

SIGNED.



Dated: January 12, 2005

*Randolph J. Haines*

RANDOLPH J. HAINES  
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 11
	)	
DEXTER DISTRIBUTING CORPORATION, et al.,	)	CASE NO. 2-03-03546-PHX-RJH
	)	
Debtor.	)	(Jointly Administered Cases Nos.
	)	03-03548-PHX-RJH and 03-04695-
	)	PHX-RJH through 03-04710-PHX-RJH)

THIS FILING APPLIES TO ALL DEBTORS

ORDER DENYING DEBTORS' MOTION TO AMEND FINDINGS OF FACT AND JUDGMENT RE MORTGAGES, LTD. CLAIMS

Debtors have moved for modification of this Court's Order that the two liens held by Mortgages, Ltd. on 300 East Camelback be treated as fully secured.

Debtors' principal argument is that Debtors did nothing to mislead the Court. This is irrelevant. What matters is what the Court and Mortgages, Ltd. reasonably understood about the stipulation for certain creditors to be treated as fully secured.

In fact, the Debtors had a golden opportunity at the confirmation hearing to clarify for everyone the position for which they currently contend, that they were reserving the right for a future hearing at which they could seek to establish a value of the property less than the amount of the debts and thereby strip down the liens. Debtors' counsel specifically denied that option, in a colloquy on page 17 of the transcript of January 28, 2004:

THE COURT: Let me rephrase the question. Mortgages Limited, I don't know what class number it is, but the Mortgages Limited claims, and let me amalgamate them, of apparently 990 and 281 on 300 East Camelback, is Mortgages Limited going to have a secured claim under this plan of 1.271, or is it going to have a secured claim of 820,000, or is it going to have a secured claim of some unknown

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value of the store that has not yet been determined?

MR. STAPLETON: We've agreed that they're going to have a secured claim that's the principal value of their loans basically. I think at least for the purpose of the confirmation trial, we've agreed it's 1.271.

THE COURT: Well, for purposes of confirmation of this plan, Mortgages Limited, those two claims will be secured claims in the amount of 1.271.

MR. STAPLETON: That's correct, fully secured.

If the Debtors then sought to retain the right to a subsequent valuation hearing and potential strip down, the correct answer to the Court's question would have been the third alternative the Court suggested, that Mortgages, Ltd. was "going to have a secured claim of some unknown value of the store that had not yet been determined." Debtors' counsel did not adopt that alternative, but instead stated that both the first and second lien claims would be "fully secured."

Debtors also argue that such an interpretation of the stipulation and pretrial order would constitute an modification of the plan, and that the Court's interpretation of the stipulation constitutes a sua sponte modification of the plan. But an agreement that a claim shall be treated as fully secured is not at all inconsistent with, nor a modification of, a plan provision that effectively provides that secured claims shall be determined in accordance with Bankruptcy Code § 506(a). Nor is it inconsistent with the March 11 Order, which was specifically intended to address the issue of whether certain default interest and late fees could be included in the amount of the secured claims.

Finally, Debtors argue that the Court's interpretation of the stipulation and pretrial order effectively gives Mortgages, Ltd. the benefit of § 1111(b) but eliminates the plan's treatment for such § 1111(b) deficiency claims. To the contrary, however, it is the Debtors' interpretation of the stipulation that would have the effect of depriving Mortgages, Ltd. of its rights under § 1111(b). Apparently, it is the Debtors' contention that the intent of the stipulation was to treat the Mortgages, Ltd. claims as being fully secured only for purposes of determining an appropriate interest rate and feasibility of the plan, but preserving for some later time the Debtors' right to a valuation hearing and potential strip down pursuant to § 506(a). Such a procedure, however, had it been adopted, would have effectively deprived Mortgages, Ltd. of its § 1111(b) rights. A creditor who is treated as fully

1 secured has no § 1111(b) rights. Bankruptcy Rule 3014 requires the § 1111(b) election to be made  
2 prior to the conclusion of the hearing on the disclosure statement, and yet under Debtors'  
3 interpretation of the pretrial order Mortgages, Ltd. would not even know whether it had an § 1111(b)  
4 election to make until some time long after the confirmation hearing. If that had actually been the  
5 Debtors' understanding and intent, it would have to have provided some procedure for Mortgages,  
6 Ltd. to make its § 1111(b) election long after confirmation. It did not do so.

7 For the foregoing reasons, the Debtors' motion to amend findings of fact and  
8 judgment is denied.

9 If is further ordered vacating the hearing on Debtor's motion previously scheduled on  
10 January 18, 2005, at 11:00 a.m. The hearing will proceed, however, as to the other matters set that  
11 day.

12 DATED AND SIGNED ABOVE

13 Copy of the foregoing faxed this  
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