ENTERED ON DOCKET
3/25/04

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G00-22033-REB
FTANDD INTERNATIONAL, LTD.,	:	CHAPTER 11
Debtor.	:	JUDGE BRIZENDINE
IN RE:	:	CASE NO. G01-20190-REB (Consolidated with G01-20199-REB Jerry L. Toney)
JERRY L. TONEY and VERLA A. TONEY,	:	CHAPTER 11
Debtors.	:	JUDGE BRIZENDINE
IN RE:	:	CASE NO. G01-20199-REB
JERRY L. TONEY,	:	CHAPTER 11
Debtor.	:	JUDGE BRIZENDINE

ORDER GRANTING OBJECTION OF B & I LENDING, LLC TO DEBTORS' RENEWED AND AMENDED JOINT DISCLOSURE STATEMENT

Before the Court is the Objection of B & I Lending, LLC ("B & I") to the Debtors' Amended Plan of Organization and Disclosure Statement. The issue presented centers on whether the claim of B & I is properly classified in Debtors' Renewed and Amended Joint Disclosure Statement in accordance with 11 U.S.C. § 1122. Upon review of the argument and citation of authority by counsel, the Court concludes that the objection should be granted.

B & I is the holder of a claim against the Debtors' estate in the amount of $963,764.00. *See* Court Order entered on February 27, 2003. This claim is secured by various assets including account receivables plus certain equipment and machinery. The plan proposes a surrender of the collateral to B & I or alternatively, to sell said property followed by a series of monthly payments to B & I in the amount of $750.00 for a period of sixty (60) months. Under the plan, B & I is

listed in Class 5 and is the only claim holder in this class. B & I is admittedly the largest unsecured claim holder in this jointly administered case. Debtors argue that given the underlying history of the parties' conduct in connection with this liability, especially in connection with B & I's commercially unreasonable disposition of its collateral, B & I's claim is different in nature from all other trade debt and unsecured vendor debt addressed in the plan under Class 8 and Class 9.

Debtors contend that given the nature and amount of B & I's claim, it is permissible to classify this claim in its own class and further, that such classification does not exist for the sole purpose of manipulating the vote to obtain confirmation of the proposed plan over B & I's objection. See generally *In re Baldwin Park Towne Center, Ltd.*, 171 B.R. 374 (Bankr. C.D.Cal. 1994); *Matter of Pattni Holdings*, 151 B.R. 628 (Bankr. N.D.Ga. 1992) (Drake, B.J.).[1] In addition, section 1122 does not require that similar claims be placed in the same class, but only prohibits the grouping of dissimilar claims. See *In re Atlanta West, VI*, 91 B.R. 620 (Bankr. N.D.Ga. 1988) (Cotton, B.J.). Finally, Debtors assert that section 1122 is improperly used to strike down a proposed classification on grounds of 'gerrymandering' and skews the Chapter 11 process which envisions bargaining and negotiation and the full exercise of those standards set forth in section 1129 of the Bankruptcy Code. See generally *In re D & W Realty Corp.*, 156 B.R. 140 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994).

In response, B & I claims that Debtors have no valid business justification for separately classifying their claim and only seek to force B & I into accepting Debtors' proposed treatment

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[1] See also *In re Club Associates*, 107 B.R. 385, 401 (Bankr. N.D.Ga. 1989) (Murphy, B.J.); cf. *In re SM 104 Limited*, 160 B.R. 202 (Bankr. S.D.Fla. 1993).

of its claim. B & I contends that it cannot be disenfranchised because it holds the largest unsecured claim or because its claim is in the nature of a deficiency claim. See *In re Roswell-Hannover Joint Venture*, 149 B.R. 1014 (Bankr. N.D.Ga. 1992) (Bihary, B.J.).[2] The facts in *Pattni Holdings* supported a finding of intertwined interests that constituted a sufficient business reason for separate classification that is absent in the present case. B & I also disputes Debtors' argument that the disposition of collateral has any bearing on classification or that any colorable lender liability claim or allegations of animosity are sufficient to support the proposed classification.

Upon review of the governing legal authority and specific facts of these jointly administered cases, the Court finds and concludes that Debtors have failed to support the proposed separate classification of B & I's unsecured deficiency claim with a valid business justification. The concern rests on the deprivation of a meaningful vote by B & I where the treatment of their claim could be effectively controlled by the votes of holders of smaller claims who affirm the plan, thus enabling Debtors to invoke the cram down powers. Classification and use of such power is permissible under the Code, but a debtor must support its proposal with a reasonable independent justification for the proposed treatment of such a claim. Accord *Pattni Holdings*, 151 B.R. at 631.[3] The fact that B & I's claim is an unsecured deficiency claim, or that

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[2] See also *In re Holywell Corp.*, 913 F.2d 873, 880 (11th Cir. 1990); *In re Greystone III Joint Venture*, 948 F.2d 134 (5th Cir. 1991); cf. *In re Lumber Exchange Bldg. Ltd. Partnership*, 968 F.2d 647 (8th Cir. 1992); *In re Bryson Properties XVIII*, 961 F.2d 496 (4th Cir.), *cert. denied*, 506 U.S. 866, 113 S.Ct. 191, 121 L.Ed.2d 134 (1992).

[3] Moreover, issues of unfair discrimination are improperly considered at the classification stage because such questions only become relevant if cram down is invoked. See *Roswell-Hannover*, 149 B.R. at 1021-22, quoting *In re 266 Washington Assoc.*, 141 B.R. 275, 286 (Bankr. E.D.N.Y.), *aff'd*, 147 B.R. 827 (1992).

B & I failed to dispose of its collateral in a commercially reasonable manner, or that it holds an animus against Debtors are not sufficient reasons in and of themselves to support its separate classification from other holders of unsecured claims. Generally, a plan proponent must show how the classification reflects originating circumstances that differentiate a separately classified claim from similar claims as in *Pattni Holdings*, or how the classification proposal will enable the proponent to enter favorable business transactions with the affected parties. Compare *Greystone Venture*, 948 F.2d at 141; *Atlanta West*, 91 B.R. at 626. Although plan proponents obviously seek to serve their interests through their proposed classification, more is demanded in that same must address or advance specific business situations or opportunities beyond the prospect of obtaining the needed vote for confirmation purposes.

Although the Court does not find a sufficient independent business reason to support the separate classification of B & I's deficiency claim as proposed by Debtors herein, this Court shares the concerns voiced by the bankruptcy court in *D & W Realty*. Debtors may not structure classes solely to manipulate the vote into securing an acceptance of their plan, but the word 'gerrymander' must be used with care as it introduces a host of intrinsic value judgments. As mentioned, the Code specifically envisions a scheme of vigorous negotiation where debtors and creditors seek to work out a plan of reorganization that accommodates a multitude of intervening and competing interests, cognizant of overall fairness as well as relativities in bargaining strength. This Court is not prepared to prejudge and prohibit every classification proposal involving large deficiency claims at the disclosure statement stage under section 1122 for to do so would render section 1129 somewhat superfluous. Compare *Roswell-Hannover*, 149 B.R. at 1022. On this point, the court's reasoning in *D & W* was not overruled and its insights remain

applicable to Chapter 11 analysis.[4]

Based upon the foregoing reasoning, it is

ORDERED that the Objection of B & I Lending, LLC to Debtors' Renewed and Amended Disclosure Statement be, and hereby is, **granted**.

The Clerk is directed to serve a copy of this Order upon counsel for the Debtor, counsel for B & I Lending, LLC, the U.S. Trustee, and other parties in interest herein.

IT IS SO ORDERED.

At Atlanta, Georgia this 22nd day of March, 2004.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

[4] The district court in *D & W* held that as a rule, separate classification of deficiency claims could not be required as such result would lead to an undermining of the democratic process of Chapter 11. 165 B.R. at 129-30. A rule providing for discretionary treatment of classification proposals in each case on its own terms by the court under the law, however, embraces this process. Accord *D & W*, 156 B.R. at 145.