the partners under the Restated Partnership Agreement and the Comprehensive Settlement Agreement and in it the Trustee was named as a stakeholder with regard to any remaining sale proceeds, including the Escrow.

After the Carroll motion was adjourned several times and back-ground submissions were made to the Court, the Trustee requested, by motion returnable February 16, 1993, an order directing him to take such further actions as would be necessary to complete the administration of the estate and distribute any funds on hand, including the Escrow, to the partners pursuant to the provisions of the Plan.

Dunphrey objects to the Trustee's motion on the same grounds that he objects to the Carroll motion. He contends that the Court should direct that any distribution be paid either into New York State Supreme Court or into some other escrowed arrangement pending a final decision in the State Court Action.

DISCUSSION

All of the parties acknowledge and it is clear from a review of the Court records that throughout this proceeding there have been continuing disagreements and hostilities among the partners, particularly between Dunphrey and Dwyer. As a result, there has been substantial time, energy and expense expended in this Chapter 11 case which would not have been necessary in the absence of such disagreement and hostility.

Section 1141(a)⁴ of the Bankruptcy Code makes a confirmed Chapter 11 plan binding on each general partner of a partnership debtor, whether or not that partner has accepted the plan. In this case, each of the individual partners was actively involved in each step of the case; was represented by experienced bankruptcy counsel at the hearing on confirmation; and failed to appeal the Confirmation Order. As a result, Section 1141(a) is dispositive.

However, as to the distributive provisions of Article V of the Plan, after reviewing the Plan and the Court records in this case, the Court finds that as to the partners these provisions are distributive only and not determinative of the ultimate rights of the partners in and to such surplus funds. The substantive rights of the partners to the surplus from the sale of the partnership assets in this solvent partnership are governed by the Restated Partnership Agreement, the Comprehensive Settlement Agreement and New York State Law. The provisions of the Plan dealing with distributions to the partners were not, in this Court's opinion, intended by the Trustee or the Court to resolve the ultimate rights and remedies among the partners under the Restated Partnership Agreement, the Comprehensive Settlement Agreement or

⁴§ 1141. Effect of confirmation.

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any equity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

New York State Law, but were an attempt to provide a distributive scheme which would allow the case to proceed, the creditors to be paid in full, and the partners to have their rights to any surplus finally determined either by negotiation or in a proper State Court proceeding.

This Court did and does have jurisdiction over the sale proceeds and how they are to be distributed. However, in the hands of each partner those distributed funds are still assets of the partnership and the obligations of each partner with respect to those partnership assets are governed by the partnership and related agreements and New York State Law. In this case, where no proceedings were conducted to determine the ultimate rights of the partners to any surplus, the Plan and the history of the case indicate that the surplus was to be distributed without prejudice to the underlying rights and remedies among and between the partners, including any rights to provisional remedies in the pending State Court Action.

CONCLUSION

The Trustee is directed to: 1) complete the administration of the estate except for the other matters directed herein within twenty (20) days of the entry of this Order; 2) file or cause to be filed with the Court all applications for allowances of professional fees and disbursements within thirty (30) days of the date of the entry of this Order; 3) serve or cause a copy of all applications for professional fees to be served upon: Dunphrey; Lacy, Katzen, Ryen & Mittleman as the attorneys for Dunphrey; Carroll; Boylan, Brown, Code, Fowler, Randall & Wilson as the attorneys for Carroll; Dwyer, and DiMarco & Riley as attorneys for Dwyer, simultaneous with the filing of the applications with the Court; 4) serve on each of the partners and their attorneys a notice of hearing on such applications which will be held on a return date to be obtained by the Trustee from the Court prior to the filing of the applications and service on the partners and their attorneys; and 5) distribute any remaining assets of the estate, including the

Escrow, to the partners in accordance with the distributive provisions of Article V of the Plan or any order entered in the State Court Action upon the completion of all administrative matters and the payment of the allowances for professional fees and disbursements, as finally determined by the Court. The payment of professional fees and disbursements and the final distribution to the partners is to be accomplished within fifteen (15) days of the Court's final award of professional fees and disbursements.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: April 1, 1993