

SIGNED.



Dated: June 18, 2009

*Randolph J. Haines*

RANDOLPH J. HAINES  
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 11
DEXTER DISTRIBUTING	)	CASE NO. 2-03-bk-03546-RJH
CORPORATION, et al.,	)	
	)	(Jointly Administered Cases Nos.
Debtors.	)	2-03-bk-03548-RJH and 2-03-bk-04695-RJH
	)	through 2-03-bk-04710-RJH)
	)	2-03-bk-05427-RJH
	)	2-03-bk-11513-RJH
	)	2-03-bk-11515-RJH
	)	2-03-bk-04238-RJH
THIS FILING APPLIES TO	)	2-07-bk-01017-RJH
ALL DEBTORS	)	2-07-bk-01018-RJH
	)	2-07-bk-01019-RJH and
	)	2:08-bk-05785
	)	ORDER DENYING STAY PENDING
	)	APPEAL

On May 19, 2009, the Court signed a non-final order finding and concluding that the Modified Joint Plan filed in this case satisfies all of the Bankruptcy Code's confirmation requirements and "therefore must be confirmed." Equity owner Taylor Coleman promptly filed a premature notice of appeal to the District Court and a motion for stay pending appeal. After the motion was fully briefed and argued to the Court on June 17, the Court finds and concludes that the stay pending appeal should be denied, except for the automatic ten day stay provided by Bankruptcy Rule 3020(e).

**Standard for Stay Pending Appeal**

The Ninth Circuit employs a sliding scale for a stay pending appeal, which should be granted when the appellant demonstrates either (1) "a strong likelihood of success on the

1 merits” and “the possibility of irreparable injury,” or (2) “serious legal questions are raised and that  
2 the balance of hardship tips sharply in its favor.”<sup>1</sup>

### 3 **Balance of Hardships**

4 Coleman argues that the balance of hardships tips strongly in his favor because, he  
5 argues, if the stay is not granted he will lose both his equity ownership interests in the Debtors and  
6 effectively lose his right to appeal because his appeal will become moot. Debtors and the plan  
7 proponents argue that the hardships tip in their favor because, they contend, the delay will likely  
8 doom the Debtors to liquidation.

9 Both sides’ prognostications are probably correct. Failure to grant a stay pending  
10 appeal will likely mean that the appeal will become moot and, if that happens, will certainly mean  
11 that Coleman loses his equity interests in the Debtors. But the entry of a stay pending appeal will  
12 likely mean liquidation of the Debtors. At the confirmation hearing the evidence was clear,  
13 unequivocal and unrefuted that the Debtors are insolvent and cannot pay their debts as they come  
14 due, and that liquidation is the only foreseeable likely alternative to the sale of the Debtors to Mark  
15 Franks, which is the essence of the Plan. The evidence also established that Franks had to be  
16 talked into making an offer to purchase the Debtors, that his offer exceeds the value of the assets  
17 he is purchasing, that the Debtors’ business is highly risky and that its sales are declining due to  
18 competition from the internet. Consequently it is reasonable to conclude, just as did all of the  
19 courts that recently addressed the Chrysler sale to Fiat, that a stay pending appeal will likely result  
20 in a loss of the pending sale and the resulting liquidation of the Debtors.

21 Thus both sides face very substantial hardships. On these facts, the Court cannot  
22 conclude that the balance of the hardships tips strongly in favor of Coleman. To the contrary, it  
23 could be argued that the hardships are precisely the same, because in both cases the hardship is the  
24 loss of an operating company. But this would appear to be a greater loss to the creditors, who  
25 stand to gain a significant repayment of their debts if the Plan and sale go forward, than it is to  
26 Taylor Coleman, who stands only to lose an equity interest that the evidence conclusively

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28 <sup>1</sup>*Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983), *rev’d on other grounds*, 469 U.S.  
1082 (1984).

1 established to have no value.

2           Consequently the Court finds and concludes that the balance of hardships does not  
3 tip in favor of Coleman and, to the contrary, the balance of hardships rests with the creditors of  
4 these estates.

### 5 **Serious Legal Questions**

6           The second prong also requires a showing of serious legal questions that are raised  
7 by the appeal. The Court finds and concludes that Coleman's appeal does not raise serious legal  
8 questions. Rather, Coleman's appeal at best raises mixed questions of fact and law. As to these,  
9 as discussed more fully below, Coleman failed to provide any evidence supporting his view of the  
10 facts. Consequently the Court concludes that Coleman's motion for stay pending appeal failed to  
11 raise any serious purely *legal* questions.

### 12 **Probability of Success on the Merits**

13           On the first prong, the party seeking a stay pending appeal must demonstrate both  
14 the possibility of irreparable injury and a probability of success on the merits.

15           Although Coleman has at various times asserted virtually every conceivable  
16 objection to confirmation, the Court will here address only those that Coleman raised at oral  
17 argument on the motion for stay pending appeal, which are presumably those that he believes to  
18 be his strongest cases for demonstrating a probability of success on the merits.

### 19 **Successive Chapter 11 Cases**

20           Coleman apparently thinks his greatest likelihood of success is based on the fact  
21 that this is a successive Chapter 11 case after confirmation of a plan of reorganization in the prior  
22 case filed in 2004. Probably the biggest hurdle in demonstrating a likelihood of success on that  
23 argument is that the Bankruptcy Code contains no prohibition on successive Chapter 11 cases.  
24 Congress certainly knew how to draft such a prohibition, as it did in numerous provisions that deny  
25 successive individual discharges and even terminate the automatic stay in successive individual  
26 bankruptcy cases; no such prohibition exists for successive Chapter 11 cases.

27           Coleman argues, therefore, by analogy from Bankruptcy Code § 1127, which some  
28 courts have applied when a successive Chapter 11 case is deemed factually akin to a modification

1 of the prior plan. Even if that approach were to be adopted as the law of the Circuit, the facts here  
2 fail to establish that this second Chapter 11 case is factually indistinguishable from a modification  
3 of the prior confirmed plan. The facts, the debt, the creditors and the financial problems are  
4 substantially different in this case from what they were when the 2004 case was filed. The facts,  
5 therefore, fail to support Coleman's analogy to § 1127.

#### 6 **Substantive Consolidation**

7 Similarly, Coleman has failed to provide any evidence that the Plan effectively  
8 constitutes a substantive consolidation that, under Ninth Circuit law, would have to be sought by  
9 motion or adversary proceeding. The fact that all creditors of all the Debtors are classified in the  
10 same class and provided the same treatment is not the equivalent to substantive consolidation.  
11 That similarity of treatment does not, by itself, put the assets of various debtors into a single entity.  
12 Moreover, to the extent that multiple debtors may be deemed responsible for individual creditors'  
13 claims, that result occurred under the plan confirmed in the 2004 case as to the creditors in that  
14 case. Finally, Coleman has been unable to identify how he holds any allowed claim that is  
15 adversely affected by such alleged substantive consolidation. And, since the creditors voted  
16 overwhelmingly to confirm this plan, Coleman has been unable to demonstrate how he has  
17 standing to raise such an objection despite the creditors' approval.

#### 18 **Reasonable Marketing Efforts/Insider Sale**

19 Similarly, Coleman has failed to identify how he has standing to object to the sale  
20 to Mark Franks, or to the marketing efforts that preceded such sale, despite the creditors' approval  
21 of that sale and the plan that embodies it. Generally, for a creditor to have an objection to  
22 confirmation despite the creditors' approval of the plan by the requisite 50% in number and 2/3  
23 in dollar amount, the creditor must demonstrate that the plan will not pay him as much as he would  
24 receive in a Chapter 7 liquidation.<sup>2</sup> At the confirmation hearing, Coleman failed to present any  
25 evidence that would support that conclusion, much less a preponderance of the evidence.

#### 26 **Third Party Releases**

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<sup>2</sup>Bankruptcy Code § 1129 (a)(7).

1 Coleman complains the Plan impermissibly discharges some creditors' claims  
2 against parties who are not debtors. This Court has been unable to identify any such improper third  
3 party release. More significantly Coleman has failed to demonstrate that he is the holder of such  
4 a claim against a non debtor entity that would arguably be released by any provision of the Plan.

#### 5 **Improper Classification**

6 Coleman argues that the classification of claims is improper because not all claims  
7 in Class 7 are being treated identically. But his argument in that respect has nothing to do with the  
8 *claims* that are classified in Class 7. Rather, what he complains about is that the Debtors may  
9 release some causes of action that they hold against the creditors who hold claims in Class 7, and  
10 may not release causes of action against other creditors who also hold claims in Class 7. That  
11 argument has nothing to do with the proper classification of claims. Bankruptcy Code § 1123(a)(4)  
12 applies only to the claims held by creditors. It does not apply to the creditors themselves, nor does  
13 it apply to the causes of action that anyone might assert against such creditors. The argument is  
14 specious.

#### 15 **Absolute Priority and Discrimination Among Shareholders**

16 Finally, Coleman argues there is a violation of the absolute priority rule or unfair  
17 discrimination among shareholders because shareholder Franks is permitted to buy the company  
18 while shareholder Coleman is not. This argument is also specious. The Plan is clear that all  
19 shareholders are being treated identically, because their equity interests are to be extinguished.  
20 This is of course the proper result when the debtor is insolvent and there is no value to extend to  
21 equity interests.

22 And there is no discrimination in the Plan between Franks and Coleman. Coleman  
23 has had just as much right as Franks to make an offer to buy the company, or to file his own plan  
24 of reorganization, as indeed he once did.

#### 25 **Conclusion**

26 For these reasons, the Court concludes that Coleman does not have a probability  
27 of success on appeal. It is rarely probable for an appellant to overturn a factual finding after trial,  
28 and virtually impossible to do so when the appellant presented no evidence to support his view of

1 the facts.

2 Nor can Coleman establish that the balance of hardships tips in his favor. In the big  
3 picture, since Coleman failed to produce any evidence demonstrating there was any value to his  
4 equity interests in the Debtors, it is difficult to see what hardship there is in having that valueless  
5 equity interest extinguished by a plan that may, at best, pay creditors 80% of their claims.

6 If the Court were to grant a stay pending appeal, it should be conditioned upon the  
7 posting of a bond sufficient to cover the loss likely to occur from a loss of the sale to Franks and  
8 the liquidation of the company. The plan proponents suggest that amount would be approximately  
9 \$10 million for the equity in the Debtors' real property and \$5 million for the value of the  
10 operating assets being purchased by Franks, for a total of \$15 million. That analysis may be  
11 entirely correct and supported by the evidence produced at confirmation. At a minimum, the  
12 amount of the bond should be equal to the amount Franks agrees to pay for the purchase. But  
13 because Coleman has not established the threshold ground for an entitlement for stay pending  
14 appeal, the Court need not address the appropriate amount of the bond.

15 DATED AND SIGNED ABOVE

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17 Copy of the foregoing e-mailed  
this 18th day of June, 2009, to:

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