UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:	)	CASE NO. 89-50239-INH
	)	
KBFS, INC.,	)	CHAPTER 11
	)	
Debtor.	)	MEMORANDUM OF DECISION

The matter before the Court is the confirmation of the Second Amended Plan of Reorganization of Debtor KBFS, Inc. (Debtor), and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). A hearing was held on June 5, 1990, and the matter was submitted to the undersigned for consideration upon receipt of the hearing transcript. This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Debtor operates an AM radio station in Belle Fourche, South Dakota. Its sole stockholder and president is William Kim Love. Debtor purchased its assets from Pluimer Broadcasting, Inc., (Pluimer) in 1983. Pluimer had purchased these assets from Joseph Kopp and under the purchase agreement between Debtor and Pluimer, Debtor assumed Pluimer's obligation to Kopp and Pioneer Bank & Trust (Pioneer). Debtor's principal, Love, as well as some of Pluimer's principals, apparently guaranteed performance on Pluimer's contract with Kopp. It is unclear whether Debtor's obligation to Pioneer was also guaranteed.

Debtor filed a Chapter 11 petition for reorganization on October 6, 1989. Total scheduled assets were $103,586.37 and debts were $626,275.53. Debtor's Schedule A-2, as amended, indicated Debtor had four secured creditors: Small Business Administration (SBA) , a fully secured claim of $48,628.88; Pioneer, a fully secured claim of $6,042.69; Pluimer, a claim

of $22,484.41 with secured value disputed; and Kopp, an $81,172.59 claim secured to the extent of $3,103.15. Debtor also identified Pluimer as an executory contract holder in his statement of affairs but did not state the unpaid balance of the contract. By order entered February 13, 1990, the Court found that Debtor's contract with Pluimer was an executory contract.

Debtor's Amended Disclosure Statement was approved by order entered May 2, 1990. The Liquidation Analysis included in Debtor's Amended Disclosure Statement indicated Debtor had a liquidation value of $59,184.40 and a "Going Concern" liquidation value of $90,000. The liquidation analysis further indicated Kopp had a secured claim of no more than $25,248.30.[1] This Disclosure Statement identified Pluimer's claim as an unsecured executory contract.

Debtor's Amended Plan of Reorganization was filed April 25, 1990. In addition to the payment of priority claims, the Amended Plan provided that Pioneer's claim would not be impaired, SBA's debt would be reamortized, Kopp's claim would be repaid over 30 years at the contract rate of interest, and Pluimer's claim would be satisfied by a one-time payment of $9,957.31 by Love. Unsecured creditors were to be paid nothing.

Kopp filed objections to the Plan and argued inter alia that the Plan was not feasible nor fair and equitable as required by 11 U.S.C. § 1129(b)(2)(B). The United States Trustee objected and argued that the Plan was not fair and equitable as required by 11 U.S.C. § 1129(b) and that several inconsistencies and omissions, including a failure to

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[1] The priority or fully secured claims of Butte County, SBA, arid Pioneer totaled $64,751.7O (plus interest that was not disclosed). This sum, subtracted from the higher liquidation value of $90,000 stated by Debtor, left $55,924.29 of Kopp's $81,172.59 claim unsecured.

identify the value, if any, of Kopp's secured claim, rendered the Plan unconfirmable.

A hearing on confirmation and approval of a proposed settlement agreement was held June 5, 1990. The settlement agreement in essence converted Pluimer's unsecured executory contract to a secured interest. The agreement, according to statements by Debtor's counsel, also provided payment in full to Pioneer and paid in full Pluimer's claim as compromised. This in turn improved the priority of Kopp's claim and released or better protected the guarantors. The United States Trustee argued the agreement essentially benefitted only the guarantors, not the estate and unsecured creditors. Debtor's counsel argued the agreement benefitted the estate, though admittedly not the unsecured creditors, because Debtor could not reorganize without it. The Court approved the settlement agreement at the hearing and an order memorializing the same was entered June 8, 1990.

Since the Amended Plan provided that Class V of unsecured creditors would receive nothing, that class was deemed to have rejected the Plan pursuant to 11 U.S.C. § 1126(g). At the confirmation hearing, Kopp withdrew his objections to the Amended Plan since the settlement agreement between Debtor and Pluimer had been approved that day by the Court.

The only witness on the issues of feasibility and "cram down" of confirmation was Love. He testified that the property values listed on Debtor's liquidation analysis were based on his experience and knowledge in the radio business and his discussions with potential buyers. There was no evidence presented on the value of the property that the equity holder would retain under the Plan. Love also stated that Debtor's secured debts substantially exceeded Debtor's "going concern liquidation

value."

Love testified that he would make up any shortfall on the payments to secured creditors provided for in the Plan. This monthly shortfall was estimated to be $300. He also stated he paid 80% of the $16,000 settlement with Pluimer. Debtor's counsel stated creditors would not have any recourse against Love if Debtor defaulted on the Plan. Further, no evidence was presented on Love's ability to meet any of Debtor's shortfalls.

Following the hearing and at the Court's request, Debtor filed a Second Amended Plan of Reorganization that incorporated Debtor's settlements with Kopp and Pluimer and restated Love's pledge to "make up any shortfall in payments" under the Plan. The Second Amended Plan also contained a new, post—hearing estimate that Debtor's going concern value was $35,000 higher than was estimated in the Amended Disclosure Statement. The basis for this revision was not set forth.

II.

Under 11 U.S.C. § 1129(b), a plan may be confirmed over the objections of a rejecting class if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claim or interest that is impaired under, and has not accepted, the plan." 11 U.S.C. §1129(b) (1) (in pertinent part). A plan is "fair and equitable" to unsecured claim holders if they will receive on the effective date of the plan, property equal to the value of their claim or if

> the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B) (in pertinent part).

> [This] absolute priority rule, in its simplest terms, requires that creditors of a debtor in bankruptcy reorganization receive payment of their claims in their established order of priority, and that they receive payment in full before lesser interests -- such as those of equity -- may share in the assets of the

reorganized entity.

In re Yasparro, 100 B.R. 91, 95 (Bankr. M.D. Fla. 1989) (quoting Powlen and Wuhrman, The New Value Exception to the Absolute Priority Rule: Is Ahlers the Beginning of the End?, 93 Com.L.J. 303, No. 3 (Fall 1988), and citing Norwest Bank Worthington. Ahlers, 485 U.S. 197, _____ , 108 S.Ct. 963, 969 (1988)).

The term property, as used in § 1129(b)(2)(B), has been broadly construed. Ahlers, 485 U.S. at ___ , 108 S.Ct. at 969 (cites omitted). Although the estate may be valueless upon liquidation for unsecured creditors, a debtor who retains an equity interest retains property. Id. Whether the value is 'present or prospective, for dividends or only for purposes of control' a retained equity interest is a property interest to 'which the creditors [are] entitled ... before the stockholders [can] retain it for any purpose whatever.'" Id. (quoting Northern Pacific R. Co. v. Boyd, 228 U.S. 482, 508 (1913)). A property's value may be found, for example, in the control of the entity or in the potential future profits. Id.; see also Yasparro, 100 B.R. at 95-96.

One exception to the absolute priority rule continues to be recognized. This "new value" or "infusion of new capital" exception evolved from pre-Bankruptcy Code case law and was later adopted by statute. See Pennbank v. Winters (In re Winters), 99 B.R. 658 (Bankr. W.D. Pa. 1989). In consideration for the retained interest, the junior interest holder must make 'a contribution in money or money's worth'' that is '' reasonably equivalent in view of all the circumstances to the participation of the [junior interest holder]." Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 121-22 (1939). There must be certainty, at the time confirmation is proposed, that there is or will be a contribution. In re 47th and Belleview Partners, 95 B. R. 117, 119 (Bankr. W.D. Mo. 1988). Further, the value of the contribution must meet or exceed the value to be retained. Id. at 120; Yasparro, 100 B.R. at 98 n.8.

The portion of § 1129(b) which mandates that a plan may not discriminate unfairly "complements" the fair and equitable test. In re Buttonwood Partners. Ltd., 111 B.R. 57, 62 (Bankr. S.D.N.Y. 1990).

Generally, a plan will not be deemed unfairly discriminatory if: (1) there is a reasonable basis for the discrimination; (2) the debtor cannot consummate the plan without discrimination; (3) the discrimination is proposed in good faith; and (4) the degree of discrimination is in direct proportion to its rationale. Id. at 63.

III.

The Court will deny confirmation of Debtor's Second Amended Plan for three reasons. First, Debtor has not shown that "[c]onfirmation 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" as required by 11 U.S.C. § 1129(a)(11). The Projections of Future Income and Expenses (Exhibit A) in Debtor's Amended Disclosure Statement did not correspond to the payments proposed in the Second Amended Plan so it was difficult to analyze feasibility. Further, while Debtor's principal, Love, indicated he would make up any shortfalls in Plan payments that Debtor incurred, the Plan did not bind Love in any way and there was no showing that Love had the means to meet these shortfalls.

Second, the Plan fails to meet the absolute priority rule as codified at 11 U.S.C. § 1129(b). While Debtor presented some evidence of its liquidation value, there was no evidence on the value of the interest the equity security holder, Love, would retain under the Plan. The two values are not necessarily the same. Ahlers, 485 U.S. at ____ , 108 S.Ct. at 969. Moreover, even if Debtor had shown the value of Love's retained interest, Debtor did not show that Love's post—confirmation contributions were "reasonably equivalent in view of all the circumstances to the participation of the stockholder" and thus sufficient to meet any exception to the absolute priority rule.[2] *Id.* at 967 (quoting Los Angeles Lumber Products, Co., 308 U.S. at 121—22). Love's bare promise to meet any future shortfalls was not sufficiently tangible and enforceable when viewed at the time confirmation was proposed. Id.; see also 47th and

[2] No party has asked this Court to decide whether or not an exception to the absolute priority rule as codified at 11 U.S.C. § 1129(b) (2) still exists so that issue is not addressed herein.

Belleview Partners, 95 B.R. at 119.

Third, contrary to 11 U.S.C. § 1129(b) (1), Debtor failed to justify the unequal treatment of the unsecured and undersecured creditors. Since Debtor's statements on the value of its assets were ever changing and since the value of Kopp's secured claim was never clearly established, the Court is unable to conclude that favorable treatment of Kopp's partially secured claim is justified even though unsecured creditors will receive nothing. There was no evidence Debtor could not reorganize without favorable treatment of Kopp's undersecured claim nor was there a showing that any favorable treatment was in proportion to the resulting benefit to the estate.

An order denying confirmation will be entered.

Dated this 28th day of September, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
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WESTERN DIVISION

IN RE:	)	CASE NO. 89-50239-INH
	)	
KBFS, INC.,	)	CHAPTER 11
	)	ORDER
Debtor.	)	DENYING CONFIRMATION

In recognition of and conjunction with the Memorandum of Decision entered this day,

IT IS HEREBY ORDERED that confirmation of Debtor's Second Amended Plan of Reorganization is denied.

Dated this 29th day of September, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk