

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
 )  
REINICHE, INC. ) CASE NO. 07-12584  
 )  
 )  
Debtor )

**DECISION**

At Fort Wayne, Indiana, on October 30, 2008

The question before the court in this Chapter 11 case is whether the debtor's proposed plan can be confirmed over the rejection of the unsecured creditors. To do so, the plan must satisfy the requirements of the absolute priority rule, which have been codified at § 1129(b) of the United States Bankruptcy Code. 11 U.S.C. § 1129(b). As it relates to unsecured creditors, this requires either that they be paid in full or that no junior class receive or retain any property under the plan on account of its interest. 11 U.S.C. § 1129(b)(2)(B). In a corporate case, such as this one, the most junior class consists of the debtor's shareholders and so, unless unsecured creditors are paid in full, a plan that allows shareholders to continue their ownership cannot be confirmed over the rejection of the unsecured creditor body. In re Potter Material Service, Inc., 781 F.2d 99, 101 (7th Cir.1986).

Under the proposed plan debtor's unsecured creditors will not be paid in full. Instead, over the next five years, they will share, pro-rata, a distribution of no more than \$1,500 per year. See, Amended Plan, filed June 13, 2008, p. 5, Art III, class 4.<sup>1</sup> At best, they will share no more than \$7,500. Despite the fact that unsecured creditors are not being paid in full, the plan allows the debtor's sole shareholder, Jeff Reiniche, to retain ownership of the debtor's stock in exchange for

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<sup>1</sup>Fifteen hundred a year is the most unsecured creditors will share. Their precise distribution is to be decreased by any administrative fees.

a contribution of \$1,500 a year, for five years, towards the distribution to creditors. Id., Class 5. Such an arrangement clearly does not satisfy the requirements of § 1129(b)(2)(B). The debtor argues, however, that Mr. Reiniche's \$1,500 annual contribution satisfies the "new value exception" to the absolute priority rule, and thus allows the plan to be confirmed even though unsecured creditors are not being fully paid. Whether or not it does is the focus of this decision. In re MJ Metal Products, Inc., 292 B.R. 702, 704 (Bankr. D. Wyo. 2003)(Bankruptcy court has the independent duty to determine whether a plan complies with § 1129).

As the proponent, the debtor bears the burden of proving that its proposed plan is worthy of confirmation. In re MCorp Financial, Inc., 160 B.R. 941, 960 (D. S.D. Tex. 1993); In re Shadow Bay Apartments, Ltd., 157 B.R. 363, 365 (Bankr. S.D. Ohio 1993). To satisfy the new value exception to the absolute priority rule, and allow shareholders to retain their interests, requires proof of at least four things. The shareholders' contribution must be:

1. necessary to the reorganization,
2. in the form of money or money's worth,
3. reasonably equivalent to the value of the interest retained, and,
4. substantial. Matter of Snyder, 967 F.2d 1126, 1131 (7th Cir. 1992). See also, Matter of Woodbrook Assocs., 19 F.3d 312, 319-20 (7th Cir. 1994).<sup>2</sup>

Although it casts doubt on whether the debtor satisfies the requirements of § 1129(a)(10)

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<sup>2</sup>In addition to these requirements, there is the possibility that satisfying the exception also requires ownership of the reorganized debtor be "exposed to the market." Bank of America Nat. Trust & Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 457, 119 S.Ct. 1411, 1422-24 (1999). In other words, the plan may not give existing equity the exclusive opportunity to acquire interests in the reorganized debtor; instead, others, such as creditors, must also be given the opportunity to acquire shares. See, LaSalle Street Partnership, 526 U.S. at 458, 119 S.Ct. at 1424. See also, MJ Metal Products, 292 B.R. at 705.

(confirmation not likely to be followed by liquidation or the need for further financial reorganization), the court is willing to accept the debtor's argument that its intermittent profitability and historical losses make Mr. Reiniche's annual contribution necessary to the success of the proposed plan. Although the contribution does not represent an immediate infusion of cash and is simply a promise to make payments in the future, such a promise has some kind of place in the asset column of a balance sheet and seems to qualify as money or money's worth. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 203-04, 108 S.Ct. 963 967 (1988). See also, Snyder, 967 F.2d at 1131; Kham & Nates Shoes v First Bank of Whiting, 908 F.2d 1351, 1362-63 (7th Cir. 1990). It is on the final two requirements that the debtor's argument flounders. The record before the court is not sufficient to allow it to conclude that Mr. Reiniche's forthcoming \$7,500, over the next five years, is reasonably equivalent to the value of the interest he will retain or that it is substantial.

Proof that the equity interest shareholders will retain under a confirmed plan is reasonably equivalent to the value of their contribution requires some kind of evidence of the value of the reorganized debtor. See e.g., In re Beaver Office Products, Inc., 185 B.R. 537, 543 (Bankr. N.D. Ohio 1995). Only if the court knows both the amount of the shareholders' contribution and the value of the interest they will retain because of that contribution will it be able to compare the two in order to determine whether they are reasonably equivalent. Here, not only is there no such evidence, there is no meaningful allegation to this effect in the debtor's amended motion to confirm. At best the motion makes only the conclusory assertion that because Debtor has taken certain actions to avoid further losses (such as terminating the employment of Debtor's manager), this shows that Mr. Reiniche is receiving a participation reasonably equivalent to his contribution. Amended Motion to Confirm, filed Sept. 5, 2008, ¶ 22. This does not allege the necessary facts concerning reasonable

equivalent value with the particularity required by Bankruptcy Rule 9013, see, In re Minton, 2006 WL 533352 \*2 (Bankr. N.D. Ind. 2006), and the stated conclusion does not follow from the motion's premise.

Finally, even if all the other requirements of the exception were satisfied, the court cannot conclude that Mr. Reiniche's promised \$7,500 contribution is substantial. This requirement "is independent of the rule that a contribution must be at least equal to the value of the interest retained." Snyder, 967 F.2d at 1131. "There is no mathematical formula for resolving the substantiality issue . . . ." Snyder, 967 F.2d at 1131-32. It depends upon the circumstances of each case and is more of a common sense determination than a mathematical one. Id.; Woodbrook Associates, 19 F.3d at 320. It does, however, allow the court to compare the proposed contribution to the amount of unsecured debt. If the disparity is extreme, no further inquiry is needed. Snyder, 967 F. 2d at 1132; Woodbrook Associates, 19 F.3d at 320.

In this instance, there is an extreme disparity between the proposed contribution and the debtor's unsecured debt; so much so that the proposed contribution of only \$7,500 "is too little to warrant the drastic remedy of cram-down." Matter of Stegall, 865 F.2d 140, 144 (7th Cir. 1989)(proposed contribution of \$2,000 was only nominal). To begin with, especially since the contribution is to be spread over five years, it does not seem to involve a lot money. This perception is reinforced when we compare it to the unsecured claims which the proposed plan will satisfy through a pro-rata distribution of no more than that. The Amended Disclosure Statement indicates that unsecured creditors hold claims totaling more than \$272,000 and the unsecured deficiency on account of secured claims exceeds \$225,000. Thus, by paying \$7,500 in new value, Mr. Reiniche will free his corporation of a half million dollars in debt. The contribution is only one and one half

percent of the corporation's unsecured debt. It is only a token infusion, not a substantial one. Snyder, 967 F.2d at 1131 (contribution of 2.7% - 4.5% was not substantial); Woodbrook Associates, 19 F.3d at 320 (contribution of 3.8% was not substantial).

Confirmation of the debtor's proposed chapter 11 plan will be DENIED.<sup>3</sup> An order doing so will be entered.

/s/ Robert E. Grant  
Judge, United States Bankruptcy Court

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<sup>3</sup>There is an additional, procedural reason that also justifies denying confirmation. The court's order of September 23, 2008, required the debtor to serve creditors with notice of a modification, filed on September 15, 2008, to the proposed amended chapter 11 plan and to make proof thereof within ten days. The order also stated: "The failure to do so may result in the denial of confirmation without further notice or hearing." As of this date the debtor has failed to comply with that order.