

In the United States Bankruptcy Court  
for the  
Southern District of Georgia,  
Savannah Division

FILED

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U.S. BANKRUPTCY COURT  
SAVANNAH, GA.

In the matter of:

GOLDEN ISLES  
PETROLEUM, INC.,

*Debtor*

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Chapter 11 Case

Number 91-42239

**ORDER ON CONFIRMATION**

A hearing in the above-captioned case was held on May 18, 1994, to consider confirmation of Debtor's Third Amended Plan of Reorganization ("Plan"). Upon initial review of the ballots cast by creditors, it appeared that Class 16, an impaired class, had not accepted the Plan under section 1126 of the Bankruptcy Code. Thus, the Plan, not having been accepted by every impaired class, could only be confirmed pursuant to section 1129(b), the so-called cramdown confirmation provisions of the Bankruptcy Code. Upon further inquiry, however, it was determined that a Class 16 claimant, Sunstar, Inc., had cast a ballot accepting the Plan without indicating the amount of its claim. Inclusion of Sunstar, Inc.'s \$85,000.00 claim resulted in class 16 becoming an accepting class under section 1126. In light of that development, I agreed, subject to further review by the court to ensure that the Plan otherwise

satisfied the provisions of section 1129, that Debtor's Plan satisfied section 1129(a)(8) of the Code, and as a result, Debtor would not be required to satisfy the criteria set forth in 11 U.S.C. Section 1129(b).

Upon further review, it appears that Debtor's Plan still does not meet the requirements for confirmation under section 1129. Specifically, I find that the Plan fails to comply with the provisions of section 1129(a)(1) because it improperly classifies and/or fails to provide for the same treatment of all claims in Class 16 of the Plan.

11 U.S.C. Section 1129(a)(1) provides:

(a) The court shall confirm a Plan only if all of the following requirements are met:

(1) The Plan complies with the applicable provisions of this title.

This provision requires, as a condition precedent to confirmation, that a plan be in compliance with any applicable provision of the Bankruptcy Code, including sections 1122(a) and 1123(a)(4). 11 U.S.C. Section 1122(a) provides:

(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.

11 U.S.C. Section 1123(a)(4) provides:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a Plan shall--

(4) provide the same treatment for such claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

Thus, section 1122(a) requires that a claim be placed in a particular class only if it is "substantially similar" to the other claims in that class, while section 1123(a)(4) requires that all claims within a particular class be provided the same treatment, unless the holder of a particular claim otherwise consents.

Debtor's Plan defines Class 16 as "claims of the Holders of claims arising out of executory contracts and unexpired leases with the Debtor . . .," and lists fifteen separate class members. ¶2.16. Treatment of the claims is found in paragraph

4.16, which provides that seven of the class members "shall have no claim," that three members' claims are "disputed," that one will be conditionally paid, that one will be paid a sum certain "in full and complete satisfaction of its claim," that payments to another will "continue," and that two leases, including that with Sunstar, will be assumed. There is absolutely no question that these claims have been improperly placed in the same class. The claims within Class 16 are similar only at the most superficial level; all arise out of executory contracts or unexpired leases. However, the fact that some of the claims are assumed, some are rejected, and some are disputed means that the legal nature of these claims varies substantially. A contracting party whose contract Debtor proposes to assume may be unimpaired, while parties to contracts which Debtor proposes to reject will likely have a general unsecured claim, *see* 11 U.S.C. § 502(g), and perhaps even an administrative claim. *See* 11 U.S.C. 503(b)(1)(A). Finally, those parties holding claims which Debtor disputes may hold no allowed claim, depending upon the resolution of the dispute. I therefore conclude that Class 16 is impermissibly formed, in that the nature of the claims held by its members are not substantially similar.

There is also little question that the claims within Class 16 are not receiving the "same treatment" as required under section 1124(a)(3). In fact, the

claims within Class 16 are receiving a vast array of treatments, including no payment, payment as complete satisfaction of a claim, continuing payment, and assumption. Clearly there is vastly different treatment accorded the various members of this class to which they have not agreed. Four members of this class, Bell Atlantic Tricon, Richard L. Gray, Nickel Pumpers of Columbia, Inc., and Sunstar, Inc., voted to accept the plan. The remainder of the disputed or disallowed claimholders either voted to reject the Plan or simply did not vote. Because Section 1123(a)(4) requires agreement by each holder to the "less favorable treatment", I conclude that this mandatory requirement for confirmation has not been met. Just as failure to object does not constitute "agreement" in other Title 11 contexts,<sup>1</sup> the Class 16 claimholders' failure to object to their treatment does not constitute "agreement", as that term is used in section 1123(a)(4). I find therefore, that, as constituted, the treatment of Class 16 creditors violates Section 1123(a)(4).

Additionally, I find that Debtor's Plan, which was disseminated to creditors with instructions for indicating their acceptance or rejection of the Plan and giving notice of the hearing on confirmation held on May 18, 1994, is still not in

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<sup>1</sup> See e.g., In the matter of Bruce Charles Bauman, Ch. 13 No 93-41818, slip op. (Bankr. S.D.Ga. May 18, 1994) (agreement for the purpose of Section 1322(a)(2) requires affirmative assent and not a mere failure to object).

compliance with the letter and spirit of section 1129(a)(5) of the Code. Following the May 20 hearing, Debtor filed a pleading entitled "Waiver of Certain Provision of Debtor's Third Amended Plan of Reorganization and Disclosure." That pleading, as it relates to the issue before me, set forth in paragraph two the following information:

Pursuant to 11 U.S.C. §1129(a)(5)(B), Golden Isles Petroleum, Inc. hereby discloses that Robert H. Puccini shall serve as the President of the reorganized Debtor at an initial salary of \$30,000.00 per year, and that Laura Puccini, the wife of Robert H. Puccini, will be employed by the reorganized Debtor as office manager, and shall be paid an initial salary of \$30,000.00 per year.

I find that the disclosure of this information filed after the hearing is insufficient, as a matter of law, to meet the requirements of 11 U.S.C. Section 1129(a)(5)(B). Clearly, this provision of the Code is intended to provide a meaningful and full disclosure of the identity and compensation package of any insider which will be employed or retained by the Debtor after confirmation. This information is absolutely fundamental to a creditor's decision of whether to accept or reject a Chapter 11 Plan for at least two reasons. First, it is part of the Debtor's showing that its Plan satisfies the feasibility requirement of 11 U.S.C. Section 1129(a)(11), which requires the Debtor to

show that confirmation is not likely to be followed by liquidation or further financial reorganization. In determining whether this provision is satisfied, it is important for creditors and the Court to be advised as to the identity and the expertise of those on whom the responsibility of operating the reorganized debtor will fall. Second, this disclosure is critical and necessary because creditors have a right, in deciding whether to accept or reject a plan, to know the extent of insider employment and the full extent of their compensation before they are asked to decide whether they wish to accept a Plan, which almost invariably will impair their interests to some degree, and in many instances will yield them deferred payments over a lengthy period of time which are far less than the full amount of their allowed claims.

Because Debtor failed to disclose this information, I conclude that creditors, in casting their ballots, were not apprised of either of the elements which this explicit provision of the Code is intended to provide. The Plan can be confirmed "only if" all of the requirements of Section 1129 are met. I find that the pleading filed two days following the confirmation hearing provided no actual notice of either the fact of employment or the terms of employment to either creditor. I further find that the terms set forth in the pleading are not sufficiently detailed to constitute sufficient disclosure of this information to the creditor class. A mere statement of the initial

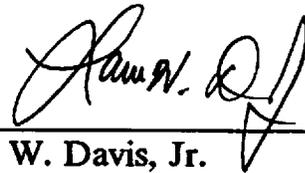
salary is simply insufficient.

I therefore conclude that the Plan fails to meet the minimum requirements for confirmation set forth in 11 U.S.C. Section 1129(a)(1) and (a)(5), and confirmation is therefore denied.

Finally, I note that an asset of potentially great value to the estate has been omitted from the Debtor's "balance sheet" Chapter 7 analysis although it has been vaguely described in narrative form. This asset is the pending claim against Debtor's former counsel which Debtor believes may be worth in excess of \$500,000.00. While the claim is hotly disputed, Debtor has represented to this court that it is preparing to file suit, and the exclusion of this claim from Debtor's liquidation analysis is misleading. Debtor is ordered to correct this omission.

Debtor is granted twenty (20) days from the date of entry of this Order to file an amendment to the Plan (1) reclassifying the members of Class 16; (2) containing all of the information reasonably called for by the provisions of 11 U.S.C.

Section 1129(a)(5);<sup>2</sup> and (3) restating its Chapter 7 liquidation analysis. The amendatory language shall be separately set forth in a separate document and, in addition, a recast amended plan, incorporating all these and earlier amendments into a single document shall be filed concurrently. Upon review of the same by the Court, the Clerk will be directed to issue a new notice transmitting the amendments and the recast plan and ballots to all creditors in this case.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 10<sup>th</sup> day of June, 1994.

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<sup>2</sup> Such information includes, at a minimum, the following: (1) name of the insider employee; (2) salary; (3) all fringe benefits - including insurance, auto, retirement, bonus, etc.; (4) job description; (5) work schedule (full or part time); and (6) any other employment held by an insider, by whom employed, and compensation, duties and schedule required in that position.