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U.S. Bankruptcy Court
Winston-Salem, NC
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re: Trimm, Inc. Debtor.	Bankruptcy Case No. B-97-16637-C-11D

MEMORANDUM OPINION

THIS MATTER came on for hearing on January 13, 2000, and again on January 19, 2000, before the undersigned Bankruptcy Judge for a confirmation hearing on the Debtor's Second Plan of Reorganization ("the plan") filed by Trimm, Inc.("Trimm"), a North Carolina corporation, and upon the Objection to Confirmation filed by Rammax Maschinenbau, GmbH ("Rammax") and Multiquip, Inc.("Multiquip"). Appearing before the Court were S. Perry Thomas, Jr., counsel for the Debtor; John A. Northen, counsel for Rammax and Multiquip; William P. Miller, counsel for King Walker; and N. Hunter Wyche, counsel for the Unsecured Creditors Committee.

The Court, after reviewing the legal authorities of the parties, considering the evidence presented, and hearing the arguments of counsel, makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rules 9014 and 7052.

JURISDICTION

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(L) which this Court may hear and determine.

BACKGROUND FACTS

The Debtor is involved in the manufacturing and sale of construction equipment and parts, including vibratory trench rollers. Trimm was previously tied to two other North Carolina corporations, Sea-Roy Corporation ("Sea-Roy")and Southern Contractors, Inc. ("Southern"). Historically, Sea-Roy would market the trench rollers produced by Trimm and Southern would sell or rent the equipment. Sea-Roy, Southern, and Trimm all filed under Chapter 11 on December 30, 1997. A consolidated plan proposed by these three companies was rejected by the Court and by order dated June 28, 1999, the cases of Sea-Roy and Southern were converted to Chapter 7 under the Bankruptcy Code. Trimm was given a period of time to submit a new plan of reorganization for consideration.

Rammax is a small German manufacturer of trench roller compaction machines used in the construction industry. From 1981 to 1991, Rammax distributed its rollers in the United States through Sea-Roy. In 1991, because of payment arrearages, Rammax terminated the exclusive agreement it had with Sea-Roy, and entered into an order-by-order arrangement with Sea-Roy, as well as with another larger United States distribution company known as Multiquip, Inc. By the end of 1992, Sea-Roy was indebted to Rammax for approximately $1,800,000.00 and Rammax terminated its agreement with Sea-Roy and entered into an exclusive distribution agreement with Multiquip.

A few months later, Sea-Roy, Trimm, and Southern introduced their own trench roller. The United States District Court for the Middle District of North Carolina and the Fourth Circuit found that this roller, in design and detail, was essentially a duplicate of the Rammax model previously distributed by Sea-Roy. Based on the judgments obtained in the United States District Court for the Middle District of North Carolina and affirmed by the Fourth Circuit, Rammax and Multiquip timely filed proofs of claims in each bankruptcy proceeding. The claims are as follows:

	Sea-Roy	Southern	Trimm	Total
Rammax	$3,785,101.00	$450,000.00	$150,000.00 [1]	$4,385,101.00
Multiquip	$1,400,000.00	$450,000.00	$150,000.00	$2,000,000.00
Total	$5,185,101.00	$900,000.00	$300,000.00	$6,385,101.00

Trimm's plan of reorganization provides that Ditch Machine Holding, Inc. ("DMH") will be formed under the laws of the State of North Carolina. The existing shares of Trimm will be transferred to DMH. DMH will either obtain the funds necessary to fund the plan from outside investors or obtain an asset-based loan from an outside lender. On the effective date, DMH will own all outstanding common stock of the Debtor and the Debtor will be revested in all property that was formerly property of the estate of the Debtor. DMH will then become responsible for all distributions in accordance with the plan. DMH has now been formed and has raised new capital to be invested in the amount of $242,500.00. The funds are not committed to the Trimm plan but instead to capitalize DMH. Mr. Michael Smith, vice-president of the Debtor, serves as the president of DMH.

The plan itself is quite simple and sets forth five (5) classes of claims, they are as follows:

Class I consists of all allowed secured claims; Class

[1] The District Court awarded $300,000.00 against Trimm to Rammax and Multiquip, jointly, for trademark infringement, which for purposes of this proceeding, has been allocated in equal shares of $150,000.00 to each.

II consists of all allowed unsecured claims held by essential trade creditors of the Debtor; Class III consists of other allowed unsecured claims including the claims held by Rammax and Multiquip; Class IV consists of the allowed claims of insiders; and Class V consists of the interests of the existing shareholders of the Debtor.

A. Treatment of Class II Claims versus Class III Claims

In this case, the Debtor has moved to classify unsecured creditors into two separate classes. The first class, Class II, consists of thirty-nine (39) creditors that the Debtor contends are absolutely necessary for the ongoing operation of the business as they supply goods that the Debtor is otherwise unable to obtain in the marketplace. Accordingly there is a "rational business justification" for the classification of the claims. Class III consists of the fifty-three (53) remaining unsecured creditors whom the Debtor contends are not necessary for the ongoing operation of the business.

In Trimm's proposed plan, both Class II and Class III are to receive a fifteen percent (15%) dividend. An initial distribution of $30,000 will be made to holders of Class II claims within 180 days of plan confirmation with monthly payments thereafter until such claimants have received fifteen percent

(15%) of their total allowed claims. Class III claimants shall be paid an initial distribution of $45,000 within 180 days of plan confirmation with monthly payments made thereafter until such claimants have received fifteen percent (15%) of their total allowed claims. The treatment then diverges in that if the Debtor's profits reach a certain level then Class II creditors can receive up to 60% of their allowed unsecured claims. No supplemental dividend is provided to Class III regardless of DMH's future profits.[2]

B. The Rammax and Multiquip Objections to the Plan

Rammax and Multiquip object to confirmation of the proposed plan of reorganization contending that the plan violates § 1129(a)(1), including but not limited to the various sections of the Bankruptcy Code set forth below. Rammax and Multiquip contend that the plan violates §§ 1122, 1123(a)(1), 1129(a)(1) and 1129(a)(10) and cannot be confirmed on the basis of acceptance by a gerrymandered class of impaired claims. Rammax

[2] The plan provides that in any fiscal year during which the net operating income of DMH exceeds $300,000, twenty-five percent (25%) of the excess will be paid to Class II and Class III Claimants with forty percent (40%) going to Class II and sixty percent (60%) to Class III. These payments are in addition to the fifteen percent (15%) Class II will receive and will continue until Class II claimants have been paid sixty percent (60%) of their allowed claims. The payment to Class III is simply an acceleration of the fifteen percent (15%) these claimants are to receive.

and Multiquip object to and have voted to reject the plan and they contend that if the unsecured creditors were properly classified, no class of unsecured creditors has accepted the plan by the requisite majority in number and two-thirds in amount. Therefore, there is no acceptance of the plan by an impaired class. Next, Rammax and Multiquip contend that the plan violates § 1123(a)(4) in that it fails to provide the same treatment to each claim of a particular class since the claims in Class II and Class III are substantially similar.

Rammax and Multiquip further object to confirmation by asserting that the plan was not proposed in good faith as required by § 1129(a)(3) in that it seeks to gerrymander classes to obtain an accepting impaired class and it does not provide a meaningful dividend to creditors. Rammax and Multiquip contend that the plan fails to meet the requirement § 1129(a)(7)(A)(ii), since the present value of the proposed dividend to Rammax and Multiquip is less than the amount they would receive whether or not the cases were substantively consolidated, if the assets were liquidated and distributions made pursuant to the provisions of Chapter 7 of the Bankruptcy Code. Rammax and Multiquip argue that the plan violates the requirement of § 1129(a)(11), in that the plan is not feasible and confirmation of the plan is likely to be followed by liquidation or the need for further reorganization of the Debtor. Rammax and Multiquip also argue that the plan unfairly discriminates against the Class III claims and so violates the requirement of § 1129(b)(1) such that the plan cannot be confirmed via cram-down as it is neither fair nor equitable with respect to the treatment of such claims.

C. The Debtor's Burden

A debtor seeking reorganization under Chapter 11 has the burden of establishing that the plan complies with all statutory requirements of confirmation. See In re Arnold & Baker Farms, 177 B.R. 648, 653 (B.A.P. 9th Cir. 1994), aff'd, 85 F.3d 1415 (9th Cir. 1996), cert. denied, 519 U.S. 1054 (1997). The Debtor must carry this burden by a preponderance of the evidence. Id.

The Debtor asserts the following responses to the objections: 1) separate classification is appropriate for valid business reasons; 2) the plan complies with § 1123(a)(4) in that the plan provides for the same treatment of all claims within a particular class; 3) the plan complies with § 1129(a)(7)(A)(ii), in that Rammax and Multiquip will receive as much or more under the plan than they would receive in liquidation; 4) the plan was proposed in good faith and complies with § 1129(a)(3); (5) the plan is feasible in that it offers reasonable assurance of success in that the Debtor has raised more than $242,500.00 in cash from outside sources; and 6) the plan complies with the cram-down requirements in that it does not unfairly discriminate against Rammax and Multiquip.

Analysis

The issue before the Court is whether or not Trimm's Seconded Amended Plan of Reorganization should be confirmed. In order for a plan to be confirmed, it must comply with all applicable provisions of Title 11. See 11 U.S.C. § 1129(a)(1). This Court must first determine that the classifications proposed in the plan are proper such that §§ 1122 and 1123 are satisfied. If classification is proper, the Court will then decide if all provisions of § 1129(a) are met except for subsection (a)(8) such that cram-down may be appropriate under § 1129(b). If so, the plan will only be confirmed via cram-down if the Court finds the plan is fair and equitable and does not unfairly discriminate.

A. The Classification Scheme is Proper under Sections 1122 and 1123

The section of the Bankruptcy Code dealing with classification of claims is § 1122, which provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class. (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

Although the statute forbids dissimilar claims being placed in the same class, it does not expressly require that substantially similar claims or interests be classified together. This issue has been addressed by numerous circuit courts with respect to nonrecourse deficiency claims. The Second, Third, Fourth, Fifth, Eighth and Ninth Circuits have held that separate classification of code created non-recourse deficiency claims as well as *bona fide* deficiency claims is impermissible, if the intent is to obtain an impaired accepting class for purposes of cram-down. These six circuits, as well as the Sixth Circuit, are all in agreement with the principal that § 1122 does not permit classification schemes designed solely to engineer compliance with the cram-down provision of § 1129(a)(10). See In re Boston Post Road Ltd. Partnership, 21 F.3d 477 (2d Cir. 1994); In re Route 37 Bus. Park Assoc., 987 F.2d 154 (3d Cir. 1993); In re Bryson Properties XVIII, 961 F.2d 496 (4th Cir. 1992), cert. denied, 506 U.S. 866 (1992); In re Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991), cert. denied, 506 U.S. 821 (1992); In re United States Truck Co., 800 F.2d 581 (6th Cir. 1986); In re Lumber Exch. Bldg. Ltd. Partnership, 968 F.2d 647 (8th Cir. 1992); Barakat v. Life Inc. Co. of Va., 99 F.3d 1520 (9th Cir. 1996).

The most frequently stated proposition is from the Fifth Circuit in the Greystone case: "One clear rule" is that "thou shalt not classify similar claims differently in order to gerrymander" compliance with § 1129(a)(10). Greystone, 995 F.2d at 1279.

This Court must examine the controlling authority of the Bryson Properties case when analyzing whether the classification scheme is proper. Bryson Properties, 961 F.2d 496. In Bryson Properties, the debtor's plan provided for the same treatment for all unsecured creditors but set up separate classes for those creditors with "natural" recourse claims and "unnatural" recourse claims arising under § 1111(b). See id. at 501. The court examined the classification and noted that 11 U.S.C. § 1122 requires that all claims placed in the same class must be substantially similar. "It does not, however, require that all substantially similar claims be placed within the same class, and it grants some flexibility in classification of unsecured claims." Id. at 502. The court pointed out that there is a limit to such flexibility and stated that the debtor may not gerrymander or artificially impair classes of claims in order to obtain an impaired accepting class. Id. The court further noted that where separate classes were created with each class receiving the same treatment and where the debtor had failed to offer "any reason for separate classification of the unsecured claims which would withstand scrutiny" that separate classifications would not be permitted as the classification scheme was clearly to manipulate the vote. Id.

The Debtor can offer no legal distinctions between the claims to justify separate classification. The Court does not end its inquiry with this finding, but must determine if the Debtor's stated business purpose justifies separate classification. Although a plan proponent has the discretion to propose a plan that does not place all similar claims within the same class, the discretion is not unlimited. The separate classification of similar claims, with the exception afforded under § 1122(b) authorizing separate classification of smaller unsecured claims when reasonable and necessary for administrative convenience, must be reasonable and not proposed for an improper purpose. See Boston Post Road, 21 F.3d at 479 (debtor must offer credible evidence showing a legitimate reason for separately classifying the unsecured portion of a creditor's claim from other unsecured claims); See also In re Johnston, 21 F.3d 323, 328 (9th Cir. 1994)(separate classification of deficiency claim is permissible if done for reasonable, nondiscriminatory reasons); In re Montclair Retail Ctr. L.P., 177 B.R. 663, 664 (B.A.P. 9th Cir. 1995)(the debtor must offer a business or economic justification for the separate classification, or show a legal distinction between the claims).

Unlike in Bryson Properties, the Debtor in Trimm has presented evidence of legitimate business reasons supporting the separate classification of similar claims. Class II is compromised of thirty-nine (39) creditors, only twenty-six (26) of whom voted. Of the twenty-six (26) creditors who voted, all voted to accept the plan. The Debtor presented evidence that because Trimm manufactures a product that is unique in its market, some of the inventory and parts that go into the manufacture of the Trimm product are unique. These creditors are essential to the ongoing operation and reorganization of the business. Evidence was presented that each member of Class II provides either a part or service that cannot be obtained from another supplier or that it would be so difficult or expensive to replace that particular supplier that it would make Trimm's business prohibitively difficult or impossible to operate.[1]

Numerous courts have recognized that if there is a valid business justification then creditors which otherwise have the same priority status under the bankruptcy system may be

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[1] There are two instances in which two different suppliers provide the same product. However, the Debtor testified that in order to have the goods on hand at all times it was necessary to have two suppliers.

classified and treated differently. See In re Georgetown Ltd. Partnership, 209 B.R. 763, 772 (Bankr. N.D. Ga. 1997); See also In re Jersey City Medical Ctr., 817 F.2d 1055, 1061 (3d Cir. 1987) (affirming the separate classification by the debtors' hospital of the claims of medical malpractice victims, breach of indemnity agreement claims by physicians, and the claims of trade creditors); In re Rochem, 58 B.R. 641, 643 (Bankr. D. N.J. 1985) (holding that separate classification and disparate treatment of tort judgment claims was reasonable); In re Brisco Enters., 994 F.2d 1160, 1167 (5th Cir. 1993) (holding that the city of Fort Worth could be classified separately because its interest in and contribution to low income housing complex was different from other creditors); In re Kliegl Bros. Univ. Elec. Stage Lighting Co., 149 B.R. 306, 309 (Bankr. E.D. N.Y. 1992) (debtor was justified in classifying separately the local electrical worker's union, without whom it could not survive); U.S. Truck Co., 800 F.2d at 587 (teamster's union could be classified separately because it had a "different stake in the future of our ability of the reorganized company").

The burden is on the plan proponent to prove the existence of a "legitimate business reason." See In re Chateaugay Corp., 89 F.3d 942, 949 (2d Cir. 1996); See also Boston Post Road, 21 F.3d at 483; Greystone, 995 F.2d at 1279; Lumber Exch., 968 F.2d at 649 ("there is some authority for the proposition of a plan may classify trade creditors separately from, and treat them more generously than, other creditors if doing so is necessary to the debtors ongoing business"); Barakat, 99 F.3d at 1528 (the separate classification for "business reasons" is improper, when dozens of other companies could supply the same goods and services); In re SM 104 Ltd., 162 B.R. 202 , 217 (Bankr. S.D. Fla. 1993) ("separate classifications for valid business reasons are uniformly accepted"). In Trimm, the ongoing business operation is dependent upon the Debtor's continued commercial relationship with those creditors listed in Class II and with whom there is a proposed future business relationship. The Debtor has been able to prove by the greater weight of the evidence that the proposed classification scheme was not simply for the purpose of gerrymandering the voting in this plan.[2]

Accordingly, the Court concludes that the classification of the unsecured claims under the Debtor's plan in this case is a reasonable classification which has been proven to be based upon reasonable business justifications and which should be permitted

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[2] Only three creditors voted against this plan. All those creditors were in Class III. Subsequent to the initial balloting, two of these creditors have indicated a willingness to change their vote to accept the plan such that Rammax and Multiquip will be the sole creditors balloting against this plan. Issues have been raised about the propriety of changing a vote at this point in time.

under the facts and circumstances of the present case. The Court finds the classification scheme is proper and so the proposed plan does not violate § 1122 of the Bankruptcy Code. The proposed plan does not violate §§ 1123(a)(1) and (a)(4) since it properly designates the classes of claims and the plan provides for the same treatment of each claim within a particular class.

B. One Class of Impaired Claims has Voted to Accept the Plan

Since the plan proposes to pay Class II claimants only a portion of their allowed claims, this class is impaired. Of the thirty-nine (39) creditors in Class II, twenty-six (26) voted and they all voted in favor of acceptance of the plan. These twenty six (26) votes for acceptance of the plan meet the majority in number and two-thirds in amount requirement to have an accepting class. Since the Court finds that the classification scheme is proper and Class II is an impaired accepting class, the proposed plan satisfies the requirement of § 1129(a)(10).

C. The Proposed Plan Violates the Best Interest Rule

11 U.S.C. § 1129(a)(7) requires a plan proponent to demonstrate that each participant, not each class of participants, receive at least as much in a reorganization as it would in liquidation. The burden is on the Debtor to establish that Rammax and Multiquip will receive property that has a present value equal to those creditors' hypothetical Chapter 7

distributions if the assets were liquidated instead of reorganized on the plan's effective date.

This section, commonly referred to as the "best interest of creditors test," prevents confirmation of a plan if a non-accepting impaired claimant is given less value than would be received if the debtor's property were liquidated under Chapter 7. The debtor has presented a liquidation analysis as of the effective date of the plan. This liquidation analysis shows that the creditors would receive six percent (6%) of their total allowed claims and therefore the treatment provided in the plan, fifteen percent (15%) over time with interest at ten percent (10%), provides the creditors with more value than they would receive under Chapter 7.

The evidence shows that the Debtor's liquidation analysis is flawed and misstates the actual amount Rammax and Multiquip would recover in liquidation. The Debtor values its receivable at \$87,460.64 less potential uncollectible accounts of \$17,916.96 for a net value for accounts receivable of \$69,543.68. A review of the debtors monthly reports of account receivables are as follows:

June	\$432,000.00
July	\$163,000.00
August	\$200,000.00
September	\$385,000.00
October	\$227,675.00

November $234,000.00[3]

The average monthly receivable amount is $270,000.00. Mike Smith, the vice-president of Trimm, testified that, through November 1999, the company's accounts receivables had increased by $250,000.00 and that inventory had grown by $100,000.00. These increases resulted in a year-to-date profit of $168,000.00 which Mr. Smith testified was probably understated by $30,000.00. The Debtor's plan is a sale of all the assets or a § 363 sale in the context of a plan. DMH will own all assets of the Debtor. DMH has already raised $242,000.00 in cash.

The Debtor has put a liquidation value on the equipment as follows:

Machines on process	$1,500.00
Parts/Inventories	$500.00
Shop equipment	$54,000.00

The Court finds that these values are grossly undervalued. There is no evidence that the inventory or shop equipment is obsolete or in need of repair. For the month ending November 1999, the Debtor valued its inventory at $383,942.00. On the schedules, the Debtor listed the following items of personalty with the following values:

1992 Chevrolet Truck	$12,500.00
Office equipment	$1,124.70
Machinery, Fixtures,	

[3] November was the last monthly report available.

Equipment in the shop	$20,309.31
Parts inventory	$280,471.00

Based upon the monthly reports, the parts inventory increased to $383,942.00. The Debtor's liquidation value of $500.00 is unconscionable and smacks of bad faith.

The Debtor is attempting to sell this business as a going-concern and pay creditors as little as possible. If, Mr. Smith is correct and the Debtor had a profit of $168,000.00, then the company has a going-concern value. The Debtor's proposed plan to transfer the going-concern value of Trimm and all assets, including assets not even disclosed,[4] for a total of an estimated $260,000.00 to be paid over time does not satisfy the requirements of §§ 1129(a)(3) or 1129 (a)(7).[5]

The determination of what a creditor would receive upon liquidation entails speculation as liquidation typically results in depressed prices. It also requires the estimation of disputed and contingent claims and of Chapter 7 administrative expenses. At the confirmation hearing, the Debtor presented two items which

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[4] Through his testimony, Mike Smith made the Court aware of the existence of intellectual property including shop drawings and patterns upon which the Debtor has failed to place a value.

[5] The Court is aware that, for purposes of § 1129 (a)(7) calculations, the liquidation value of the assets is used not the going-concern value. However, the Court finds that regardless of the valuation used the Debtor has not met its burden of showing that creditors will receive more under the plan than under a Chapter 7 liquidation.

would reduce the overall amount of claims, thereby increasing the estimated return to creditors in a Chapter 7 liquidation. First, the Debtor stated that it believed it would prevail on an objection to the claim held by Southern, a Class III claimant, in the amount of $217,606.00 such that the claim would be reduced to zero. Second, the Debtor has reached an agreement with King Walker, another Class III creditor, whereby King Walker's allowed claim will be reduced from $188,262.12 to $100,000.00. The "best interest" analysis is not precise and does entail speculation, but if the claim of Southern was reduced to zero, and the claim of King Walker was reduced by $88,262.12 it would impact the dividend creditors would obtain in Chapter 7. See In re Sierra-Cal, 210 B.R. 168, 170 (Bankr. E. D. Cal 1997) ("a plan of reorganization fails the "best interest" test when it purports to give any value to a creditor who has a claim disallowable under § 502(d) at the expense of creditors and interest holders who are not under § 502(d) disability and who would receive a distribution in a hypothetical chapter 7 liquidation in which § 502(d) is enforced"). Without the Southern claim and with a reduced King Walker claim, the total of Class III claims would be $968,880.09. At the Debtor's estimated liquidation distribution of six percent (6%), Class III claimants would receive $58,132.80. However, the Court is confident that these creditors would receive a larger dividend than this in an actual Chapter 7 liquidation.

The total amount of claims in Class III is $1,274,748.21 of which $217,606.00 is a claim held by Southern. The Debtor now contends that this claim should be disallowed in full. The claim has been treated as an allowed claim for liquidation purposes. The Debtor has failed to demonstrate that Rammax and Multiquip would receive more under the amended plan than they would if immediate liquidation were required under a Chapter 7. Accordingly, the Debtors have failed to satisfy § 1129 (a)(7)(A)(ii).

D. The Plan was not Proposed in Good Faith

For a plan to be confirmed, the Bankruptcy Code requires that the plan be proposed in good faith. See 11 U.S.C. § 1129(a)(3). Good faith is determined by examining the totality of the circumstances and considering many factors, including the debtor's ability to pay. See In re Weber, 209 B.R. 793, 797-98 (Bankr. D. Mass. 1997)(citing In re Fernandez, 97 B.R. 262, 263 (Bankr. E.D. N.C. 1989)); See also In re Piece Goods Shop Co., L.P., 188 B.R. 778 (Bankr. M.D. N.C. 1995)(good faith requirement for confirmation of a Chapter 11 plan must be viewed in light of the totality of circumstances surrounding establishment of plan).

The Debtor has incorrectly identified the initial payments to creditors. It was represented to the Court that under the proposed plan Class II and Class III would each received an initial distribution within 180 days of confirmation equal to six percent (6%) of the allowed claims within each class. However, upon closer examination of the proposed distribution, it has come to the Court's attention that although Class II will receive a distribution equal to six percent (6%) of the total allowed claims within that class, Class III will only receive a three and eight-tenths percent (3.8%) distribution in the first 180 days after confirmation.[6] Debtor then proposes to make monthly payments of an undetermined amount until the creditors receive fifteen percent (15%) of their allowed claims. Technically, the Debtor could make payments of as little as one dollar ($1.00) per month and still comply with the terms of the plan. The Court finds that the plan was proposed in bad faith since the plan does not provide sufficient information for the Court to determine the amount and timing of distributions to be made to the creditors. Nor does the proposed plan provide sufficient information for the Court to make an accurate comparison of the present value of the

[6] According to Exhibit B attached to the proposed plan, Class III includes debts that were formerly debts owed to insiders, Chris Smith and Southern Contractors, however since the bankruptcy cases of these insiders have been converted to Chapter 7 cases and trustees have been appointed in each case, the debts are no longer owed to insiders and are properly listed as general unsecured debts.

proposed distributions creditors would receive under the plan and the amount creditors would receive under a Chapter 7 liquidation analysis.

The proposed plan provides for only nominal payments to creditors and the time-frame in which the payments are to be made is unclear. Meanwhile, all of the assets of the Debtor will have been transferred to the newly created DMH. So if the Debtor somehow does not fulfill its vague duties under the plan, the creditors' only remaining remedy will be to further incur expenses in taking action against DMH based on its responsibility under the plan which at best will allow only the recovery of the fifteen percent (15%) dividend.

The Court finds that the plan was proposed in bad faith and violates § 1129(a)(3) in that the Debtor has inaccurately represented the initial payments to unsecured creditors, has failed to provide the Court with accurate and sufficient information upon which to make its best interest analysis, and has proposed a plan that will provide only a nominal dividend to unsecured creditors.

E. Cram-down is not Available

The requirement that the plan not discriminate unfairly and be fair and equitable applies only to the rejecting class of creditors. Numerous courts have confused the classification issues with unfair discrimination. They are two separate legal issues. Only if a debtor can prove at confirmation that the plan complies with the requirements of §§ 1122 and 1129(a)(10) is there even the possibility of reaching cram-down under § 1129(b)(1). A debtor is only entitled to a cram-down hearing and thus an inquiry as to whether the plan unfairly discriminates and is fair and equitable if the debtor can prove they have complied with all confirmation requirements but for § 1129(a)(8). Accordingly, in this instance a cram-down is not available.

IT IS THEREFORE ORDERED that confirmation is denied as the Debtor has failed to meet the confirmation requirements of §§ 1129 (a)(3) and (a)(7). IT IS FURTHER ORDERED that the Debtor has thirty days to file a final amended plan. Only those four (4) creditors voting against the Second Amended Plan shall cast ballots. The time to cast ballots under Federal Rule of Bankruptcy Procedure 2002(a) shall be shortened to ten (10) days and the time to file objections to confirmation under Rule 2002(b) shall be shortened to fifteen (15) days. The failure to submit an amended plan within the required time period shall result in the entry of an order converting this case to a Chapter 7 case. This Debtor has been given an extensive amount of time to present a confirmable plan. The Debtor has now presented two (2) plans of which the Court has denied confirmation.

This the 17 day of February, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge