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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Dexter Distributing Corporation, et al.,)

No. CV 09-1099-PHX-JAT

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Debtors,)

BK NO. 2:03-bk-03546-RJH

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Taylor R. Coleman,)

Jointly Administered as Case With:

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Appellant,)

2-03-BK-03548-RJH

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vs.)

2-03-bk-04238-RJH

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ANMP, et al.,)

2-03-BK-04695-RJH through

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Appellees.)

2-03-BK-04710-RJH

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2-03-BK-05427-RJH

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2-03-BK-11513-RJH

2-03-BK-11515-RJH

2-03-BK-04238-RJH

2-07-BK-01017-RJH

2-07-BK-01018-RJH

2-07-BK-01019-RJH; and

2-08-BK-05785-RJH

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ADV. NO. 00-0000

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BAP NO. AZ-00-0000

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ORDER

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Pending before this Court is Taylor R. Coleman’s Emergency Motion for Stay

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Pending Appeal (Doc. # 4). For the reasons that follow, the Court denies Coleman’s motion.

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BACKGROUND

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Coleman is the founder of Castle Megastore Corporation (“Castle”). In 2003, Castle

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and other related entities owned by Coleman filed voluntary chapter 11 bankruptcy

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proceedings. In 2004, a plan of reorganization was proposed by the debtors and confirmed

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by the Bankruptcy Court (“the 2004 Plan”).

1 *Virginian R. Co. v. United States*, 272 U.S. 658, 672-73 (1926). “A stay is not a matter of
2 right, even if irreparable injury might otherwise result.” *Id.* at 672. “The party requesting
3 a stay bears the burden of showing that the circumstances justify an exercise of that
4 discretion.” *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009).

5 In order for this Court to grant or deny a request for a stay, the Court must consider
6 four factors: “(1) whether the stay applicant has made a strong showing that he is likely to
7 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
8 whether issuance of the stay will substantially injure the other parties interested in the
9 proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776
10 (1987). The first of these two factors “are the most critical,” and “[i]t is not enough that the
11 chance of success on the merits be ‘better than negligible.’” *Nken*, 129 S.Ct. at 1761 (quoting
12 *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)).

13 *Likelihood of Success on the Merits*

14 Coleman argues that the 2008 Plan violates 11 U.S.C. § 1129(a)(3), which provides
15 that “[t]he court shall confirm a plan only if all of the following requirements are met: . . .
16 The plan has been proposed in good faith and not by any means forbidden by law.”
17 Specifically, Coleman argues that the Plan lacks good faith because it transfers assets of
18 Castle to Franks, “a conflicted insider,” and that the “transaction is devoid of arms-length
19 negotiation.” (Doc. # 4 at p. 16.) “The bankruptcy judge is in the best position to assess the
20 good faith of the parties. The finding of good faith will not be overturned unless the
21 opponent of the plan can show that the finding was clearly erroneous.” *In re Stolrow’s Inc.*,
22 84 B.R. 167, 172 (B.A.P. 9th Cir. 1988) (citation omitted).

23 A review of the evidence before the bankruptcy court, however, supports the
24 bankruptcy court’s finding that the 2008 Plan was proposed in good faith. The Proponents
25 presented evidence that the 2008 Plan was not only feasible, but the amount of consideration
26 to be paid by Newco is greater than the operating assets Newco will acquire in exchange.
27 Moreover, there were numerous other plans considered throughout the course of the
28 proceedings, none of which ever materialized, until the 2008 Plan was presented. The 2008

1 Plan was overwhelmingly supported by the creditors of the estate. Significantly, the record
2 before the bankruptcy court is devoid of any qualified expert or other testimony to suggest
3 that the transaction is materially unfair or substantially less than the fair market value of the
4 business. The mere fact that the 2008 Plan may not produce the greatest possible return of
5 capital does not transform the 2008 Plan into one that violates § 1129(a)(3).

6 Likewise, even if Franks constitutes an “insider,” this in and of itself does not tarnish
7 the 2008 Plan such that it is violative of § 1129(a)(3). The 2008 Plan was approved by a
8 committee consisting of independent directors and, as discussed earlier, the amount of
9 consideration given exceeds the amount of assets obtained. Such evidence, contrary to
10 Coleman’s contentions, demonstrates the impartiality of the 2008 Plan. Accordingly, the
11 evidence in the record supports the bankruptcy court’s finding that the 2008 Plan was
12 proposed in good faith, and the Court cannot say that the bankruptcy court erred in so
13 concluding.

14 In a related argument, Coleman argues that the bankruptcy petitions filed in 2007 were
15 not filed in good faith. “Dismissal for a lack of good faith in filing is a matter for the
16 bankruptcy court’s discretion.” *In re Stolrow’s Inc.*, 84 B.R. at 170. Coleman asserts that
17 the purpose of the 2007 bankruptcy filing was not Castle’s insolvency, but rather a calculated
18 plan to eliminate Coleman’s majority stock interest in Castle. In support of this argument,
19 Coleman points to certain emails and a memorandum from a representative of ANMP
20 purportedly designed to “attack” Coleman. However, even if the Court agrees that such
21 documents evidence a plan on the part of ANMP to eliminate Coleman’s majority stock
22 interest—a finding the Court is not making—the evidence in the record before the bankruptcy
23 court demonstrates that the Debtor was both insolvent and unable to pay its obligations
24 coming due. There was testimony before the bankruptcy court that there were significant
25 errors in the 2004 Plan, the unsecured debt was underestimated, and sales projections were
26 unrealistic. As a result of these issues, Castle was faced with impending payments on various
27 properties that it was unable to satisfy. Moreover, the testimony before the bankruptcy court
28 evidenced that Castle attempted to refinance these properties, but to no avail. Consequently,

1 the Court finds that the 2007 bankruptcy petition was filed for legitimate reasons under the
2 bankruptcy code, and not simply to divest Coleman of his majority interest in Castle.¹

3 Coleman next argues what amounts to a corollary of his good faith arguments;
4 namely, that the 2007 bankruptcy petition is essentially an attempt to modify the 2004 Plan
5 in violation of 11 U.S.C. § 1127(b). As the bankruptcy court noted, there is no prohibition
6 in the Bankruptcy Code against successive Chapter 11 filings. Moreover, the evidence in the
7 record before the bankruptcy court demonstrates that the 2004 Plan had serious failings, and
8 as a result there was a need to file the 2007 bankruptcy petition. Because of the tangible and
9 serious problems with the 2004 Plan, the Court finds that the 2007 petitions were not filed
10 simply to circumvent 11 U.S.C. § 1127(b).

11 Coleman argues additionally that the 2008 Plan produces “a *de facto*, impermissible
12 substantive consolidation” because, Coleman urges, not all of the Class 7 creditors have
13 claims against each of the separate Debtors. (Doc. # 4 at p. 34.) Therefore, “it is *per se*
14 improper to lump such creditors indiscriminately into one class that will share in assets from
15 another Debtor.” (*Id.*) “Whether or not a plan of reorganization provides for equality of
16 treatment for each claim or interest of a particular class is a factual determination reviewable
17 under the clearly erroneous standard.” *In re Stolrow’s Inc.*, 84 B.R. at 172. Coleman
18 ignores, however, that under the 2004 Plan each of the Debtors are jointly liable for the

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21 ¹ At oral argument, Coleman placed particular emphasis on the bankruptcy court’s
22 alleged rejection of an independent examiner’s report. However, the examiner’s report was
23 not admitted into evidence, nor did the examiner testify. As such, his qualifications to
24 provide expert opinion testimony were never established. In any event, the bankruptcy court
25 found that the evidence propounded by the Proponents was more credible and established
26 that the 2007 bankruptcy filings were made in good faith. Such determinations concerning
27 the credibility of particular witnesses lie within the sound discretion of the bankruptcy court.
28 The Court finds that the bankruptcy court did not err by finding the evidence of Proponents
more credible. *See In re Johnston*, 321 B.R. 262, 287 (Bankr. D. Ariz. 2005) (“To reverse
on the basis of an evidentiary ruling . . . the Court must conclude not only that the bankruptcy
court abused its discretion, but also that the error was prejudicial.”) (citing *McEuin v. Crown
Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003)).

1 unsecured claims. As such, the fact that a particular Class 7 creditor may only have a claim
2 against one of the Debtors is immaterial.

3 Coleman next argues that the 2008 Plan permits impermissible third party releases and
4 contains improper exculpations. However, based upon the evidence before the bankruptcy
5 court, the 2008 Plan does not release the claims of third parties in violation of the Bankruptcy
6 Code. Rather, the 2008 Plan permits the settlement of certain claims that are owned by the
7 Debtors against third parties, as well as the discharge of claims against the Debtors. Such
8 settlements and discharges, however, do not amount to the discharge of debts of non-debtors
9 in violation of the Bankruptcy Code.

10 Coleman contends that the 2008 Plan contravenes 11 U.S.C. § 1123(a)(4) because
11 certain claims against the creditors are transferred to the liquidating trust, while other claims
12 are transferred to Newco. Section 1123(a)(4), however, only requires that a plan “provide
13 the same treatment for each claim or interest of a particular class.” What Coleman complains
14 of, however, relates to certain causes of action that the Debtors may have against certain
15 creditors, and how these causes of action are handled. Such an argument, however, does not
16 fall under the rubric of how *claims* of a particular class are handled. Under the 2008 Plan,
17 all claimants in Class 7 are entitled to a *pro rata* distribution from the liquidating trust.

18 Coleman next asserts that the 2008 Plan impermissibly requires him to transfer to the
19 liquidating trust certain real property owned by him through his real estate limited liability
20 companies. The fact that Coleman may still technically own the various properties, however,
21 ignores the dictates of the 2004 Plan. Under the 2004 Plan, Coleman was required to transfer
22 the properties to Castle. Coleman has failed to demonstrate why he is not bound by the
23 requirements of the 2004 Plan. As such, Coleman is not being required to transfer any real
24 property that he was not already obligated to transfer under the 2004 Plan.

25 Finally, Coleman argues that the 2008 Plan violates 11 U.S.C. § 1123(a)(4) because
26 the 2008 Plan treats Coleman and Franks differently, even though they are both members of
27 Class 8 under the 2008 Plan. In support of this argument, Coleman directs the Court’s
28 attention to the fact that Franks is being permitted to become the sole owner of the company

1 that will replace Castle, while Coleman is left with nothing. However, the evidence before
2 the bankruptcy court demonstrates that Coleman’s interests as a Class 8 member are treated
3 the same as Franks’. What Coleman’s argument actually amounts to is a disdain for Franks’
4 purchasing of the company that will replace Castle. Such an option does not stem from
5 Franks’ status as a Class 8 member. Coleman had the same opportunity of purchase as
6 Franks. Coleman’s argument is unavailing.

7 Therefore, the Court finds that Coleman has failed to make a “strong showing” that
8 he is likely to prevail on the merits. Accordingly, the first factor weighs heavily against the
9 entry of a stay order pending appeal.²

10 *Irreparable Injury*

11 Coleman argues that if this Court does not enter a stay, “there is a very real danger
12 that the legitimate issues raised by Mr. Coleman on appeal will become moot.” (Doc. # 4 at
13 p. 14.) The Court does not disagree with Coleman that if a stay is not entered, Coleman’s
14 appeal is likely to become moot. Thus, the Court finds that the second factor—whether the
15 applicant will be irreparably injured absent a stay—weighs in favor of Coleman.

16 *Substantial Injury to Other Parties*

17 The evidence before the Court demonstrates that there is a substantial risk of injury
18 to both the Debtors and the creditors. The evidence suggests that the Debtors will be unable
19 to continue their business operations if a stay is granted, which will also have an impact on
20 their ability to successfully reorganize. The evidence also supports a finding that a stay will
21 eliminate or significantly reduce Castle’s ability to obtain trade credit. If a stay is entered,
22 Castle would face a real and significant risk of the liquidation of its operating assets. ANMP
23 asserts that it has a secured claim, but has agreed under the 2008 Plan to a general, unsecured

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25 ² It is arguable whether the Court need address the other factors after having
26 concluded that Coleman has failed to make a “strong showing” that he is likely to prevail on
27 the merits. *Nken*, 129 S.Ct. at 1762 (“Once an applicant *satisfies the first two factors*, the
28 traditional stay inquiry calls for assessing the harm to the opposing party and weighing the
public interest.”) (emphasis added). Nevertheless, the Court will assess the other three
factors before determining whether to grant or deny Coleman’s requested stay.

1 claim. Coleman disputes that ANMP has a secured claim, nevertheless, ANMP has not
2 agreed to remain an unsecured creditor if a stay is granted pending appeal. A stay would
3 inevitably result in further litigation concerning the status of ANMP's claim. Relatedly,
4 Franks' offer to purchase the operating assets of Castle does not remain viable if a stay is
5 entered. As such, the 2008 Plan itself faces a substantial risk of failing if a stay order is
6 entered by this Court.

7 For these reasons, the Court finds that the third factor weighs against the entry of a
8 stay order.

9 *The Public Interest*

10 Coleman argues that the public interest weighs in favor of granting his requested stay
11 because it would permit the preservation of his right to appeal. The Proponents assert that
12 the public interest is best served by denying Coleman's requested stay because the
13 "fundamental policy underlying Chapter 11" is to permit the successful rehabilitation of
14 debtors. (Doc. # 16 at p. 49.) The Court finds that the public interest weighs in favor of the
15 Proponents. The Court is mindful of the importance of one's right to appeal and the fact that
16 Coleman's appeal would likely be rendered moot if the Court denies Coleman's requested
17 stay. Nevertheless, the Court gave particular consideration of such harm under the second
18 factor, as discussed above. Moreover, because the granting of a stay would endanger the
19 successful rehabilitation of the Debtors by jeopardizing the 2008 Plan, the public interest is
20 best served by upholding the underlying rationale of the Bankruptcy Code by denying
21 Coleman's requested Stay.

22 **CONCLUSION**

23 After having given proper consideration to the four factors required in order to grant
24 or deny a stay request, the Court finds that Coleman has failed to carry his burden of showing
25 that the circumstances in this case justify an exercise of the Court's discretion to grant a stay.

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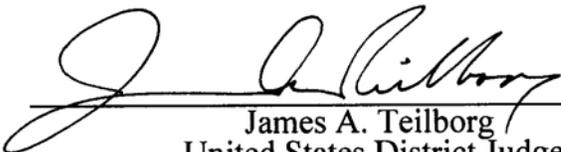
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Accordingly,

IT IS ORDERED that Taylor R. Coleman's Emergency Motion for Stay Pending Appeal (Doc. # 4) is denied.

DATED this 13th day of July, 2009.



James A. Teilborg
United States District Judge