ORDERED.

Dated: October 01, 2019

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

Advanced Manufacturing & Power Systems, Inc.

Debtor.
_____/

Chapter 11
Case No.: 6:12-bk-16507-KSJ

ORDER DENYING MOTION BY DEBTOR TO ENFORCE CONFIRMED PLAN AND FOR ISSUANCE OF AN ORDER TO SHOW CAUSE

After confirming a Chapter 11 plan of reorganization almost six years ago, Debtor, Advanced Manufacturing & Powers Systems, Inc. ("Debtor" or "AMPS"), now seeks to compel a secured creditor, Cogent Bank[1] ("Cogent"), to release its mortgages on the Debtor's real property arguing that omitting lien retention language in the confirmed plan extinguished Cogent's mortgages under Section 1141(c) of the Bankruptcy Code. Because the plan language is ambiguous on whether Cogent would retain its liens after confirmation, and the parties, including the Debtor, always intended for Cogent to retain its liens after confirmation of the plan, the

[1] Cogent Bank is formerly known as Pinnacle Bank. The Court will refer to Cogent and any predecessors collectively as Cogent or the Bank.

Debtor's omission of the lien retention language is a scrivener error that the Court will not enforce. The Court denies the Debtor's Motion.[2]

Debtor, an engineer and manufacturer of power generators, filed this Chapter 11 case seeking reorganization on December 7, 2012.[3] On the bankruptcy schedules, Debtor listed that it owned a manufacturing facility and adjacent lot at 1965 Bennett Drive, Deland, Florida 32724 (the "Property"), and that Cogent held an undisputed, liquidated, noncontingent claim secured by the Property.[4] Cogent later filed proofs of claim for $1,028,461.60 (Claim 30), and $277,670.85 (Claim 31) (collectively the "Claims")[5] secured by a first and second mortgage, respectively, on the Property. The Debtor never objected to the Claims or challenged the extent, validity, or priority of the mortgages.

In May 2013, Debtor filed its Plan of Reorganization (the "First Plan").[6] The First Plan classified claims and interests and provided for Cogent within the Secured Claims section. Shortly thereafter, Cogent's counsel sent an e-mail to Debtor's counsel, proposing this treatment in the plan:

> Class 6a Secured Claim in the amount of $1,028,461,60 P+1.0% adjusted every 5 years, matures in 25Y
>
> Class 6b Secured Claim in the amount of $277,670.85 P+1% adjusted every five years, matures in 25Y

Debtor then filed an Amended Plan of Reorganization (the "Second Plan"), which adopted the

[2] Debtor's Emergency Motion to Enforce Confirmed Plan and for Issuance of an Order to Show Cause Why Cogent Bank Should Not Be Held in Contempt of Court (Doc. No. 215). Cogent opposed the Motion (Doc. No. 218). After a hearing on April 25, 2019, the Court requested parties to file supplemental briefs. Debtor and Cogent filed supplemental briefs (Doc. Nos. 226, 227) and replies to the briefs (Doc. Nos. 228, 229). After briefing, the Court entered an Order Scheduling Trial on the Motion (Doc. No. 234). The trial was held on August 1, 2019.
[3] Doc. No. 1
[4] Doc. No. 1
[5] Creditor also filed Claim 32, another secured claim. However, that claim has been paid in full under the terms of the confirmed Chapter 11 plan.
[6] Doc. No. 114.

Cogent's proposal.[7] Debtor's Second Amended Plan ("Third Plan") did not alter the treatment.[8]

In August 2013, Debtor conducted an auction of its equity to raise capital (the "Auction"). Pacific International, LLC ("PI"), whose principal is Ira Perlmuter, was the winning bidder.[9] After the Auction, PI's counsel e-mailed Debtor's counsel with proposed changes to the Third Plan.[10] PI's counsel did not request that the word "secured" be removed or altered Cogent's treatment in the plan.

Debtor then filed its Third Amended Plan of Reorganization, as modified, and this Court confirmed it ("Confirmed Plan") in October 2013.[11] The Confirmed Plan treated Cogent's claims:

> a. Class 6a – Pinnacle Bank
>
> Class 6a shall consist of a secured claim in the amount of $1,028,461.60 held by Pinnacle Bank (Claim #30-1). This claim will be paid a monthly payment based upon prime rate plus one percent (1.0%) interest adjusted every 5 years, and will mature in twenty-five (25) years. This class 6a is impaired and the holder of the claim is entitled to vote to accept or reject the plan
>
> b. Class 6b – Pinnacle Bank
>
> Class 6a shall consist of a secured claim in the amount of $1,028,461.60 held by Pinnacle Bank (Claim #30-1). This claim will be paid a monthly payment based upon prime rate plus one percent (1.0%) interest adjusted every 5 years, and will mature in twenty-five (25) years. This class 6a is impaired and the holder of the claim is entitled to vote to accept or reject the plan.[12]

The order confirming the Confirmed Plan did not alter or amend the treatment of Cogent.[13]

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[7] Doc. No. 126.
[8] Doc. No. 145.
[9] Doc. No. 176.
[10] Cogent's Trial Exh. 44.
[11] Third Amended Chapter 11 Plan of Reorganization (Doc. Nos. 176, 177). Modification to Third Amended Plan of Reorganization (Doc. Nos. 184,185).
[12] Doc. No. 176.
[13] Doc. No. 188.

After confirmation, Debtor took no action to compel the release of Cogent's mortgages. Debtor, instead, continued to recognize Cogent as a secured creditor, with valid and existing mortgages. Debtor identified Cogent as a "loss payee" and "mortgagee" on its insurance policies.[14] Debtor's balance sheet recognized "Pinnacle Mortgage-Bld & Land" and "Pinnacle Mortgage-Lot" as long-term liabilities.[15] And Debtor's continued communications with Cogent over the years indicated that Cogent had retained its liens[16] Now, almost six years later, Debtor seeks an order compelling Cogent to satisfy its mortgages.[17]

At trial, Cogent's former counsel testified that he intended to preserve Cogent's liens with the e-mailed proposal and that he had no discussions with the Debtor's counsel regarding any issues or defects with Cogent's mortgages or their continuation post-confirmation. Instead, the conversations focused on the monthly payments. Cogent's counsel believed and understood that the Confirmed Plan preserved Cogent's mortgages, despite the lack of express lien preservation language. The Court found Cogent's counsel testimony credible.

Debtor's counsel testified that he believed Cogent's liens would be preserved under Cogent's proposal and the Confirmed Plan. Debtor's counsel recalled no discussions regarding any defects or issues with Cogent's mortgages. He recalled that negotiations with Cogent's counsel focused on reducing the monthly payment to Cogent. Debtor's counsel further testified that he intended to treat each claim under the Secured Claims subsection of the Confirmed Plan as a secured claim post confirmation, despite whether the class included express lien preservation language. The testimony of Debtor's counsel, a long-time practitioner before this Court, was credible.

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[14] Cogent Trial Exh. Nos. 17-21.
[15] Cogent Trial Exh. Nos. 22-24.
[16] Cogent Trial Exh. 32, 35.
[17] Doc. No. 215.

Joseph Scofield, president of the Debtor, was called as a witness by Cogent, not the Debtor. He testified that he was unaware of the lien extinguishment argument until at least four years after confirmation. He also was unaware of any issues or defects with Cogent's mortgages. No other representatives of the Debtor testified on the Debtor's intent. The Court easily concludes that the Debtor and Cogent intended Cogent's mortgage liens to survive confirmation, even though an ambiguity exists insofar as the Confirmed Plan fails to expressly say this.

Mr. Perlmuter, principal of PI, was the only witness for the Debtor. He stated he was an expert in acquiring bankrupt companies and is proficient in analyzing plans of reorganization. He testified that his purchase price was based upon the assumption that Cogent's mortgages were extinguished upon confirmation. The Court did not find Mr. Perlmuter or his testimony convincing or credible.

Until recently, the Debtor consistently treated Cogent's liens as enforceable. Mr. Perlmuter could not explain why he waited over five years to challenge Cogent's liens the Debtor had thought valid. He also claimed ignorance on the insurance certificates and the Debtor's financials, both of which acknowledge Cogent's mortgages, yet both would have affected his analysis. More troubling, any true expert who invests in bankrupt companies, would have noticed ambiguities in the Secured Claims section of the Confirmed Plan—defined terms were not consistently capitalized or used; similar claims of identical creditors, like the Volusia Finance Department in Classes 3 and 4, were treated differently; and Cogent's third claim in Class 6(c) was paid in full as a secured claim, even though the language is near identical to that at issue. It was a sloppy plan and any true "expert" would have seen the problems. Either Mr. Perlmuter did not carefully analyze this plan, or he bought the equity knowing of the ambiguity. The Court rejects his

conclusion he invested in this company in reliance on the extinguishment of Cogent's liens. The Debtor submitted no evidence other than Mr. Perlmuter's testimony.

Section 1141 of the Bankruptcy Code[18] describes the effects of plan confirmation.[19] Confirmation of a Chapter 11 plan of reorganization binds debtors and creditors to the plan, vests all property of the estate in the debtor free and clear of all claims and interests except as otherwise provided in the plan, and discharges the debtor of pre-confirmation debt.[20] Courts follow "principles of contract interpretation [when interpreting] a confirmed plan of reorganization."[21]

In Florida, "[i]n construing a contract the object is to ascertain the intent of the parties by a reasonable construction."[22] The entire contract must be considered in determining the intention of the parties.[23] In addition, courts in Florida are required to "place themselves, as near as possible, in the exact position of the parties to the instrument, when executed, so as to determine the intention of the parties, objects to be accomplished, obligations created, time of performance, duration, consideration, mutuality and other essential features."[24]

Construction of written contracts is a question of law where the language is unambiguous,[25] and extrinsic evidence is admissible only if the contract is ambiguous.[26] Florida recognizes a difference between latent and patent ambiguities.[27] A latent ambiguity is created where the language "is clear and intelligible and suggests but a single meaning, but some extrinsic fact or

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[18] 11 U.S.C. § 101 *et seq.*(2012), referenced as the "Bankruptcy Code."
[19] 11 U.S.C. § 1141 (2012).
[20] *Id.*
[21] *Iberiabank v. Bradford Geisen (In re FFS Data, Inc.)*, 776 F.3d 1299, 1304 (11th Cir. 2015) (internal citations omitted).
[22] *Bennett v. Williams,* 149 Fla. 4, 6, 5 So.2d 51 (1941).
[23] *Florida Power Corporation v. City of Tallahassee,* 154 Fla. 638, 643, 18 So.2d 671, 674 (1944).
[24] *Id.,* 154 Fla. at 644, 18 So.2d at 674.
[25] *Friedman v. Virginia Metal Products Corp.,* 56 So.2d 515, 516 (Fla.1952),
[26] *Carlon v. Southland Diversified Company,* 381 So.2d 291, 293 (Fla.Dist.Ct.App.1980), *reh'g denied, citing, Pearson v. Pearson,* 342 So.2d 1018 (Fla.Dist.Ct.App.1977).
[27] *Ace Electric Supply Company v. Terra Nova Electric, Inc.,* 288 So.2d 544, 547 (Fla.Dist.Ct.App.1973), *reh'g denied* (1974).

extraneous evidence" necessitates "a choice among two or more possible meanings."[28] A patent ambiguity "appears on the face of the instrument, and arises from the defective, obscure or insensible language used."[29] Extrinsic evidence is admissible to cure a latent ambiguity, but not a patent ambiguity.[30]

The Debtor contends that the Confirmed Plan did not preserve the mortgages due to the Plan's failure to include express lien preservation language. According to the Debtor, without specific lien retention language, Cogent's mortgages have extinguished by operation of Section 1141(c) of the Bankruptcy Code.[31]

Having reviewed the Confirmed Plan, the Court finds that the Confirmed Plan contains latent ambiguities on the treatment of Cogent - Class 6a and Class 6b. Debtor classified Cogent under "Secured Claims" and provided that Class 6a and 6b "consist of a secured claim" but included no lien retention language. The evidence demonstrates that the parties always intended for Cogent to retain its liens or mortgages after confirmation. And the Court cannot fathom a reason Cogent would release its mortgages at confirmation given the terms of the Confirmed Plan. The Court believed Mr. Perlmuter's testimony to be self-serving and not an accurate representation of what the parties intended. The parties made a mistake in omitting the lien retention language. The Court will not provide the Debtor with a windfall–the release of over $1 million of mortgages—based on an error made by both parties.

Accordingly, it is

ORDERED:

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Section 1141(c) of the Bankruptcy Code provides, in pertinent part, that ". . . except as otherwise provided in the plan . . . after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of the general partners in the debtor."

1. The Motion (Doc. No. 215) is **DENIED.**

2. Confirmation of the Plan did not extinguish Cogent's mortgages.

3. This Court shall retain jurisdiction to enforce this Order and to enter any orders or judgments incident to this Order.

Bradley M. Saxton is directed to serve a copy of this Order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the Order.