SO ORDERED: December 30, 2008.

Anthony J. Metz III
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
FRANKFORT TOWER INDUSTRIES, INC., et al., f/k/a ROHN INDUSTRIES, INC., et al. ,	)	Case No.: 03-17287-AJM-11 (Substantively Consolidated)
	)	
	)	
Debtors	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING OBJECTION TO NOTICE OF INTENT TO COMMENCE FOURTH INTERIM DISTRIBUTION

This matter has come before the Court on the *Objection to Terms of Debtor's Notice of Intent to Commence Fourth Interim Distribution* and the *Reply Brief of Official Creditors' Committee in Support of Its Objection to Terms of Debtor's Notice of Intent to Commence Fourth Interim Distribution*, filed by the Official Creditors' Committee (the "Committee") on October 9, 2008 [Docket No. 1340] and November 7, 2008 [Docket No. 1351], respectively; the *Response of Debtor and Disbursing Agent to Objection to Terms of Debtor's Notice of Intent to Commence Fourth*

Interim Distribution, filed by the Debtors and Horace H. Ward, in his capacity as Disbursing Agent for the above-captioned Debtors [1] , on October 23, 2008 [Docket No. 1344]; and the *Memorandum in Support of Debtors' Proposed Distribution filed by UNR Asbestos-Disease Claims Trust* (the "UNR Trust") on November 14, 2008 (the "Response") [Docket No. 1352]. The Court having conducted a Hearing on the merits on November 21, 2008, at which the Committee, the Debtors and the UNR Trust were each represented by counsel, and having considered the arguments presented and undisputed factual evidence, and being in all things duly advised, now makes the following findings of fact and conclusions of law.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, and the matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

The Court adopts as findings of fact the factual statements contained in the "Procedural History and Factual Background" set forth in the Response. Specifically, the following undisputed facts are hereby adopted:

A. On September 16, 2003 (the "Petition Date"), the Debtors commenced their respective cases under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

B. On November 23, 2004, the Court entered an *Order* [Docket No. 761] confirming the

[1] The Debtors are the following entities: Frankfort Tower Industries, Inc., Frankfort Tower Installation Services, Inc., Frankfort Tower Enclosures, Inc., Frankfort Tower Products, Inc., Frankfort Tower Construction, Inc., formerly known as Rohn Industries, Inc., Rohn Installation Services, Inc., Rohn Enclosures, Inc., Rohn, Inc., Rohn Products, Inc., and Rohn Construction, Inc.

Debtors' *Chapter 11 Plan of Liquidation, as Immaterially Modified* (the "Plan").

C. The Plan had the overwhelming support of the votes submitted by general unsecured creditors.

D. Neither the Committee nor any general unsecured creditor objected to either the Plan or to the specific language contained in Section 6.6(a) of the Plan, the provision governing the payment of interest on Claims (as defined under the Plan).

E. Pursuant to the Plan, Horace H. Ward was appointed as Disbursing Agent and vested with the power to make interim and final distributions of estate funds according to the Plan's terms.

F. Despite the Committee's contention to the contrary, the possibility of a distribution to shareholders was contemplated by at least one party in interest. This case was filed on September 16, 2003, and, by October 1, 2003, not only had the Committee been formed , but it had hired counsel who had intervened in the case. On October 27, 2003, the Debtors moved to discontinue providing further notice of case proceedings to shareholders, in part, because "[i]t appears certain that there will be insufficient funds to fully satisfy the claims of [the Debtors'] unsecured creditors , and that there will be no available funds to distribute to its shareholders". *Motion to Discontinue Further Noticing to Shareholders* filed by the Debtors on September 25, 2003 [Docket No. 66]. The UNR Trust objected to the motion, partly on the basis that it was too early to "make a determination that the shareholders of the company will receive nothing under the plan of reorganization.....". *Objection of UNR Trust to Debtor's Motion To Discontinue Further Notice to Shareholders*, filed on October 27, 2003 [Docket No. 129]. The Court overruled UNR Trust's objection and granted the

Debtors' motion, but the fact remains that as early as October 27, 2003 – nearly thirteen (13) months before confirmation of the Debtors' plan – the holder of nearly 55% of outstanding equity believed that it was too early to tell whether there would be sufficient funds to pay unsecured claims in full. Thus, it cannot be said that, as of the November 19, 2004 confirmation date, "no one" contemplated that there would be sufficient funds to pay unsecured claims in full, and yet no objection was made regarding the language found in Section 6.6(a) of the Plan.

G After confirmation of the Plan, the Disbursing Agent made interim distributions to unsecured creditors. These distributions paid a total of 79% of the allowed claims of general unsecured creditors.

H. In the fall of 2007 and after years of extensive litigation by the Disbursing Agent, the Debtors successfully negotiated the settlement of a claim against Platinum Equity LLC and PFrank LLC. This settlement resulted in additional funds to the estate of approximately $12,300,000.

I. The Court approved the settlement on December 13, 2007 [Docket No. 1209].

J. As a result of this recovery, the Disbursing Agent concluded that the estate now has the means to pay general unsecured creditors in full, and to make a distribution to shareholders.

K. On October 3, 2008, the Disbursing Agent filed the *Notice of Intent to Commence Fourth Interim Distribution* [Docket No. 1338]. The Fourth Interim Distribution contemplates that general unsecured creditors will receive an additional pro rata payment of 21% of their allowed claims, resulting in such creditors receiving 100% of their allowed claims. Any

excess funds available (net of funds paid for continued administration of the Debtors' estates) are proposed to be distributed to shareholders of the Debtors.

Conclusions of Law

1. The provisions of the Plan that are applicable to the issue before the Court are unambiguous. Pursuant to these unambiguous terms, the holders of Class 3 claims (general unsecured claims pursuant to ¶4.3 of the Plan) are not entitled to post-petition interest under the facts and circumstances before the Court.[2] Section 6.6(a) of the Plan addresses interest on claims and provides that:

> Unless otherwise specifically provided for in the Plan, the Confirmation Order, or required by applicable bankruptcy law, (i) post-petition interest shall not accrue or be paid on Claims, and no holder of a Claim shall be entitled to interest accruing on or after the Petition Date on any Claim...

The Court agrees that it would be difficult to conceive how the Plan could have been more clear with respect to the interest issue than stating, as it does, that "post-petition interest shall not accrue" and that "no holder of a Claim shall be entitled to interest accruing on or after the Petition Date . . . ."

2. To avoid the implications of this unambiguous language, the Committee points to another Plan provision to suggest that the intent of the Plan was to provide for interest payments to general unsecured creditors before equity holders would receive any distribution. The Committee argues that the phrase "payment in full" contained in Section 6.1(e) of the Plan, a provision governing the treatment of claims and interests, makes that intent clear,

[2] The Court is not persuaded by, and therefore rejects, the Committee's suggestion that statements contained in other documents, notably the Disclosure Statement and a motion having to do with notice, are necessary to interpret the Plan's treatment of post-petition interest.

(e) Class 5 (Equity Interests). It is not yet known whether holders of Interests will receive a distribution under the Plan, however, to the extent that estate funds exist after satisfaction of all prior Classes of Claims in full, holders of Interests will receive a Pro Rata share of such Estate Funds.

Referring to the phrase "payment in full", the Committee argues this phrase means that payments will include post-petition interest.

3. Here, the Court concludes that "claim" as used in the Plan does not include "post petition interest". The Plan defines "claim" as "any right to payment...*in existence on the Petition Date..."* (Emphasis added). As of the Petition Date, holders of unsecured claims had a right to payment of their core claim and any pre petition accrued interest, but had no right to post petition interest as none would have accrued at that point. Section 726(a)(5) of the Bankruptcy Code – the section that provides for payment of post petition interest in solvent chapter 7 estates, as will be discussed later – buttresses the fact that "claim" and "post petition interest" are mutually exclusive. Section 726(a)(1) through (4) speak in terms of "payment" of "claims" and subsection (a)(5) then speaks of "payment of interest...*on any claim*", indicating that post petition interest is something separate and beyond a "claim" as set forth in that section. Thus, when the Plan here provided for "Claims" to be "paid in full" before any distribution was to be made to equity holders, the Court concludes it meant that only the core amount and any accrued pre petition interest was to be "paid in full".

4. Furthermore, the Committee's interpretation that "payment in full" of "Claims" includes payment of post petition interest conflicts with the clear provisions of Section 6.6(a) of the Plan, which, as the Debtors correctly note, provides that interest is only available under three limited circumstances: "(1) the Plan ***specifically*** provides for such interest; (2) the

Confirmation Order specifically provides for such interest; or (3) the payment of post-petition interest is 'required' by applicable bankruptcy law." (Emphasis added). (Debtors' Resp. at 8.) By the Committee's own admission (*i.e.*, that "payment in full" is ambiguous), the Plan cannot be said to "specifically" provide for post-petition interest.

5. Neither the Plan nor the Confirmation Order specifically provide for the payment of post petition interest on unsecured claims, so the first two of the three limited circumstances do not apply. As to the third limited circumstance, bankruptcy law does not "require" the payment of post-petition interest prior to any distributions to equity holders. The cases upon which the Committee relies provide that awarding post-petition interest in Chapter 11 cases is within the discretion of the Bankruptcy Court.[3] *See Groundhog, Inc. v. San Joaquin Estates, Inc. (San Joaquin Estates, Inc.)*, 64 B.R. 534, 536 (BAP 9th Cir. 1986); *In re Gaines*, 178 B.R. 101, 103 (Bankr. W.D. Va. 1995); *In re David Green Prop. Mgmt.*, 164 B.R. 92, 97 (collecting cases). Because the award of post-petition interest is discretionary (in light of these cases), then it cannot be said to be "required." The third alternative ground contemplated by Section 6.6(a) for awarding post-petition interest is not satisfied.

6. For the reasons set forth in the briefs filed by the Debtors (Resp. at 5-8) and the UNR Trust (Mem. at 8-9), the Court concludes that the cases cited by the Committee are distinguishable and do not control the resolution of the threshold issue before this Court. The Court agrees with both the Debtors and the UNR Trust that the Sixth Circuit's decision in *Kentucky Lumber Company*, and the *Manchester Gas Storage* and *Consolidated Water Utilities* decisions are most applicable to the facts and circumstances before this Court. Therefore,

[3] Section 726(a)(5) does not apply since this matter does not arise in the context of a Chapter 7 case.

the Court expressly adopts the reasoning set forth in these decisions in ruling that general unsecured creditors are not entitled to post-petition interest under the facts here.

7. Furthermore, the terms of the confirmed plan bind the Debtors and the creditors under §1141(a). *Ocasek v. Manville Corporation Asbestos Disease Compensation Fund*, 956 F.2d 152 (7th Cir. 1992). Here, the unsecured creditors "overwhelmingly voted in favor of this plan aware that it made no provision for post-petition interest,"and they are "simply too late in making their claim for post-petition interest." *Thompson v. Ky. Lumber Co. (In re Ky. Lumber Co.)*, 860 F.2d 674, 679 (6th Cir. 1988). Likewise, if creditors consent to a plan or fail to object to a plan that does not require payment of post-petition interest, such creditors are not entitled to post-petition interest. *See M & I Thunderbird Bank v. Birmingham (In re Consolidated Water Utils.)*, 217 B.R. 588, 591-92 (BAP 9th Cir. 1998); *In re Manchester Gas Storage, Inc.*, 309 B.R. 354, 381-84 (Bankr. N.D. Okla. 2004).

8. The Committee further argues that one of the prerequisites to confirmation is that creditors not receive less under the Plan that they would in a chapter 7 case (the "best interest" test). If the case were a chapter 7, they'd be entitled to post petition interest under §726(a)(5), and so, the Committee argues, unsecured creditors should receive at least as much in this chapter 11. The Court rejects the Committee's position with respect to the "best interest" test under Section 1129(a)(7) of the Bankruptcy Code. (*See* Obj. at ¶ 13, at pp. 3-4.) As observed by the *Manchester Gas* Court, the "best interest" test only applies "*at the time of confirmation* and only if a creditor objects to confirmation." 309 B.R. at 382 (emphasis in original). After confirmation, the plan is binding regardless of whether it would have survived the "best interest" test. *Id.* The "best interest" test may only be considered at confirmation and not

afterwards with the benefit of hindsight. *See In re Consol. Water Utils.*, 217 B.R. at 592; *see also Ky. Lumber*, 860 F.2d at 678. The Court found and held that the Plan satisfied Section 1129(a) when the Plan was confirmed. (Order, ¶ 6 [Docket No. 761].) That Order was not appealed and is now a final order of this Court.

9. The Committee acknowledges that, under the Bankruptcy Code, post petition interest on pre petition unsecured claims generally is not payable unless (1) the chapter 7 estate produces a surplus or (2) the creditor is oversecured. The Committee makes much of the fact that the Plan confirmed here was a liquidating plan, thus bolstering its argument that the case here should be *treated* as a chapter 7. Thus, the Committee argues, the Court should nonetheless apply §726(a)(5) and award post petition interest despite the fact that §726(a)(5) expressly applies exclusively to solvent chapter 7 estates. In addition to the problem of applying the "best interest" test post confirmation, the Committee's argument is convoluted for a couple of reasons. First, if the effect of every chapter 11 liquidating plan was to treat the case as if it were in a chapter 7, then every solvent liquidating chapter 11 estate would be required to pay post petition interest and it would not matter what the plan or the confirmation order provided; to the extent they provided to the contrary they would not be following "applicable law" and could not be confirmed. Second, such treatment of liquidating chapter 11 cases would place a requirement on the estate where none exists under the Bankruptcy Code. Nothing in §1125 or §1129 requires it. Had Congress intended for liquidating chapter 11 cases to be treated as chapter 7 cases and require solvent estates to pay post petition interest, it easily could have provided for §1129 to contain a chapter 11 counterpart to §726(a)(5); its failure to do so prompts this Court to conclude that there is no "applicable law" that *requires*

payment of post petition interest here. Rather, Congress has allowed the Court in its discretion to determine whether interest is payable, after considering the terms of the plan, the confirmation order and the circumstances of the case.

10. Finally, even had the Court concluded that it was not bound by the plain terms of the confirmed Plan, it would still overrule the Committee's Objection. In the exercise of its sound discretion, the Court concludes that equitable principles do not favor distributing any remaining surplus to general unsecured creditors who will have already received 100 cents on the dollar of their allowed claims. As between these unsecured creditors and the constituency represented by the UNR Trust (involuntary tort creditors), the Court concludes that the equities weigh in favor of the latter group.

11. Because the Court concludes that general unsecured creditors are not entitled to post-petition interest, there is no need to address the issues of how an appropriate rate of interest is to be calculated, nor how interest payments are to be distributed.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the *Official Creditors' Committee's Objection to Terms of Debtor's Notice of Intent to Commence Fourth Interim Distribution* is hereby OVERRULED;

IT IS FURTHER ORDERED that the manner of distributing the funds remaining in the estate as set forth in the *Notice of Intent to Commence Fourth Interim Distribution* is hereby approved; and IT IS FURTHER ORDERED that the Disbursing Agent is hereby authorized to take all action necessary or convenient to consummate the transactions contemplated by said *Notice of Intent to Commence Fourth Interim Distribution.*

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Distribution:

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