

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

FEB - 1 1996

J. BARON GROSSHON

BY: JRA  
Deputy Clerk

IN RE:

PRITCHARD PAINT AND GLASS  
COMPANY

Debtor.

Tax I.D. No. ~~53~~-0366100  
56-

Case No. 95-30365

CHAPTER 11

JUDGEMENT ENTERED ON FEB - 1 1996

**ORDER CONFIRMING PLAN OF REORGANIZATION**

The Amended Plan of Reorganization filed by Pritchard Paint and Glass Company (hereinafter referred to as the "Debtor") dated December 12, 1995, and the Disclosure Statement approved by the Court having been transmitted to the holders of claims and interests; and after due notice, a hearing to consider confirmation and other matters relating to confirmation having been held before the Court on January 12, 19, 24 and 25, 1996 (the "Confirmation Hearing"); and certain minor plan modifications having been delineated by the Debtor's counsel in open Court and in the Debtor's Amendment to Proposed Plan of Reorganization held January 12, 1996, all as contained in Exhibit A hereto (the plan as so modified being referred to hereinafter as the "Plan"); and all parties in interest having had an opportunity to appear and be heard at the Confirmation Hearing; and this Court having considered the Plan and Disclosure Statement and based upon all other pleadings and papers heretofore filed herein, all proceedings heretofore had herein, and the record of the Confirmation Hearing; and after due deliberation and sufficient cause appearing therefor; and the Court having found and determined:

1. The Plan complies with the applicable provisions of Chapter 11 of the Code.

2. The Debtor has complied with the provisions of Chapter 11 of the Code.

3. The Plan has been proposed in good faith and not by any means forbidden by law.

4. Any payment made or promised by the proponent, by the Debtor, or by any person issuing securities or acquiring property under the Plan, for services or for costs and expenses in, or in connection with, the case, or in connection with the Plan and incident to the case, have been disclosed to the Court; and any such payment made before confirmation of the Plan is reasonable; or

if such payment is to be fixed after confirmation of the Plan, such payment is subject to the approval of the Court as reasonable.

5. The Debtor has disclosed the identity and affiliations of each individual proposed to serve, after confirmation of the Plan, as an officer, director or voting trustee of the Debtor, and the appointment to, or continuance in, such office of such individuals, is consistent with the interests of creditors and equity security holders and with public policy; and except as disclosed in the Plan, the proponent of the Plan does not know of any insider who will be employed or retained by the Debtor after confirmation.

6. Each holder of a claim or interest in each Class of claims or interests under the Plan has either accepted the Plan or will receive or retain under the Plan on account of such claim or interest property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would so receive or retain if the Debtor were liquidated under Chapter 7 of the Code on such date.

7. All classes entitled to ballot on the Plan have accepted the Plan except Class 5 which is the FDIC and which timely filed an objection to confirmation, and Class 8 which is comprised of state and local taxing authorities holding secured claims.

8. The Plan complies with the provisions of Section 1129(a)(9) of the Code with respect to priority claims.

9. At least one class of claims has accepted the Plan, determined without including any acceptance of the Plan by an insider holding a claim in such class.

10. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor under the Plan.

11. All conditions precedent to confirmation as set forth in the Plan have been met.

12. Certain technical modifications to the Plan were announced at the Confirmation Hearing which modifications do not require the re-solicitation of votes as provided in Section 1127 of the Code and Bankruptcy Rule 3019. Such modifications are set forth on Exhibit A attached to and incorporated in this Order.

13. With respect to the Class 5 claim of the FDIC, the Court heard testimony and arguments of counsel concerning the Debtor's proposed treatment of the secured claim of the FDIC. The uncontroverted evidence is as follows:

a. This Court entered an Order dated January 23, 1996 finding the value of the Debtor's real estate located in Raleigh,

North Carolina (the "Raleigh Premises") to be \$790,000.00.

b. The FDIC has a first mortgage on the Debtor's Raleigh Premises and on the Debtor's real estate located in Charlotte, North Carolina (the "Charlotte Premises") for which the Debtor has received an offer of purchase at a price of \$1,430,000.00. NationsBank has a second mortgage on the Charlotte Premises, together with liens on substantially all of the Debtor's other assets, which secure an indebtedness of approximately \$1,800,000.00. The Debtor's indebtedness to NationsBank will be satisfied under the Plan, as modified, by payment of \$1,550,000 in cash on the Effective Date and all NationsBank liens will then be terminated.

c. The Debtor's Plan proposes to remove the FDIC lien on the Charlotte Premises, which will leave the FDIC with a first mortgage on the Raleigh Premises to secure an indebtedness to the FDIC in an amount of approximately \$230,000.00 plus accrued interest and fees. The Debtor's Plan further proposes to provide a promissory note to the FDIC which will amortize over 30 years and which will mature in 5 years.

d. Section 1129(b) provides as follows:

(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides --

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date

of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

e. The FDIC objects to the treatment proposed for its claim on several grounds which the Court will address in order:

(1) The FDIC contends that subsection (b)(2)(a)(i)(I) is not complied with inasmuch as the Plan proposes that one of the parcels held as collateral for the FDIC indebtedness, the Charlotte Premises, is to be released and, therefore, the FDIC is not being permitted to "retain the liens securing its claims ...". Inasmuch as this subsection requires the retention of liens "to the extent of the allowed amount of such claims;", the Court is not persuaded by this contention. In view of the finding and ruling below, however, it is not necessary for this Court to rule on this issue;

(2) The FDIC also contends that it is not realizing the "indubitable equivalent of (its) claims" as provided in subsection (iii). The Debtor, however, contends that inasmuch as the treatment proposed for the FDIC will, based upon rulings of this Court, leave the FDIC with an equity cushion equal to nearly three times its debt, the provisions of subsection (iii) are satisfied. The Debtor cites several cases in support of its argument that subsection (iii) is satisfied - e.g., *In re James Wilson Assocs.*, 965 F.2d 160 (7th Cir. 1992) (eliminating lien on rents); *Woods v. Pine Mountain, Ltd.* (*In re Pine Mountain, Ltd.*), 80 B.R. 171 (Bankr. 9th Cir. 1987) (subordinating secured claim to construction mortgage). Based upon the facts before this Court, it is this Court's opinion that the FDIC is realizing the indubitable equivalent of its claim.

f. The treatment proposed for the FDIC claim does not "discriminate unfairly" against the FDIC because that treatment is justified, reasonable, necessary for the reorganization of the Debtor, and provides an adequate level of protection for the FDIC.

14. All creditors and equity security holders of the Debtor are jointly and severally restrained and enjoined from commencing

or continuing any action or employing any process to collect any debts or claims that arose prior to the commencement of this case against the Debtor or any of its property or assets or to obtain possession of property of the estate or to create, perfect, or enforce any lien against property of the estate other than by the treatment under the Plan.

15. The Debtor and the official Committee of Unsecured Creditors appointed in this case ("Committee") shall specifically retain all rights to object to any claims filed or scheduled and any applications filed in this case and the Court specifically retains jurisdiction to determine said objections to claims prior to determining the allowed amount of such claims.

16. This case should be held open and subject to the jurisdiction of this Court until Final Decree has been entered by the Court. The Court shall retain jurisdiction for the purposes specified in Article X of the Plan.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. Subject to the provisions hereof including, without limitation, the minor modifications identified on Exhibit A, and conditioned on the closing of the sale/leaseback of the Charlotte Premises, the compromised satisfaction of the NationsBank loan claims, and the closing of the Sirrom Capital exit financing, the Plan is hereby confirmed.

2. The Debtor is authorized to enter into and to perform a contract for the sale, and lease-back of a part, of the Charlotte Premises for a price of not less than \$1,430,00.00 and on terms substantially similar to those provided in the Sale Procedure Order entered by the Court on January 19, 1996. The Debtor is further authorized and empowered to convey title to the Charlotte Premises free and clear of all liens, encumbrances and other interests except for easements and restrictions of record.

3. That the Court shall retain jurisdiction of these proceedings as set forth in Article X of the Plan.

4. The Accountants and the Attorneys for the Debtor and the Committee previously appointed shall continue without the need for further Order respectively as the Accountants and Attorneys for the Debtor and the Committee and shall continue to perform services for which services they shall be entitled to be compensated by the Debtor's estate upon such application, notice and hearing as may be required by the Court.

5. Any pre-petition executory contract or unexpired lease of the Debtor which is not included on Appendix A to the Plan or which has not been assumed or rejected by an Order of the Bankruptcy Court on or prior to the Effective Date or which, as of the

Effective Date, is not the subject of a pending motion or application to assume or reject shall be deemed to have been rejected by the Debtor. Unless otherwise provided by order of the Court entered prior to the date hereof, proof of any Claim against the Debtor arising from the rejection by the Debtor of any executory contract or unexpired lease pursuant to a Final Order must be filed with the Bankruptcy Court within thirty (30) days from and after the Confirmation Date. Any entity that fails to file proof of its Claim arising from such a rejection within the applicable thirty (30) day period shall be forever barred from asserting a Claim against the Debtor or its estate.

6. No liens or other charges will survive confirmation and closing of this estate other than the treatment of liens or claims set forth in the Plan.

7. The interests and rights of equity security holders shall not be terminated or otherwise affected until entry of further order of this Court.

This the 15<sup>th</sup> day of <sup>February</sup>~~January~~, 1996.



United States Bankruptcy Judge

## Exhibit A to Confirmation Order

The following are modifications to the Debtor's Plan of Reorganization dated December 12, 1995 and certain minor plan modifications having been delineated by the Debtor's counsel at the Confirmation Hearing and in the Debtor's Amendment to Proposed Plan of Reorganization filed January 12, 1996 (the "Plan") and determined not to materially increase nor decrease the amount of payments on the claims of any class; nor to extend or reduce the time for such payment; nor materially to alter the amount of the distribution to a creditor whose claim is provided for in the Plan and therefore require no further notice, solicitation of votes or filing of amendments:

1. The definition of Debt Service Amount in Article I shall have the following parenthetical provision inserted in subsection (c) after the phrase "the costs of closing and commissions":

(including but not limited to payment of \$3,000.00 to Delta Environmental Consultants, Inc. ("Delta") at the closing of any sale by the Debtor of real property located at 1912 Main Street, Salisbury, North Carolina, 140 Remount Road, Charlotte, North Carolina or 205 South Albright Street, Rock Hill, South Carolina.)

2. Article II, section 2.10 will be deleted and the following section substituted therefor:

2.10 Class 10: The Priority Tax Claims of the Federal and State Governments. Class 10 shall consist of the Allowed Claims of federal and state taxing authorities for taxes which the Debtor was required to withhold or collect from its employees, together with employment and unemployment taxes the Debtor was required to pay as an employer, plus any pre-petition interest thereon.

3. The last sentence in Article II, section 2.15 and in Article III, section 3.15 will be deleted and the following substituted therefor:

Nothing in the description or treatment of this class by the Debtor, and further no acceptance or rejection of the plan, objection to confirmation of the plan, support of confirmation of the plan, or failure to accept, reject, oppose, or support, alone or in any combination, by any one or more holders of claims of this class constitutes an allowance or other determination of any claim or waiver or admission by the Debtor or of any other party; the sole purpose of this classification and the treatment afforded is to preserve the

respective rights and defenses of the respective parties for later determination.

4. The Class 4 Claim of NationsBank provided in Article III, Section 3.4 shall be modified to provide that the Debtor shall:

(a) conduct the sale of the Charlotte Premises under the terms and conditions of the sale procedures outlined in the Order entered Friday, January 19, 1996.

(b) complete the sale and lease back of the Charlotte Premises authorized by this Order.

(c) on the Effective Date pay NationsBank \$1,550,000 in cash out of sale proceeds from the sale of the Charlotte Premises and proceeds of the exit financing from Sirrom, in full satisfaction of all claims of NationsBank.

(d) in the event the Effective Date does not take place on or before March 15, 1996, the terms of the settlement between Pritchard and NationsBank embodied in this Order will be voidable by NationsBank at its option and Pritchard will not oppose a motion for relief from stay or a motion to dismiss or to convert the case by NationsBank.

(e) in the interim between Confirmation and the Effective Date, the terms of the June 19, 1995 Final Order on Cash Collateral and Extension of Credit will remain in effect including, but not limited to, the requirement that the Debtor pay monthly installments of interest.

(f) in the interim between Confirmation and the Effective Date, Pritchard will not seek to prime NationsBank's liens except by a loan into, and under the terms of, the Vendor Credit Facility which shall be continued in effect until the Effective Date by this Order.

5. Article III, section 3.9-3.11 will be deleted and the following substituted therefor:

3.9-3.11 Treatment of Allowed Class 9, 10, and 11 Claims (Unsecured Priority Tax Claims). Holders of such Allowed Claims shall receive the amount of such claims (a) as provided in Section 1129(a)(9)(C) of the Code in deferred cash payments over a period not exceeding six years after the date of assessment, with interest at a rate of 7%, through a series of semi-annual payments, or (b) upon such other terms as may be agreed between the Debtor and holders of such claims. It has been agreed by the Debtor and the Internal Revenue Service that payments to the Internal Revenue Service will be made on a quarterly basis with the first quarterly payment to be made ninety (90) days



after Confirmation. Those portions of taxing authority Allowed Claims which constitute penalties will be treated as Class 14 General Unsecured Claims.

6. The fourth complete paragraph of Article III, section 3.14 beginning with the words "Failure to make" and concluding with "N.C.G.S. § 6-21.2" will be deleted and the following paragraph substituted therefor:

The following shall be events of default with respect to the payment obligation to holders of Class 14 claims:

(i) failure to make a scheduled distribution of an annual Debt Service Amount within fifteen (15) days after such distribution becomes due; and

(ii) failure to distribute 50% of net preference recoveries as required by Section 6.3 of the Plan by the March 31 next following receipt of such recovery; and

(iii) breach of any requirements or any prohibition imposed on the Debtor provided in Section 7.6 or 7.7 of this Plan or the Order confirming the Plan.

Upon occurrence of an event of default, the entire unpaid balance of the \$725,000 obligation shall immediately become due and payable. After acceleration of the \$725,000 obligation for any reason, interest shall accrue on the unpaid balance at the rate of 8% per year, and the Debtor shall be obliged to pay reasonable attorneys fees of up to 15% of the unpaid balance of principle and interest. The reorganized Debtor's obligations pursuant to the Plan constitute an "evidence of indebtedness" to the holders of Allowed Class 14 claims as that term is used in N.C.G.S. § 6.21.2.

7. Article III, Section 3.16 shall be modified by the insertion of the phrase "the day after" between "On" and "the Effective Date" in the first sentence, which shall then read:

"On the day after the Effective Date (which shall be the date of the closing on the Charlotte Premises). . ."

8. The fifth sentence of Article V, Section 5.1 and the first sentence of Article VI, Section 6.2 are amended by deletion of the word "Confirmation" and by substitution of the words "Effective Date" therefor.

9. The second paragraph of Article VII, Section 7.1 will be modified to provide in subsection (g) that the Sirrom Capital loan will be secured by a second priority lien on the Debtor's real property in Raleigh, North Carolina, rather than by a third priority lien thereon.

10. Article VII, section 7.2 shall be deleted and the following substituted therefor:

7.2 Secured Trade Credit. On the Effective Date the Debtor will enter into a vendor credit security agreement ("Vendor Security Agreement") which will create a first priority lien on the reorganized Debtor's accounts receivable (including inventory proceeds) up to a maximum amount of \$350,000 in favor of suppliers who provide post-Effective Date credit terms in accordance with the Vendor Security Agreement on purchases by the reorganized Debtor. The post-petition Vendor Credit Facility shall continue in effect until the Effective Date and credit outstanding pursuant thereto shall be rolled into, become a part of, and be secured by, the Vendor Security Agreement after the Effective Date. The Vendor Security Agreement shall be substantially in the form filed by the Debtor on January 9, 1996 and shall contain terms mutually satisfactory to the Debtor, the Committee and Sirrom Capital, the final form of which shall be filed with the Court as an amendment to the Confirmation Order.

11. Article VII, Section 7.8 shall be modified by the insertion of the following sentence after the first complete sentence of that section:

(However, with respect to John Pritchard only, the waiver of the \$137,000 indebtedness and the Debtor's release of John Pritchard's obligation to pay the \$137,000 indebtedness plus interest will be conditional, but only upon Mr. Pritchard's release from, or his ability to settle or compromise in a manner satisfactory to him, his liabilities to one or more third parties identified by him. In no case, however, will the Debtor be entitled to offset Mr. Pritchard's existing obligations to the Debtor (or interest thereon) against any amounts the Debtor is obligated to pay to Mr. Pritchard in the future.)