SIGNED.

Dated: January 21, 2004

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re DEXTER DISTRIBUTING CORPORATION, et al., Debtor. THIS FILING APPLIES TO ALL DEBTORS	Chapter 11 CASE NO. 2-03-03546-PHX-RJH (Jointly Administered Cases Nos. 03-03548-PHX-RJH and 03-04695-PHX-RJH through 03-04710-PHX-RJH) MEMORANDUM DECISION DENYING DELLHEIM'S MOTION FOR EXPEDITED HEARING ON MOTIONS TO CHANGE BALLOTS AND DENYING DEBTORS' MOTION FOR EXPEDITED DISCOVERY

The Dellheim creditors have moved for expedited hearings on 47 motions to change ballots. Those motions have not in fact been filed and do not appear on the docket, but appear in the record only as exhibits to the Dellheim motion for expedited hearings. The Debtors have filed a response in opposition to the Dellheim motion, and in addition filed an emergency motion for expedited discovery, requesting Court authority to take depositions of the 47 investors/creditors who signed the motions to change ballots. Both the Debtors' motion and the Dellheim motion rely on the fact that the evidentiary hearing on confirmation of the Debtors' plan of reorganization ("Plan") is scheduled to begin this afternoon as the principal reason why expedited hearings are necessary on the respective motions.

Both motions are denied because the underlying motions to change ballots do not assert sufficient "cause" to change the ballots, as is required by Bankruptcy Rule 3018(a).

As both parties duly note, Bankruptcy 3018(a) does not define the kind of cause that must be shown for the Court to permit a change of ballot after the deadline for balloting has passed. Nor does there appear to be any relevant precedential case law in this Circuit. The motions to change ballots

rely on *dictum* in a Minnesota bankruptcy decision suggesting that misreading the terms of the proposed plan of reorganization might constitute sufficient cause. *See In re Kellogg Square Partnership*, 160 B.R. 332, 334 (Bankr. D.Minn. 1993). Even if that were appropriate cause, however, the motions to change ballot do not allege that the signator creditor in fact misread or misunderstood the terms of the Plan.[1]

Nothing in the motions to change ballots suggests that the moving creditor misunderstood the Plan's treatment of the creditors' claims. Briefly summarized, the Plan provides that each of the creditors who have purportedly sought to change their ballots would share in the Receiver's distribution of $14 million to be paid by the Debtors to the Receiver, and that such sharing would occur on the basis of the creditor's "net investment amount." This is what the Plan provides for those creditors who "opt in" to such treatment, as have all of the creditors who have filed motions to change ballots. The fact that the moving creditors did not misread or misunderstand those Plan terms is most clearly demonstrated by the fact that the motions do not seek to change that treatment by opting out of that election. Nor do the motions to change ballots assert any confusion about the treatment such creditors would receive if they had elected to "opt out."

The Dellheim motion for expedited hearing similarly does not assert any confusion about the terms of the two options provided by the Plan. To the contrary, the Dellheim motion asserts the alleged confusion exists with regard to the alternatives to confirmation of the Debtors' Plan. It asserts that the moving creditors failed to understand that a rejection of the Plan would "force Debtors to come forward with a more equitable Plan," Dellheim Motion at 5, or that "they could 'participate' in the Stipulation/Settlement and vote to 'reject' the Plan." Dellheim Motion at 8.

For several reasons, such alleged confusion regarding alternatives to confirmation of the Plan cannot constitute sufficient cause to permit a change of ballot.

First, in any confirmation process there will always be some degree of confusion regarding the alternatives to confirmation of the plan. Usually, as is the case here, no such alternatives to the proposed plan have been drafted and circulated to creditors, except for the liquidation analysis usually

[1]The motions are identical forms, apparently drafted by Dellheim's attorney who does not represent the moving creditors.

contained in a disclosure statement to demonstrate compliance with the best interests test. As both a legal and practical matter, the alternatives to confirming a proposed plan are always an unknown. There will only be various parties' conflicting predictions of what will happen if a proposed plan is not confirmed. Therefore if confusion regarding the alternatives to the proposed plan were sufficient cause to change the ballot, the balloting process could never be concluded.

Moreover, if such uncertainty regarding alternatives to a proposed plan were sufficient cause to change a ballot, then certainly the drafters of the Code would have required the plan proponent to explain and evaluate such alternatives in the disclosure statement. This would permit all of the parties and the Court to be heard on the accuracy of the predictions of what alternatives might exist. Instead, however, the Code expressly provides that a disclosure statement "need not include such information about any other possible or proposed plan." Code § 1125(a)(1). This clearly indicates that the drafters of the Code did not intend to preclude uncertainty regarding alternatives to a proposed plan, but instead intended that a proposed plan could be confirmed notwithstanding the ignorance of creditors as to what other alternatives might exist.

The alternative of which the moving creditors were allegedly ignorant does not realistically exist. The motions to change ballots assert: "If I had known that under the Plan I could 'participate' in the Stipulation/Settlement and vote to 'reject' the Plan [,] I would have done so." As a practical matter, that option does not exist and never has. This is because if enough of these creditors so voted to reject the Plan, it does not appear that the Plan can be confirmed. The Dellheim creditors themselves assert that if sufficient creditors voted to reject the Plan, it would violate the absolute priority rule and therefore could not be confirmed. In that case those creditors who voted to reject the Plan (and indeed all creditors regardless of how they voted) would not in fact be able to participate in the stipulation/settlement, which is effective only if the Plan is confirmed. Indeed, in both a practical and a Kantian sense it would be irrational for creditors to want to participate in the settlement and yet vote to reject the Plan, because their rejecting votes would contribute to making the stipulation impossible. In any event, however, even if this were rational, the alleged misunderstanding about a non-existent alternative cannot possibly constitute cause to change a ballot. The movants cannot participate in the settlement if the Plan is not confirmed.

Moreover, even if the type of alleged confusion asserted in the motions could constitute

cause to permit a ballot change, it appears here that the purported confusion arose only after the balloting deadline. The attorney for the Dellheim creditors admits having sent a letter to all "Class 3.B creditors that had voted to accept the Plan." Dellheim Motion at 4. That letter contained numerous inaccuracies that could account for any confusion that allegedly now exists. For example, the letter asserted that the Plan permits Taylor Coleman to "keep 100% of his 37 million dollars in stock," whereas in fact neither the Plan nor the Disclosure Statement ever put such a value on the stock. It asserted that permitting Coleman to keep his stock is a violation of the absolute priority rule even though the absolute priority rule did not apply to Class 3.B when the letter was sent because that class had accepted the Plan. The absolute priority rule is invoked only when a class of creditors rejects the plan, so there could not possibly be any violation of the rule with respect to an accepting class. The letter stated that Castle has "evaded" the absolute priority rule, when in fact Castle had done exactly what the Code contemplates, which is to propose a plan that obtains the acceptance of creditors. The letter stated that opting in to the stipulation in aid of confirmation would entitle the creditor "at minimum, to recover 56% of your net investment if the Castle plan is confirmed," without disclosing that such minimum recovery is not available if the creditors' rejections cause the plan not to be confirmed. The letter stated that denial of confirmation of the Debtors' plan "could open the door for alternative plans, such as the 'Molina' Plan which is being proposed," when in fact the Molina plan had not been proposed by the time of the balloting deadline.[2]

Thus prior to signing their motions to change ballot, the moving creditors received a substantial amount of information and argument from Dellheim's attorney. Some of this information and argument was clearly wrong, such as the assertion that the Plan violated the absolute priority rule and the prohibition on unfair discrimination, neither of which applied to the Plan as of the conclusion of the balloting. Some of the information is certainly debatable, such as Dellheim's calculation of what percentage recovery the Plan would provide to the investors/creditors. Some of the information simply

[2]Debtors contend that the December 19 letter included as an exhibit to the Dellheim motion was not in fact the letter that was sent to creditors by Dellheim's attorney, but that instead Dellheim's attorney sent a December 31 letter that is attached to the Debtors' response to Dellheim's motion. The key difference between the two form letters appears to be the reference to the Molina plan in the December 31 letter. The Molina plan was apparently filed as an exhibit to a disclosure statement that was filed on January 6, 2004.

did not exist as of the conclusion of the balloting, such as the Molina plan.

It is therefore entirely possible, if not likely, that any purported confusion that now exists among these creditors in fact arose only after the balloting was concluded, and only after receipt of the arguments of Dellheim's attorney. As a legal matter, this Court does not believe that "cause" to permit a ballot change could ever consist of confusion or information that arises only after the conclusion of the balloting. And as a practical matter it may now be impossible to unring the bell to ascertain exactly what the creditors knew and understood as of the balloting deadline, instead of what they subsequently learned. Instead of permitting such satellite discovery and litigation, the Court will regard the best and conclusive evidence of what the creditors understood and intended is the ballot they actually signed and submitted prior to the ballot deadline, so long as it itself is not ambiguous. As the Court has previously noted, the ballot forms were simple and unambiguous, and the ballot form to "opt in" to the settlement clearly provided the opportunity for the creditor also to vote to reject the Plan.

Finally, the Dellheim letter of December 31 was in practical effect a solicitation for the Molina plan, whose disclosure statement had not yet been approved. Neither the language of the Code nor decisions of the Ninth Circuit make clear whether such solicitation is permissible after one disclosure statement has been approved even though no disclosure statement has been approved with respect to the plan being solicited. But even if such solicitation does not in itself constitute a violation of § 1125(b), grounds for denial of its confirmation pursuant to §§ 1129(a)(2) or (3), or grounds for designation and disqualification of the votes obtained as a result of such solicitation pursuant to §§ 1126(b) or (e), such solicitation certainly cannot be permitted to create the "cause" to change a ballot with respect to another plan that was properly solicited.

For these reasons, the Dellheim motion for expedited hearing on the unfiled motions to change ballots, and the Debtors' motion for authority to conduct expedited discovery with respect to the motions to change ballots, are denied.

DATED AND SIGNED ABOVE

Copy of the foregoing faxed this
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