IT IS ORDERED as set forth below:

Date: May 31, 2011

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 11
	)	
PHA LIGHTING DESIGN, INC.,	)	CASE NO. 10-74787-jrs
	)	
Debtor.	)	

ORDER DENYING CONFIRMATION OF PLAN

The matter came on for hearing on February 16, 2011 on confirmation of PHA Lighting Design, Inc.'s ("Debtor") First Amended Plan of Reorganization filed by Debtor PHA Lighting Design, Inc. (the "Plan") on February 14, 2011 (Docket No. 73). Based on the Plan, the evidence presented at the hearing and all relevant matters, the Court finds and concludes as follows:

Debtor is a lighting design company that employs five people, including Debtor's chief executive officer and sole shareholder, Paul Helms. Debtor filed Plan of Reorganization (Docket No. 52) and Disclosure Statement (Docket No. 53) on December 15, 2010. Debtor filed its petition

for Chapter 11 relief on May 19, 2010. This is a small business case. The Disclosure Statement was conditionally approved by order entered on December 28, 2011 (Docket No 57). The last day to file written acceptances or rejections of the Plan and written objections to the Disclosure Statement was February 11, 2011. The confirmation hearing was set for February 16, 2011. Two written objections to the Plan were filed: (a) the objection filed by the Internal Revenue Service on January 21, 2011 (Docket No. 63), and (b) the objection filed by the City of Atlanta Business Licensing Division on February 11, 2011 (Docket No. 68). On February 14, 2011, the Plan was amended. Each of these objections was resolved prior to the confirmation hearing. At the hearing, Richard P. Kosheluk appeared, *pro se*, to object to the Plan. Mr. Kosheluk, who voted to reject the Plan, is a Class 3 unsecured creditor who asserts a claim in the amount of $232,172.07.

After calculating creditor votes, Debtor had one impaired class vote to accept the plan, that being Class 2, consisting of the secured claim of SunTrust Bank. Class 3 consisted of all unsecured claims. Class 3 was also impaired, but voted to reject the Plan. Class 3 consisted of fourteen (14) unsecured creditors, including the unsecured claim of Paul Helms ("Helms"), Debtor's CEO and sole shareholder. Class 3 claims totaled $834,699.74. Under the Plan, Class 3 creditors would receive 3% of the total amount of their claims, a total of $25,040.98 for the entire class, which would be paid over four (4) years. Approximately 30 percent of the amount of Class 3 claims were held by Helms and, if approved, Helms would receive approximately $7,512 on account of his claim and the remaining thirteen (13) Class 3 creditors would share in approximately $17,441. During the term of the Plan, Helms would also receive a salary of $150,000 per year, which he testified he would not waive except to the extent necessary to fund operating losses if he chose to do so: therefore, Helms could possibly receive as much as $600,000 in salary over four years while non-insider, unsecured

creditors would receive only $17,441 over the same four year period.

The Plan also provides that Helms shall retain 100% of his stock in the Debtor in consideration for "a commitment to fund the year 2011 projected operating losses of $293,074.00." However, Helms' testimony was that he was under no legal obligation to pay such operating losses, and that his agreement to do so was not in the nature of a guarantee. In fact, upon questioning, Helms would not commit to make such payments and, in fact, testified that he does not presently have the financial ability to cover such losses. He testified that he could forgo salary, if he chose to do so, or borrow money from his family or friends to cover those losses, but that neither his family nor his friends had made any binding commitment to fund those losses.

The Bankruptcy Code provides that a plan of reorganization may be confirmed either consensually, pursuant to 11 U.S.C. § 1129(a)(8), or nonconsensually pursuant to 11 U.S.C. § 1129(b). Because a class of impaired claims did not accept the Plan, the Debtor must cram down the Plan pursuant to 11 U.S.C. § 1129(b). Under 11 U.S.C. § 1129(b), the Plan must be fair and equitable and cannot be confirmed unless

> (B) With respect to a class of unsecured claims—
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

This "absolute priority rule" means that the claims of an impaired class must be paid in full before a junior class of claims or interests is to retain any interest. *In re Snyder*, 967 F.2d 1126 (7th Cir.

1992). Despite this rule, the holder of a junior interest can avoid the "absolute priority rule" if such holder contributes "new value." *Id*. at 1131. The "new value" must be (1) in money or money's worth; (2) reasonably equivalent to the value of the new equity interest in the reorganized debtor and (3) necessary for implementation of the plan. *In re Woodbrook Assocs.*, 19 F.3d 312, 319-20 (7th Cir. 1994). Under the Plan, Helms proposes retain 100% of the shares of the reorganized debtor in exchange for his alleged "commitment" to pay Debtor's 2011 operating losses. The question thus is whether this alleged commitment constitutes "money or money's worth" as that term is used in section 1129(b). The Court concludes that it does not.

In order to constitute "money or money's worth," Courts have generally required an "up-front infusion of money or money's worth". *Snyder*, 967 F.2d at 1131. A promise of future labor is insufficient. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). In the present case, the Class 4 interest holder, Helms, does not provide a firm commitment of future payment nor does he provide an "up-front infusion" of cash or cash equivalent. Helms testified that he would not and could not guarantee future payment. In other words, for example, if the company had operating losses of $100,000 and were to owe vendors $100,000 post confirmation, Helms testified that he would not be obligated to pay $100,000 to either the Debtor or the vendors to cover those losses. Accordingly, there is no commitment on the part of Helms, legal or otherwise, to fund Debtor's 2011 operating losses. While Helms may fund such losses, he acknowledges that he is not committed to do so. In fact, Helms testified that he could choose to close the business with no liability in such a situation.

Further, even if Helms did commit to fund Debtor's 2011 operating losses, he testified that he does not have sufficient assets to fund the losses or any legally binding commitments from third

parties to advance or loan him the money to do so. Rather, Helms can only fund the Debtor's operating losses by either forgoing future salary or by getting loans from friends or family members. Like Helms himself, Helm's friends and family members have no legal obligation to loan money to Helms or to Debtor. As noted above, "new value" requires money or money's worth on the effective date of the Plan. Debtor has provided no evidence tending to establish that Helms is, or has the ability to, provide money or money's worth on the effective date of the Plan.

Finally, the Court finds that this is not fair and equitable that the Debtor is seeking to discharge approximately $600,000 of non-insider, unsecured debt while paying only $17,441 to those creditors over four years and while the Class 4 interest holder retains his all of his stock and receives a salary of $150,000 per year in the reorganized debtor.

Accordingly, for the reasons set forth herein, it is hereby

ORDERED that Confirmation of the Plan is **DENIED**.

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