

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

BKY No. 03-37759

Shark Industries, Ltd.,

Chapter 11

Debtor.

**COMMITTEE OF UNSECURED CREDITORS' VERIFIED OBJECTION
TO CONFIRMATION OF DEBTOR'S PLAN OF REORGANIZATION
DATED AUGUST 18, 2004**

INTRODUCTION

The Committee of Unsecured Creditors ("CUC") objects to the Debtor's Plan of Reorganization dated August 18, 2004 ("**Plan**") for the reasons set forth herein. In summary, the CUC believes that the Plan is not feasible and violates the absolute priority rule in that while unsecured creditors are not being paid in full, the equity security holders are retaining their interests in the Debtor corporation.

ARGUMENT

I. PLAN NOT A "GOOD FAITH" PLAN

Section 1129(a)(3) requires that the Plan be proposed in "good faith and not by any means forbidden by law." A plan is proposed in good faith "if there is a likelihood that the Plan will achieve a result consistent with the standards prescribed under the Plan." *In re Union Financial Services Group, Inc.*, 303 B.R. 390, 419 (Bankr. E.D. Mo. 2003), citing, *Hanson v. First Bank of South Dakota*, 828 F.2d 1310, 1313 (8th Cir. 1987). The focus under §1129(a)(3) is on whether the proposal of a plan is consistent with the objectives of the Bankruptcy Code. *Id.*, citing, *In re Madison Hotel Assocs.*, 749 F.2d 410 (7th Cir. 1984).

A policy of Chapter 11 reorganizations is that creditors' returns on claims should be maximized. Here, the Debtor has ignored, and continues to ignore potentially significant avoidance actions which could dramatically increase the unsecured creditors' return in this case. Attached hereto as Exhibit A is a redacted letter to Debtor's counsel detailing just some of the potential avoidance actions. It is the CUC's belief that the Debtor desires not pursue potential avoidance actions as they will land too close to "friends and family." However, the Debtor has an obligation to maximize the return to unsecured creditors and the CUC is not convinced that it is doing so.

II. THE DEBTOR'S PLAN IS NOT FEASIBLE

A number of factors are considered by the Eighth Circuit in determining feasibility. The test is whether the provisions of the plan which are to be accomplished after confirmation can be done as a practical matter under the facts. *In re Value Recreation, Inc.*, 228 B.R. 692, 698 (Bankr. D. Minn. 1999), citing, *Clarkson v. Cooke Sales & Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2nd Cir. 19878). Pertinent factors to be considered include the business' earning power, the sufficiency of the capital structure, economic conditions, managerial efficiency and whether the same management will continue to operate the business. *Id.*, citing *Clarkson* at 420 and *In re E.I. Parks No. 1 Limited Partnership*, 122 B.R. 549, 559 (Bankr. W.D. Ark. 1990).

A. Required Capital Has Not Been Raised By Debtor

The CUC has been informed that the Debtor is \$250,000.00 short of the investment capital required to fund its Plan. This failure will cause the Debtor to lose the investment capital proposed to be provided by Crestmark Commercial Finance, Inc. Accordingly, on this basis alone, the Debtor's Plan is not feasible.

B. Debtor's Performance Does Not Indicate That it Can Meet its Projections

During the pendency of this case, the Debtor's net operations have been, in part:

<u>MONTH</u>	<u>NET</u>
December 2003	(2,996.19)
February 2004	(210,488.59)
March 2004	(8,377.61)
April 2004	(3,373.99)
May 2004	6,578.49
June 2004	1,230.63
July 2004	5,557.39

It is difficult to ascertain what the Debtor is projecting for future operations. However, its projection lists future months as having a net income of \$1,987.00, \$18,288.00 and \$29,940.00. Based on past performance, the CUC is skeptical of the Debtor's projections. There is no objective evidence to support the Debtor's ability to meet these Plan obligations.

C. Management Remains the Same

The Debtor proposes to leave in place the same management that guided the business into Chapter 11 and which has shown very little to no sign of being able to improve performance. The CUC submits that in a case such as this, leaving current management in place causes the Plan to fail for lack of feasibility.

III. THE PLAN FAILS UNDER THE ABSOLUTE PRIORITY RULE

The absolute priority rule, codified in 11 U.S.C. §1129(b)(2), prevents junior interests in a bankruptcy case from receiving property at the expense of senior interests who are not being paid in full the allowed amounts of their claims. *Value Recreation*, 228 B.R. at 699. An exception to the absolute priority rule exists where the junior creditor or interest holder contributes sufficient "new value" to the debtor's estate in exchange for the interest it retains or receives. *Union Financial*, 303

B.R. at 423. The Supreme Court has recognized that an old equity holder may obtain an interest in the reorganized debtor, so long as it does not acquire such interest without "competition and the benefit of market valuation." *Id.*, citing, *National Trust & Savings Assoc. v. 203 North LaSalle Street*, 526 U.S. 434, 458 (1999).

In the case at bar, the equity security holders are retaining their interests without compliance with §1129(b)(2) while senior interests (namely the unsecured creditors) are not receiving payment in full. Additionally, the Plan does not provide for "new value," at all, from the equity security holders, leave alone provide for "competition and the benefit of market valuation."

Due to the foregoing, the Plan fails the absolute priority rule provided by §1129(b)(2) and cannot be confirmed.

CONCLUSION

Based on the foregoing arguments of law and fact presented in this verified objection, the CUC requests that confirmation of the Debtor's Plan be denied.

**LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.**

/e/ Matthew R. Burton

Dated: September 17, 2004

By _____
Matthew R. Burton, #210018
Attorneys for CUC
100 South Fifth Street
Suite 2500
Minneapolis, Minnesota 55402-1216
(612) 332-1030

VERIFICATION

I, Anthony SanGiovanni, the Applicant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Dated: September 13, 2004

By: 

Anthony SanGiovanni
Its: Chairman

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LEONARD, O'BRIEN
SPENCER, GALE & SAYRE

FILE COPY

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June 18, 2004

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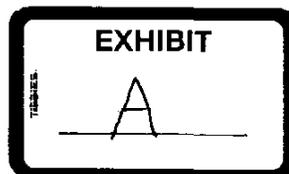
□ Also admitted in Wisconsin
◇ Also admitted in Arizona
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** Retired Status

Steven B. Nosek, Esq.
701 Fourth Avenue South, #300
Minneapolis, MN 55415

Re: Shark Industries, Inc.
Bankr. No. 03-37759

Dear Steve:

I appreciate your candor with me regarding Shark's status and its intentions with respect to propounding a confirmable plan. I am encouraged that there is flexibility.



Mr. Nosek
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POTENTIAL AVOIDANCE ACTIONS

I have reviewed the check registers that you have provided to me. On initial review, the following appear to be potential avoidance action targets.

King Machinery

DC Marketing

What are the checks made payable to "Shark Industries" for?

JTB Consulting

Mr. Nosek
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ShopAid
Koltec USA
Delta Machine & Design
Wright Hennepin Cooperative
IPAC
Wilson Industries
Boro Park
Dan Lombardi
RMDS
Itasca Business Credit
SIA Abrasives
Gardci
Goodson
Alpha Frey Tech.
American Express
UPS Custom House
American National Carbide
Wire Worx
DC Marketing
Kinik Corp.

Each of the foregoing, to me, appears to be a preference candidate. None are huge, but together they add up.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Shark Industries, Ltd.,

Bankr. No.: 03-37759

Debtor.

UNSWORN CERTIFICATE OF SERVICE

I, Stephanie Wood, declare under penalty of perjury that on the 17th day of September, 2004, I mailed a copy of the annexed *Committee of Unsecured Creditors' Verified Objection to Confirmation of Debtor's Plan of Reorganization Dated August 18, 2004* on:

SEE ATTACHED SERVICE LIST

by mailing to all parties copies thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota, directed to said parties at the last known addresses of said parties.

Dated: September 17, 2004


Stephanie Wood
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(612) 332-1030

SERVICE LIST

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BKY Case No.: 03-37759

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