2003 BNH 031 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-12829-JMD
Chapter 11

River Valley Fitness One Limited Partnership,
Debtor

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MEMORANDUM OPINION

I. INTRODUCTION

On August 18, 19, 26 and September 8, 2003, the Court conducted evidentiary hearings on the competing plans of reorganization filed by the Debtor and Orion Fitness Group, LLC ("Orion"). At the commencement of the confirmation hearing on August 18, 2003, the Court reviewed the certificates of vote submitted by the Debtor and Orion and determined that the Debtor in Possession's Third Amended Plan of Reorganization as amended on June 11, 2003 (the "Debtor's Plan") and Orion's Fourth Amended Plan of Reorganization dated June 3, 2003, as

Amended by Minor Modifications Pursuant to June 23, 2003 Order (the "Orion Plan") both had received sufficient creditor support to proceed to confirmation under the "cram down" provisions of section 1129(b)[1] of the Bankruptcy Code.[2] Over the four days of the confirmation hearing the Court received evidence and heard arguments of the parties both in support of and in opposition to the confirmation of the Debtor's Plan and the Orion Plan.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

During the course of the confirmation hearing the proponents for each of the competing plans moved to amend their respective plans in response to objections to confirmation filed by one or more creditors.[3] The Court granted those motions and specifically found and ruled that each of the amendments did not materially affect the treatment of any creditor who had not consented to the change and could be approved by the Court without the need for further disclosure or voting. The Debtor's Plan and the Orion Plan are described in their respective court approved disclosure

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[1] Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

[2] In this opinion the terms "Bankruptcy Code" or "Code" shall mean Title 11 of United States Code.

[3] Orion filed the following motions to amend: Motion for Permission to Amend Orion Fitness Group's Fourth Amended Plan of Reorganization (Doc. No. 473) and Second Motion for Permission to Amend Orion Fitness Group's Fourth Amended Plan of Reorganization (Doc. No. 481). The Debtor filed the following motions to amend: Motion to Modify Third Amended Plan (Doc. No. 503), Second Motion to Modify Third Amended Plan (Doc. No. 514) and Third Motion to Modify Third Amended Plan (Doc. No. 536).

statements and in the various motions to modify the plans. See Doc. Nos. 390, 391, 401 and 402. Accordingly, the provisions of the two plans shall be discussed in this opinion only to the extent necessary for the purposes of this opinion.

The Debtor's Plan is based upon the agreement of Elizabeth Asch to fund its plan of reorganization. Under the Debtor's Plan Elizabeth Asch shall form a new limited liability company (the "New Entity") on or before the effective date of the plan, capitalized by an investment of at least $100,000.00 and a subordination of her claims against the Debtor totaling approximately $3,470,000.00. The Debtor would be merged into the New Entity and the surviving entity would be the New Entity. The New Entity would be the successor in interest to the Debtor with respect to all of the Debtor's assets subject only to the obligations under the Debtor's Plan and those not discharged by the Debtor's Plan. The New Entity would be owned solely by Elizabeth Asch, who would also be the sole member and manager of the New Entity. The Debtor's Plan would be funded by the capital contributed to the New Entity by Elizabeth Asch, the assets of the Debtor on the confirmation date and the revenues of the New Entity during the five year term of the Debtor's Plan. The Debtor estimates that unsecured creditors will receive payments between 68% and 100% of their claims over five years depending upon its success in objecting to the claims of two ex-employees and David Halsey, a former a limited partner of the Debtor, a former member of the River Valley Club and a principal of Orion.

The Orion Plan is based upon the purchase of all of the Debtor's assets by Orion on the effective date of the plan for the amount of the claim of Laconia Savings Bank and the existing lien of the bank on the Debtor's real estate, a $400,000.00 promissory note, without interest, payable quarterly over ten years, and a promissory note for a payment equal to 8.0% of Orion's net income, after certain adjustments, for the third through tenth years of the Orion Plan. Payments to most

creditors under the Orion Plan will be made through a plan trust to be funded by the Debtor's cash on hand on the confirmation date, the balance in the tax escrow account, up to $200,000.00 from the issuance of debentures by Orion and payments from Orion under the promissory notes delivered by Orion as part of the purchase price for the Debtor's assets. Orion estimates that unsecured creditors will receive payments between 21% and 64% of their claims over ten years depending upon its success in objecting to the claim of the Debtor's prepetition litigation counsel and the recharacterization from debt to equity, or the equitable subordination, of the claims of Elizabeth Asch, and another note holder of the Debtor.[4]

At the conclusion of the evidentiary hearing on the confirmation of the Debtor's Plan and the Orion Plan, the parties stated their objections to the confirmation of the competing plan in light of the evidentiary record. If the Debtor's Plan and the Orion Plan are both confirmable, the Court may only confirm one plan. See 11 U.S.C. § 1129(c). For this reason the parties also argued why the plan that they were supporting should be preferred over the competing plan.

The Debtor objected to the confirmation of the Orion Plan based upon the failure of the Orion Plan to satisfy the requirements of section 1129(a)(3) of the Bankruptcy Code which requires a plan of reorganization to be filed in good faith and not by any means forbidden by law because:

a. Orion acted in bad faith by purchasing claims of third party creditors without disclosing the terms of the two plans, solely for the purpose of blocking confirmation of the Debtor's Plan,

[4] On September 18, 2003, the Court approved a compromise between the Debtor and M.C. Sheppard under the terms of which the Sheppard claim was withdrawn. Accordingly, the estimated dividend under the Orion Plan will increase. See the discussion in section III.C.1 below.

b. the debentures to be sold under the Orion Plan will result in a violation of New Hampshire RSA 358-I:5 by offering the sale of health club memberships for a term greater than one year, and

c. Orion has been offering and selling the debentures without registration under New Hampshire securities law and without the proper broker dealer license.

In addition, the Debtor contends that the Orion Plan is not feasible as required by section 1129(a)(11) of the Bankruptcy Code because:

a. Orion did not submit evidence that it had sold sufficient debentures to fund the Orion Plan and the creditors should not be required to assume the risk that Orion will be unable to fund the Orion Plan or would have insufficient working capital,

b. Orion will be unable to make any material initial distribution to creditors due to the necessity of using all of the tax escrow account to fund Orion's proposed settlement with the City of Lebanon on the tax assessment of the Debtor's real estate and the need to reserve funds sufficient to pay the Claims of the creditors, primarily Elizabeth Asch, that it proposes to recharacterize or subordinate because they hold 75% to 80% of all unsecured claims, and

c. Orion proposes to use all of the Debtor's available cash at confirmation leaving it with insufficient working capital to pay the ordinary and necessary expenses of operating the Debtor's business.

Elizabeth Asch joined in the Debtor's objections to confirmation of the Orion Plan.

Orion objected to the confirmation of the Debtor's Plan based upon the failure of the Debtor's Plan to satisfy the requirements of section 1129(a)(3) of the Bankruptcy Code which requires a plan of reorganization to be filed in good faith and not by any means forbidden by law because:

a. Under the Debtor's Plan Elizabeth Asch will capitalize a new entity with only $100,000.00 and obtain control of approximately $590,000.00 of cash in the Debtor's hands on the confirmation date and pay only $110,000.00 to unsecured creditors, and

b. Elizabeth Asch, and her husband Joseph Asch, knowingly prepared and transmitted to creditors, in the disclosure statement for the Debtor's Plan, operating projections which were unrealistically low in order to mislead creditors, all in breach of the Debtor's fiduciary duty to creditors as a debtor in possession.

In addition, Orion contends that the Debtor's Plan violates the requirements of section 1129(a)(1) of the Bankruptcy Code because:

a. The separate classification of the M.C. Sheppard unsecured claim in Class 6 of the Debtor's Plan violates the classification requirements of the Bankruptcy Code, as set forth in Granada Wines v. New England Teamsters and Trucking Indus. Pension Fund, 748 F.2d 42 (1st Cir. 1984), through gerrymandering of voting and treatment of the claim differently from other claims of the same legal priority, and

b. The separate classification of the Ledyard Bank claim in Class 5 of the Debtor's Plan violates the classification requirements of the Bankruptcy Code, as set forth in Granada Wines, through gerrymandering of voting and treatment of the claim differently from other claims of the same legal priority.

III. DISCUSSION

A. The Orion Plan

1. Good Faith Under Section 1129(a)(3)

The term "good faith" as used in section 1129(a)(3) is not defined in the Bankruptcy Code. In re Madison Hotel Assoc., 749 F.2d 410, 424 (7th Cir. 1984). However, the term is generally interpreted to mean that there exists "a reasonable likelihood that the plan will achieve a result consistent with the purposes and objectives of the Bankruptcy Code." Madison Hotel, 749 F.2d at 425; see also In re Coastal Cable T.V., Inc., 709 F.2d 762, 765 (1st Cir. 1983) (holding that a plan must bear some relation to the statutory objective of resuscitating a financially troubled corporation); In re Keach, 243 B.R. 851, 868 (1st Cir. B.A.P. 2000) (defining good faith as simple honesty of purpose). The Court's determination that a plan was "proposed in good faith" is a finding of fact that should be made in light of the totality of the circumstances surrounding the formulation of the plan. In re 203 N. LaSalle Street P'ship, 126 F.3d 955, 969 (7th Cir. 1997), rev'd on other grounds, Bank of America v. 203 N. LaSalle Street P'ship, 526 U.S. 343 (1999); In

re Jasik, 727 F.2d 1379, 1383 (5th Cir. 1984); Public Fin. Corp. v. Freeman, 712 F.2d 219, 221 (5th Cir. 1983); In re Weber, 209 B.R. 793, 797 (Bankr. D. Mass. 1997).

The Debtor's objection to the confirmation of the Orion Plan based upon Orion's purchase of third party claims does not establish a lack of good faith in connection with the formulation or purpose of the Orion Plan. The evidence established that Orion purchased approximately six small unsecured claims in Class 4A (claims of less than $2,000.00) for approximately 50% to 75% of the face amount of the claim without affirmatively disclosing to the original holders of such claims the high dividends proposed under either the Orion Plan (100%) or the Debtor's Plan (90%). However, at the time Orion approached the holders of the claims, the disclosure statements for both plans had been mailed to, and presumptively received by, each of the holders. Accordingly, the holders of the claims knew, should have known or could have readily determined the proposed dividends under either of the two competing plans. No evidence was offered which suggested that such holders were not aware of the proposed dividends.

At the beginning of the confirmation hearing Orion presented a certificate of vote which reflected that it had voted the six purchased claims in Class 4A against the Debtor's Plan. The Debtor did not object to the good faith of those votes at that time. The evidence presented during the confirmation hearing does not support a finding that the Orion Plan was not proposed to achieve a result consistent with the purposes and objectives of the Bankruptcy Code. Accordingly, the objections to confirmation of the Orion Plan by the Debtor and Elizabeth Asch based upon a lack of good faith under section 1129(a)(3) are overruled.

2. Illegal Membership Provisions in Debentures

The Debtor objects to the confirmation of the Orion Plan because the implementation of the plan involves the sale of debentures, which permit the holder to elect to receive interest for ten

years or membership in the reorganized club for ten years which allegedly violates the provisions of state law regarding the sale of health club memberships. New Hampshire law provides that "[n]o term contract for health club services shall be for a term of more than one year." N.H. Rev. Stat. Ann. § 358-I:5.I (Supp. 2002). The words "term contract" are defined as "any contract where services are paid for in advance for a period of time greater than one month." N.H. Rev. Stat. Ann. § 358-I:1.I(b) (Supp. 2002).

The Debtor has not explained how this provision of the Orion Plan differs in any material respect from the original limited partnership interests sold by the Debtor which included a membership in return for an equity investment. The Debtor's Plan will cancel those limited partnership interests, but will continue the memberships for as long as Elizabeth Asch controls the reorganized debtor. No evidence has been presented to suggest that any regulatory action has ever been taken by the State of New Hampshire in the nearly five years that the original limited partners have had memberships available to them, despite the fact that evidence was presented which suggested the State of New Hampshire did exercise regulatory oversight over the Debtor under RSA 358-I with respect to yearly memberships.

Accordingly, the Debtor's argument appears to rest on some distinction between memberships associated with an equity investment and those associated with a debt investment. The receipt of a membership as part of an equity or debt investment does not appear to create any principled distinction. Whether an investment is a limited partnership interest without a duration, or a ten year debenture, the economic impact is the same. The membership is part of the investor's return on his or her investment.

If the economics of the debenture portion of the Orion Plan suggested a scheme to evade state laws regulating health clubs, the Debtor's objection would be well taken. However, the

Court does not find that the debenture provisions of the Orion Plan constitutes a scheme to evade state laws or regulations on the sale of health club memberships. Accordingly, the Debtor's objection to the membership provisions of the Orion Plan is overruled.

3. Illegal Security Sales

The Debtor objects to confirmation of the Orion Plan under section 1129(a)(3) because Orion is allegedly violating state law by offering debentures which are not registered under New Hampshire securities law and because the principals of Orion are not licensed by the state as broker dealers. Section 1145(a) of the Bankruptcy Code provides, with certain exceptions not relevant to this case, that:

> [The] section 5 of the Securities Act of 1933 and <u>any State or local law requiring registration for offer or sale of a security or licensing of an issuer of, underwriter of, or broker or dealer in, a security do not apply</u> to . . . the offer or sale under a plan of a security of the debtor, . . . or a successor to the debtor under the plan . . . in exchange for an interest in the debtor or such affiliate; or . . . principally in such exchange and partly for cash or property.

(emphasis added)

The sale of the debentures is contingent upon confirmation of the Orion Plan. The exemption from registration and licensing in section 1145(a) of the Bankruptcy Code applies to the issuance and sale of the debentures under the Orion Plan. The Debtor's objection to confirmation of the Orion Plan based upon the offering and sale of the debentures under the Orion Plan is overruled.

4. Feasibility of the Orion Plan

The Debtor mounts a three-pronged objection to the feasibility of the Orion Plan. The first prong involves Orion's alleged failure to present sufficient evidence that it had received commitments to purchase all of the debentures in order to provide the necessary monies to fund the

initial distributions under the Orion Plan ($200,000.00) and a portion of the initial working capital for the reorganized debtor ($100,000.00). Orion presented evidence that its principals had sold at least 30 debentures at $5,000.00 each and that the three principals were prepared to purchase the remaining 30 debentures, if necessary. Orion presented in court evidence of purchase commitments for approximately 20 debentures and testimony that the remaining debentures not to be purchased by the principals had been sold, but the papers were in the possession of David Halsey who was not present in Court on the day in question.

Under the circumstances, the Court finds that Orion has presented sufficient evidence to establish it has or will likely sell sufficient debentures to fund a confirmed plan on the effective date. While it would have been cleaner and easier to have 100% of the purchase price for the debentures paid and held in escrow pending confirmation, due to the uncertainty surrounding the competing plans and the fact that three separate principals of Orion have each been responsible for marketing their respective shares of the debentures, the evidence presented is sufficient to establish a reasonable likelihood that the debenture offering has been, or will be, fully subscribed. Any ambiguity regarding the sale of sufficient debentures to fund the Orion Plan could be cured by a provision in a confirmation order requiring evidence of such a completed sale to be provided to the Court on or before the effective date of the plan, subject to revocation of confirmation.

The second prong of the Debtor's objection concerns the alleged small initial distribution to unsecured creditors due to the settlement with the City of Lebanon on its real estate tax claim and the need the reserve up to 75-80% of the distribution pending a resolution of the recharacterization or subordination of the claims of Elizabeth Asch and another. The only change in circumstances since the approval of the disclosure statement for the Orion Plan is the settlement with the City of Lebanon. The Court finds that Orion received sufficient votes after circulation of

the Court approved disclosure statement to proceed with confirmation of the Orion Plan. The only objections were from the Debtor, the proponent of a competing plan, and Elizabeth Asch, the funder of the competing plan. No unsecured creditor who is not involved in the competing plan objected.

The third prong of the Debtor's attack on feasibility is based upon the allegation that the reorganized debtor under the Orion Plan will have insufficient working capital to pay its ordinary and necessary operating expenses. The disclosure statement details how the Orion Plan would be consummated. Orion proposes to obtain $100,000.00 from the sale of sixty units of debentures and a loan of up to $150,000.00 from its principals. The projections attached to the Orion disclosure statement reflect that the Orion Plan will have sufficient working capital if the projected sources of that capital are available. For the reasons discussed above, the Court has found that the proceeds from the sale of the debentures is reasonably likely to occur. Orion presented evidence at trial which establishes that its principals have secured a commitment from Laconia Savings Bank for a line of credit which would permit them to fund the remaining working capital needs of the reorganized debtor.

The Debtor's objection to the confirmation of the Orion Plan based upon a lack of feasibility under section 1129(a)(11) is overruled.

B. The Debtor's Plan

1. Good Faith Under Section 1129(a)(3)

As discussed in section III.A.1 above, "good faith" for purposes of the requirement of section 1129(a)(3) of the Bankruptcy Code requires the Court to find that "a reasonable likelihood that the plan will achieve a result consistent with the purposes and objectives of the Bankruptcy

Code." Madison Hotel, 749 F.2d at 425. Orion's objection to the confirmation of the Debtor's Plan for failure to satisfy the requirements of section 1129(a)(3) has two parts.

Part one is based upon Orion's allegation that an insider, Elizabeth Asch, will obtain control of approximately $590,000.00 of the Debtor's cash at confirmation and will contribute only $100,000.00 of her own money and initially distribute only $110,000.00 to unsecured creditors. Orion's argument fails to note that control of the Debtor's assets, including the cash on hand, by the reorganized debtor under the Debtor's Plan is subject to the terms and conditions of the Debtor's Plan, all of which was described in the approved disclosure statement and to which no party in interest, other than the competing plan proponent, has objected. In addition, Elizabeth Asch has agreed to subordinate her claims totaling approximately $3,470,000.00 to all plan payments to unsecured creditors. Orion has not, and could not, cite any authority for the proposition that an insider cannot be a funder or a proponent of a plan of reorganization where proper disclosure has been made. Elizabeth Asch is funding the Debtor's Plan as disclosed to creditors. This part of Orion's objection is overruled.

Part two of Orion's objection is based upon the operating projections which accompanied the disclosure statement. Orion contends that they are inaccurate and were intentionally "low-balled" in order to make the Debtor's operations look materially worse than its actual operations. Specifically, Orion cites the absence of projections for tennis income beginning in 2004, over estimation of the amount of the tax claim by the City of Lebanon and under estimation of income from personal trainer services. The Debtor presented evidence that no capital cost estimates, financing costs or even a decision to proceed with tennis have been made and, therefore, there is no basis to include any estimates in the projections. The Debtor argues that the disclosure statement does advise creditors that tennis facilities are under consideration. The Debtor contends

that it estimated the Lebanon tax claim at the full amount sought by the City in order to be conservative in its projections. Finally, the Debtor presented testimony that the Debtor's management is not confident that income from personal training services will rise continuously during the term of its plan and has used lower projections in order to be conservative in predicting feasibility.

The Court finds that Orion has not established that the Debtor's estimates were intentionally understated to mislead creditors. The Debtor chose to rest its feasibility proof upon conservative projections of future operations. If those projections are too bearish, the Debtor's Plan provides for creditors to be paid up to 100% of their claims. If Orion's contention is correct, creditors will be paid in full in a shorter period of time than provided in the Debtor's Plan. The Court cannot find harm in such an outcome. The second part of Orion's objection is overruled.

2. Improper Classification of Claims Under Section 1129(a)(1)

Orion contends that the separate classification of the M.C. Sheppard and Ledyard Bank unsecured claims constitutes improper classification under section 1122 of the Bankruptcy Code as interpreted by the First Circuit in Granada Wines. Accordingly, Orion concludes that the Debtor's Plan may not be confirmed because it does not comply with classification provisions of the Bankruptcy Code as required by section 1129(a)(1).

The statutory provision governing the classification of claims or interests is set forth in section 1122:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

While the plain language of section 1122(a) provides that only "substantially similar claims" may be placed in the same class, the statute does not *expressly* require that all substantially similar claims be placed in a single class, nor does it expressly prohibit substantially similar claims from being classified separately. 5 James F. Queenan, Jr. et al., Chapter 11 Theory and Practice: A Guide to Reorganization, § 30.16 (1994) (emphasis added); see also In re Barney and Carey Co., 170 B.R. 17, 22 (Bankr. D. Mass. 1994) (reviewing the legislative history of section 1122 as well as providing an exhaustive review of the case law). Predictably, the ambiguity of section 1122 has generated numerous contradicting decisions addressing a debtor's ability to separately classify unsecured claims under a Chapter 11 plan of reorganization.

In Granada Wines, the First Circuit ruled that the debtor's separate classification of an unsecured pension fund claim from other unsecured creditors was inappropriate because there was an insufficient basis for distinguishing the claims. The court announced the general rule that "all creditors of equal rank with claims against the same property should be placed in the same class." Granada Wines, 748 F.2d at 46 (citations omitted). The Granada Wines rule is often referred to as the so-called "strict approach." See Barney and Carey, 170 B.R. at 22.

While Granada Wines has often been cited for the proposition that any separate classification of unsecured creditors is impermissible, the First Circuit actually held that separate classification for unsecured creditors is justified "where the legal character of their claims is such as to accord them a status different from the other unsecured creditors." Granada Wines, 748 F.2d at 46. This Court is bound to apply Granada Wines and, therefore, shall look to the language of that decision for direction. In Granada Wines, the claim sought to be separately classified was a claim for "withdrawal liability" under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381, et seq. The debtor in Granada Wines sought to separately classify

the withdrawal liability claim on the grounds that the withdrawal liability claim in Chapter 11 was allowable in the full amount, but under Chapter 7 would have been reduced by 50% pursuant to the MPPAA. The Granada Wines court rejected that distinction as a basis for separate classification, holding that the difference between the withdrawal liability claim and that of other unsecured creditors affected only the allowable amount of the claim and not its legal nature. Granada Wines, 748 F.2d at 47. In so holding, the Granada Wines court chose to follow the "general rule regarding classification . . . that all creditors of equal rank with claims against the same property should be placed in the same class." Id. at 46 (quoting In re Los Angeles Land and Inv., Ltd., 282 F. Supp. 448, 453 (1968)).

Four days after the conclusion of the confirmation hearing the Debtor filed a Motion to Approve Compromise and Settlement Providing for Withdrawal of Claim of M.C. Sheppard and Withdrawal of Debtor's Counter-claim Against M.C. Sheppard (Doc. No. 554) (the "Sheppard Compromise"). After notice and a hearing on September 18, 2003, the Sheppard Compromise was approved. Accordingly, her claim is withdrawn and any provision in either the Debtor's Plan or the Orion Plan regarding payment of any Sheppard claim is moot. For that reason, the Court shall only consider Orion's classification argument with reference to the Ledyard Bank claim.

The Court believes that the Ledyard Bank claim enjoys a rank, character and status different from the other general unsecured claims of the Debtor. While the Granada Wines withdrawal liability claim was distinct from other unsecured claims only in its allowable amount, Ledyard Bank has voluntarily agreed to accept less favorable treatment of its claim vis-a-vis other unsecured creditors.[5] Furthermore, the Court does not believe that the holding of Granada Wines

[5] Ledyard Bank has acquiesced to its treatment under the Debtor's Plan by voting in the affirmative. Under the Debtor's Plan, Ledyard Bank will receive interest only, on its claim of $435,000.00,

amounts to a per se prohibition on any separate classification of unsecured claims. Otherwise, the First Circuit would not have suggested that separate classification of unsecured claims was possible under certain circumstances. See id. It is important to note that Granada Wines expressly states that based on differences in "rank," "status" and "character," there may be separate classification of unsecured claims. Id. Therefore, consistent with Granada Wines the Court must examine the "rank," "legal character" and "status" of Ledyard Bank's claim to determine if separate classification is permissible. Because Ledyard Bank has agreed to subordinate repayment of its claim to other unsecured creditors, the rank, legal character and status of the Ledyard Bank claim is different from other unsecured claims and separate classification is permissible under Granada Wines.[6]

Finally, the Court feels compelled to address the "gerrymandering" issue, that the Ledyard Bank class is created for the sole purpose of creating one accepting impaired class to improperly manipulate the voting requirements of section 1129(a)(10). Barney, 170 B.R. at 24. The Court is unable to find an "unlawful purpose" in the act of separately classifying a claim that has essentially subordinated its rights to that of the general unsecured creditors. Nor does this Court find such a classification to be an improper manipulation. While Ledyard Bank voted its claim in favor of the Debtor's Plan, that accepting class is not essential to confirmation, because the general unsecured creditors' class has also voted for the Debtor's Plan.[7]

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at 1% for the first 60 months with repayment of principal subordinated to plan payments to other unsecured creditors.

[6] It is also arguable that under the facts of this case, Granada Wines not only would permit separate classification of the Ledyard Bank claim, but may require separate classification.

[7] If Ledyard Bank's claim of $435,000.00 was lumped into Class 4B with the other general unsecured claims, Class 4B would still have voted affirmatively for the Debtor's Plan but the class dividend would drop approximately 44%.

C. Competing Plans of Reorganization

The Court may only confirm one plan and where more than one plan may be confirmed, the Court is directed to "consider the preferences of creditors and equity security holders in determining which plan to confirm." 11 U.S.C. § 1129(c). However, the Court is only obligated to consider the preferences of creditors and equity security holders, not simply obey them. In re River Village Assoc., 181 B.R. 795, 807 (E.D. Pa. 1995). The Court must make the choice that is most beneficial to all creditors and equity security holders. In re Sound Radio, Inc., 93 B.R. 849, 859 (Bankr. D.N.J. 1988). In deciding which competing plan of reorganization to confirm, the factors which the Court considers are: (1) the type of plan; (2) the treatment of creditors and equity security holders; (3) the feasibility of the plan; and (4) the preferences of creditors and equity security holders. In re Internet Navigator Inc., 289 B.R. 128, 131 (Bankr. N.D. Iowa 2003); In re Holley Garden Apartments, Ltd., 238 B.R. 488, 493 (Bankr. M.D. Fla. 1999).

The competing plans are essentially the same type of plan. Both the Orion Plan and the Debtor's Plan provide for the Debtor's assets to be acquired on the effective date of the plan, either by merger or purchase, by an acquiring entity formed solely for that purpose. The acquiring entity will become the reorganized debtor and will continue the operation of the Debtor's business under the terms of their respective plans. For the reasons set forth above both plans are feasible, although there may be some differences in risk between them. The Court finds that the plans differ in only three of the four factors which the Court must consider.

1. Treatment of Creditors

Both the Orion Plan and the Debtor's Plan will pay a 100% dividend to creditors in the administrative convenience class. Under the Debtor's Plan, Ledyard Bank would receive interest only at the rate of 1.0% per annum during the five year term of plan payments being made to

general unsecured creditors with payment of the principal on its claim subordinated to payments to other unsecured creditors. Settlement of the M.C. Sheppard claim results in the elimination of a possible distribution to her under the Orion Plan on a maximum claim of $300,000.00. The elimination of the Sheppard claim increases the estimated distribution to unsecured creditors to 23% to 75%, depending upon Orion's success in attempting to recharacterize or subordinate the Elizabeth Asch claims. The Debtor's Plan is estimated to pay general unsecured creditors 68% to 100%, depending upon the resolution of disputed claims with two of the principals of Orion and a third party.[8] Under the Debtor's Plan payments to unsecured creditors will be made over five years. Under the Orion Plan, payments to unsecured creditors will be made over ten years.

The Debtor's Plan is estimated to pay unsecured creditors a greater dividend over a significantly shorter period of time. If Orion were to be successful in recharacterizing or subordinating the Elizabeth Asch claims, and the Debtor had the worst possible result in resolving the disputed unsecured claims under its plan, the Orion Plan would pay a 75% dividend while the Debtor's Plan would pay a 68% dividend. However, the Court does not find this projected difference in dividends under the best case for the Orion Plan to be significant because of the certainty of significant delay in payments to unsecured creditors due to the necessity of holding in reserve payments totaling approximately three-quarters of all distributions to unsecured creditors under the Orion Plan during the litigation with Elizabeth Asch. At best, the Debtor's Plan will result in greater payments to unsecured creditors. At worst, the payments to unsecured creditors under the Debtor's Plan will be slightly less than under the Orion Plan, but will be paid much

[8] Under the Debtor's Plan payment of the M.C. Sheppard claim was to be made in a manner which did not dilute or affect the estimated payments to general unsecured creditors. Accordingly, approval of the Sheppard Compromise does not affect the estimated dividend to unsecured creditors.

sooner. Since money received sooner is worth more than money received later, the worst case under the Debtor's Plan is that creditors will receive dividends of a value at least equal to the best case under the Orion Plan. Accordingly, the Court finds that the Debtor's Plan provides a greater return to unsecured creditors.

2. Preference of Creditors

Orion placed all unsecured creditors, including M.C. Sheppard and Ledyard Bank, but excluding administrative convenience claims (Class 5), in one class (Class 6). The general unsecured creditor class rejected the Orion Plan by a vote of twelve creditors in favor and fifteen against. The Debtor placed the unsecured creditors, other than the administrative convenience claims, in five separate classes, the general unsecured creditor class (Class 4B), the disputed unsecured creditor class (Class 4C), the note holder claims (Class 4E), the M.C. Sheppard claim (Class 6) and the Ledyard Bank claim (Class 5). Four out of five of those classes voted to accept the Debtor's Plan. The only unsecured class that rejected the Debtor's Plan was M.C. Sheppard. The aggregate votes cast by all five unsecured creditor classes on the Debtor's Plan were twenty-five in favor and five against. It is clear that the unsecured creditors prefer the Debtor's Plan.

3. Operational Risk

While the Court has found that both competing plans are feasible, the Debtor's Plan pays unsecured creditors over five years while the Orion Plan pays unsecured creditors over ten years. It is axiomatic that a five year term involves less business risk than a ten year term due to the number of factors (competition, unfavorable economic changes, unfavorable demographic trends, etc.) which may occur over a longer period and cannot be factored into operational projections.

In addition, the Orion Plan will be able to pay unsecured creditors a dividend which will exceed the lower end of the range of dividends projected under the Debtor's Plan if, and only if, it

is successful in litigation with Elizabeth Asch on the recharacterization or subordination of her claims. Although Orion is confident in the success of that litigation, all of the risk of the outcome and delay in payment will fall on the unsecured creditors. The Debtor's Plan avoids such risks because the Elizabeth Asch claims are subordinated to the unsecured creditors under the terms of the plan.

Accordingly, the Debtor's Plan is less risky and, therefore, provides greater certainty for unsecured creditors.

IV. CONCLUSION

For the reasons set forth in this opinion the Court finds that both the Orion Plan and the Debtor's Plan meet the requirements of the Bankruptcy Code for confirmation and that under section 1129(c) of the Bankruptcy Code the Debtor's Plan shall be confirmed. The Debtor shall submit a proposed confirmation order to the Court within one week from the date of this opinion. The proposed order shall incorporate language reflecting the amendments to the Debtor's Plan approved by the Court during the confirmation hearing as well as any changes necessary on account of approval of the Sheppard Compromise. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: September 19, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge