UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **AGRI SYSTEMS**, Debtor.	Case No. **04-60069-11**

MEMORANDUM of DECISION

At Butte in said District this 26th day of August, 2005.

In this Chapter 11 bankruptcy, after due notice, a hearing on confirmation of Debtor's Chapter 11 Plan of Reorganization and Partial Liquidation was held in Butte on June 7, 2005. Debtor was represented at the hearing by its counsel of record, Jon E. Doak; and Matthew Hamlin, an 8% shareholder of Debtor and Vice President of Sales for Debtor, testified in support of confirmation. Debtor's Exhibits A, B and C were admitted into evidence without objection. The sole objection to confirmation of Debtor's Chapter 11 Plan was filed by Greg Braun, Plan Agent for Coast Grain Company ("Coast Grain"). Coast Grain was represented at the hearing by its attorneys, Riley C. Walter and Alan C. Bryan. Greg Braun testified in opposition to approval of Debtor's Chapter 11 Plan and Coast Grain's Exhibits 1 and 2 were admitted into evidence without objection. At the conclusion of the hearing, the Court granted Debtor and Coast Grain until July 1, 2005, to file simultaneous briefs. Both Debtor and Coast Grain filed post-hearing briefs on July 1, 2005. This matter is thus ready for decision. This Memorandum of Decision

sets forth the Court's findings of fact and conclusions of law.

BACKGROUND

Debtor is a family owned business that was incorporated in the State of Montana in 1978. Debtor's principal place of business is in Billings, Montana. Debtor began its operations by doing specialized design/build construction of building materials handling and processing systems, such as small farmer-owned feed mills and small grain handling facilities. Over the years, Debtor has expanded the size, number, scope and complexity of its projects and in approximately 1993, Debtor began constructing slip-formed concrete facilities. Debtor's operations include: engineering; process design; procurement of materials, supplies and equipment; bulk material storage design; construction/erection of support systems and storage silos; and installation and programming of automated control systems. Prior to 2002, Debtor's design/build projects were financed through capital reserves and cash-flow.

In the early 2000's, Debtor undertook two projects that contributed to Debtor's need to borrow working capital. The first project was as general contractor for the design and construction of a large steam flaking mill for Coast Grain in Madera, California ("Madera project"). The second project was as a subcontractor with Alstom Power, Inc. for the design, engineer and construction of fly ash and bed ash storage facilities on a power construction project located in Seward, Pennsylvania, owned by Reliant Energy Seward, LLC ("Alstom Power project").

Delays and disputes relating to the Madera project and the Alstom Power project had a substantial negative impact on Debtor's financial stability. To further frustrate matters, creditors of Coast Grain filed an involuntary Chapter 11 bankruptcy petition against Coast Grain. The

involuntary petition was eventually converted to a voluntary Chapter 11 bankruptcy proceeding and Coast Grain obtained confirmation of a liquidating plan. Coast Grain obtained a certificate of occupancy at the Madera project and the Chapter 11 Trustee proceeded to sell the facility to Pacific Ethanol.

At the time Debtor sought protection under Chapter 11 of the Bankruptcy Code, Debtor was in litigation with Alstom Power, Coast Grain and Foster Poultry Farms ("Foster Farms").[1] Debtor has resolved its litigation with Alstom Power and Foster Farms. The litigation between Debtor and Coast Grain over the Madera project is ongoing and is scheduled for trial in 2006. In each instance, Coast Grain, Alstom Power and Foster Farms have alleged that Debtor's design and/or construction of the facilities was deficient.

Debtor's financial difficulties can be traced almost exclusively to the litigation with Coast Grain, Foster Farms and Alstom Power, and the underlying projects associated therewith. As noted above, Debtor has resolved its disputes with Foster Farms and Alstom Power. Pursuant to an approved stipulation, Debtor was awarded $150,000.00 from Alstom Power, and Alstom Power agreed to withdraw its claim of $14,454,105.00 filed May 24, 2004.

Since filing for protection under Chapter 11 of the Bankruptcy Code, Debtor has scaled its operations back and intends to move forward doing smaller-scale projects that do not require surety bonding or additional third-party financing. According to Matthew, the time and resources

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[1] The litigation between Debtor and Foster Farms stems from Debtor's performance as the general contractor under a contract to construct a corn rolling mill for Foster Farms in Traver, California. Following binding arbitration, Foster Farms was awarded a claim against Debtor of $178,422.40 to correct various deficiencies in the mill and to allow the mill to be used efficiently and to its designed capacity. On July 5 2005, Foster Farms amended its original claim of $685,822.10 to reflect the arbitrator's award.

of Debtor's principals was diverted for the better part of 2004 with the bankruptcy filing and dealing with the litigation with Coast Grain, Foster Farms and Alstom Power. However, Matthew testified that Debtor has more than $90 million in bids outstanding and hopes to secure at least $12 million in construction work in 2006.

DISCUSSION

Both Coast Grain and the Pennsylvania Department of Revenue objected to approval of Debtor's Chapter 11 plan. However, the objections of the Pennsylvania Department of Revenue were resolved by Stipulation. Thus, the sole remaining objections to Debtor's Chapter 11 Plan are those of Coast Grain. Additionally, only two creditors, namely Coast Grain and Foster Poultry Farms, have voted to reject acceptance of Debtor's Chapter 11 plan.

A court may not confirm a Chapter 11 plan without full satisfaction of each of the requirements of §§ 1129(a) and (b), and debtors have the burden of proof by a preponderance of the evidence. *In re Soo*, 15 Mont. B.R. 159, 161-62 (Bankr. D.Mont. 1996); *In re Professional Hotel & Motel Management*, 12 Mont. B.R. 304, 309 (Bankr. D. Mont. 1993); *In re Holthoff*, 58 B.R. 216, 218 (Bankr. E.D. Ark. 1985); *see also* 7 L. KING, COLLIER ON BANKRUPTCY, ¶ 1129.02[5] (15th ed. rev.) (*citing* at n. 19 *In re Turner Eng'g, Inc.*, 109 B.R. 956, 961 (Bankr. D.Mont. 1989)).

Recognizing that debtors bear the burden of proof with respect to proving each and every element set forth in §§ 1129(a) and (b), the Court finds, after observing the parties in this case on numerous occasions, that discussion of each and every element under 11 U.S.C. §§ 1129(a) and (b) is not necessary. If there is any conceivable objection to Debtor's Chapter 11 Plan, Coast Grain has raised such objection. Thus, the Court finds that it need only discuss the objections

that Coast Grain has raised in opposition to approval of Debtor's Chapter 11 Plan.

In the Objection filed March 11, 2005, Coast Grain first complains that Debtor's plan fails to satisfy 11 U.S.C. § 1129(a)(1) to "the extent Debtor's Plan seeks to disallow Coast Grain's claim for either estimation or distribution without a hearing". Following a hearing that spanned 3 days, this Court entered an Order on June 2, 2005, estimating Coast Grain's claim at $0.00 for purposes of voting on Debtor's Chapter 11 plan. Any distribution on Coast Grain's claim is now dependent on the outcome of litigation that is currently pending in the United States District Court for the Eastern District of California. Coast Grain's argument that confirmation of Debtor's Chapter 11 Plan is premature was rendered moot by the Court's estimation of Coast Grain's claim for voting purposes.

Coast Grain next complains in its initial objection that Debtor's Chapter 11 Plan is not feasible. As Greg Braun admitted during the confirmation hearing, Debtor's financial position changed substantially between the time Coast Grain filed its original objections on March 11, 2005, and the date of the hearing on confirmation of Debtor's Chapter 11 Plan. Thus, the Court will overrule Coast Grain's original objection and will discuss the feasibility of Debtor's Chapter 11 plan later in this Memorandum of Decision.

Finally, Coast Grain complained that Debtor's Chapter 11 Plan failed to disclose insider compensation. At the confirmation hearing, Debtor cured the foregoing objection when Matthew Hamlin testified regarding the wages of Robert Hamlin, Janice Hamlin, Gerald Schleining and Matthew Hamlin. For the reasons discussed above, the Objections to Confirmation of Debtor's Chapter 11 Plan filed by Coast Grain on March 11, 2005, are overruled.

Coast Grain filed supplemental objections to confirmation of Debtor's Chapter 11 Plan

on June 3, 2005; raising objections under 11 U.S.C. §§ 1129(a)(1), (a)(3), (a)(5), (a)(7), (a)(11), 1129(b), 1126, and 1123(a)(5). With respect to Coast Grain's argument under 11 U.S.C. § 1129(a)(1), 7 COLLIER ON BANKRUPTCY, ¶ 1129.03[1] explains:

> Section 1129(a)(1) states that a court can confirm a plan only if "[t]he plan complies with the applicable provisions of this title." This requires that the plan conform to the "applicable" provisions of title 11. The legislative history suggests that the applicable provisions are those governing the plan's internal structure and drafting: "Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of plan."
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> Section 1129(a)(1) can also be used as the grounds for denial of confirmation when the plan is contrary to provisions of title 11 not found in chapter 11, such as impermissible releases of third parties which violate section 524(e), or if the plan selectively rides roughshod over and attempts to nullify important provisions of the Bankruptcy Code. At some level, however, the courts have recognized that the complexity of plan confirmation permits notions of "harmless error," so that technical noncompliance with a provision that does not significantly affect creditor rights will not block confirmation.

After reading the foregoing passage, the Court finds it appropriate to discuss not only Coast Grain's 11 U.S.C. § 1129(a)(1) objection at this juncture, but also Coast Grain's 11 U.S.C. §§ 1123(a)(1), 1123(a)(5) and 1126 objections to confirmation. Coast Grain's objection under 11 U.S.C. § 1129(a)(1) is that Debtor's plan contains an "inaccurate statement of the law as to voting and fails to provide for all classes."

The Court would agree with Coast Grain that Debtor's definitions of "Allowed Claim" and "Disallowed Claim" set forth in the definition section of Debtor's Chapter 11 Plan are inaccurate and appear to be nothing more than gymnastics on paper. However, the Court finds that such inaccuracy is not material in this particular case. The creditors in Classes A through F

are fairly sophisticated and are represented by legal counsel. The Court would presume that the creditors in Classes A through F are thus aware of F.R.B.P. 3003 which provides in relevant part:

> (b) Schedule of Liabilities. The schedule of liabilities filed pursuant to § 521(a) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.
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> (c)(2) Who Must File. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed[.]

Debtor cannot, as aptly stated by COLLIERS, nullify the above Bankruptcy Rule through muddled rambles in a Chapter 11 plan. However, the sophisticated creditors in Classes A though F of Debtor's plan were certainly aware of whether they needed to file a proof of claim and indeed, even Coast Grain, an unsecured creditor from Class G, has demonstrated that is was fully aware of Debtor's inability to sidestep Bankruptcy Rule 3003. Thus, the Court finds that the inaccurate statements referenced by Coast Grain did not impact solicitation of ballots, at least with respect to Classes A through F.

As to Class G, to which Coast Grain belongs, the Court finds that Debtor's definitions of an allowed claim and a disallowed claim do not impact the overall outcome of this case. Coast Grain has complained ad nauseam about the Ballot Report and the Amended Ballot Report prepared by Debtor's counsel. Rather than delve into the trivial complaints regarding the ballot reports, the Court has prepared its own Ballot Report, which is attached hereto as Exhibit A. As reflected by the Court's Ballot Report, Classes A, B, E, and F have voted to accept Debtor's

Chapter 11 Plan. Class G is deemed to have rejected approval of Debtor's Chapter 11 Plan because two creditors, namely Coast Grain and Foster Poultry Farms, voted to reject approval of Debtor's Chapter 11 Plan in the sum of $178,422.40, while 7 creditors in Class G voted to accept Debtor's Chapter 11 Plan in the sum of $336,741.59.[2] The degree of rejection in Class G is of no importance in this case. The Court would note, however, that at least one impaired class affirmatively voted in favor of the Plan thus satisfying 11 U.S.C. § 1129(a)(10) of the Bankruptcy Code. *In re Lewis Indus.*, 75 B.R. 862, 865 (Bankr. D. Mont. 1987).

Coast Grain raises 2 objections to confirmation of Debtor's Chapter 11 Plan under 11 U.S.C. § 1123(a). The first objection is that Debtor's plan fails to designate a class of equity interests. Debtor's Chapter 11 Plan appropriately designates the classes of claims that will be paid under Chapter 11 Plan. Debtor's Amended Chapter 11 Plan also discloses who the shareholders of Debtor are, and discloses that Debtor has only one class of stock issued and outstanding. Given the foregoing, Coast Grain's skeletal objection on this point needs no further discussion.

Coast Grain's second objection under § 1123(a) is that Debtor may or may not have sufficient cash on hand to pay the claims that are payable on the effective date of the plan. The Court concludes that Debtor's plan meets the requirements of § 1123(a)(5) in that Debtor proposes to sell various items of property, to retain other items of property and proposes to continue with its business, all in an effort to provide adequate means for implementation of Debtor's Chapter 11 Plan. Coast Grain's objection simply contorts § 1123(a)(5) beyond its

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[2] Although creditors totaling over one-half in number voted to accept Debtor's Chapter 11 Plan, 11 U.S.C. § 1126 requires also that at least two-thirds in dollar amount must accept the plan. In this case, Debtor has not met the two-thirds in amount requirement.

intended purpose.

Coast Grain's objection under § 1126 is nothing more than an attempt to accumulate numerous frivolous objections for the purpose of casting a dark shadow over Debtor's Chapter 11 Plan. Through yet another discussion of the ballot reports prepared by Debtor's counsel, which are superseded by the Ballot Report attached hereto, and by reference to the absolute priority rule, Coast Grain seeks to create an objection where none exists. The ballot report issue is moot and the absolute priority rule is covered by other provisions of the Bankruptcy Code.

Coast Grain also objects to confirmation of Debtor's Chapter 11 Plan under the following Bankruptcy Code sections: 11 U.S.C. § 1129(a)(3), (a)(5), (a)(7), (a)(11). The requirements of § 1129(a)(3) are two-fold. Section 1129(a)(3) states that the bankruptcy court shall confirm a plan if the plan has been proposed in good faith and not by any means forbidden by law. *In re Boulders on the River*, 164 B.R. 99, 103 (9th Cir. BAP 1994). Good faith is assessed by the Court viewed under the totality of the circumstances. *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.),* 314 F.3d 1070, 1074 (9th Cir.2002); *Jorgensen v. Federal Land Bank (In re Jorgensen),* 66 B.R. 104, 108-09 (9th Cir. BAP 1986). The good faith that is required to confirm a plan requires the plan to achieve a result consistent with the objectives and purposes of the Bankruptcy Code. *In re Boulders on the River*, 164 B.R. at 104; *In re Mann Farms Inc.*, 917 F.2d 1210, 1214 (9th Cir.1990); *In re Corey*, 892 F.2d 829, 835 (9th Cir.1989), *cert. denied*, 498 U.S. 815, 111 S.Ct. 56, 112 L.Ed.2d 31 (1990).

In an oft cited opinion, the Seventh Circuit Court of Appeals made the following statement regarding the requirements of § 1129(a)(3):

Though the term "good faith," as used in section 1129(a)(3), is not defined in the

> Bankruptcy Code, *see* 5 L. KING, COLLIER'S ON BANKRUPTCY ¶ 1129.02[3][a] at 1129-14 (15th ed. 1979), the term is generally interpreted to mean that there exists "a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Nite Lite Inns*, 17 B.R. 367, 370 (Bankr.S.D.Cal.1982). *See also In re Coastal Cable T.V., Inc.*, 709 F.2d 762, 764 (1st Cir.1983); Matter of Nikron, Inc., 27 B.R. 773, 778 (Bankr.E.D.Mich.1983).
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> Thus, for purposes of determining good faith under section 1129(a)(3), . . . the important point of inquiry is the plan itself and whether such plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.
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> According to the good faith requirement of section 1129(a)(3), the court looks to the debtor's plan and determines, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code. The plan "must be 'viewed in light of the totality of the circumstances surrounding confection' of the plan [and] ... [t]he bankruptcy judge is in the best position to assess the good faith of the parties' proposals." *In re Jasik*, 727 F.2d 1379, 1383 (5th Cir.1984) (quoting *Public Finance Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir.1983)).

In re Madison Hotel Associates, 749 F.2d 410 (7th Cir. 1984).

In the instant case, Debtor's Chapter 11 Plan provides for the continued operation of Debtor's business, and further provides for the orderly marketing and sale of various assets in order to repay Debtor's creditors. The Court deems Debtor's proposal for repayment of creditors consistent with the objectives and purposes of the Bankruptcy Code.

On the subject of good faith, the Court is perplexed, and indeed troubled, by the time, effort and money that Coast Grain has spent trying to derail Debtor's bankruptcy, particularly when the United States District Court for the Eastern District of California could ultimately determine that Coast Grain does not have any claim against Debtor. It would certainly smack of inequity if this Court were to allow Coast Grain to singlehandedly thwart Debtor's efforts at

reorganization only to learn that the court in California later awarded Coast Grain nothing in the litigation between Coast Grain and Debtor. Furthermore, if Coast Grain is awarded a claim against Debtor, its only hope for any recovery is that Debtor is successful in its reorganization because upon liquidation, Coast Grain stands to receive nothing, or virtually nothing.

At the hearing, Debtor's counsel provided an enlightening theory that Coast Grain seeks to sink Debtor's Chapter 11 bankruptcy with the hopes that a Chapter 7 trustee would abandon Debtor's claims against Coast Grain. According to Debtor's theory, Greg Braun could then use the funds that are in excess of $2.6 million, which are being held in escrow for the payment of any potential claim owed by Coast Grain to Debtor, to pay other creditors of the Coast Grain estate, including a claim that Foster Farms has against the Coast Grain estate.

After considering the totality of the circumstances, the Court simply does not buy Coast Grain's argument that Debtor's Chapter 11 Plan has been proposed in bad faith. Debtor, and its principals, have put forth every effort to rehabilitate a business that has been in operation for several decades. This Court will not allow a creditor, with questionable motives, to thwart the Debtor's good faith effort to once again stand on solid financial ground.

Coast Grain also maintains that Debtor's Chapter 11 Plan fails to comply with § 1129(a)(5) in that Debtor's plan does not disclose the nature of compensation payable to insiders. Matthew disclosed the names of Debtor's directors and officers at the hearing. The four individuals who serve as Debtor's directors and officers do not receive compensation for serving in such capacity but each of the four individuals receives a salary in their capacity as employees of Debtor.

Coast Grain next argues that Debtor and the "Reorganized Debtor are responsible for

paying the personal income taxes of Robert and Janice Hamlin. (Which violates the absolute priority rule.)" At the hearing, Matthew clarified that Debtor is not, and will not, pay the personal income taxes associated with the salaries of Robert, Janice or Matthew Hamlin. Rather, as Debtor's Amended Chapter 11 Plan clarifies, "Debtor may . . . reimburse taxes attributed to equity interest owners under State or Federal law on Debtor's undistributed year-end taxable net profits due to Debtor's Internal Revenue Code Subchapter S corporate status." The Court fully understands the purpose for such language. Imagine if Debtor's net profits in any given year under the plan were $1,000,000.00. Under such a scenario and for purposes of taxation, $920,000.00 of that income may flow through to Robert's and Janice's individual 1040. Absent other individual deductions, the tax implications to Robert and Janice, as a result of Debtor's operations, could exceed $300,000.00; which amount of tax liability is substantially greater than Robert's and Janice's combined salary of $100,000.00.

While the Court understands the purpose of such language in Debtor's plan, and even though such language rarely raises an objection by creditors, the Court agrees with Coast Grain that such language could potentially result in a dividend distribution to Robert, Janice and Matthew Hamlin, thus potentially violating what is commonly referred to as the absolute priority rule. Because Coast Grain has raised a separate objection under the absolute priority rule, the Court will reserve ruling on Coast Grain's foregoing objection until later in this Memorandum of Decision.

Continuing on, Coast Grain concedes that Debtor's Chapter 11 Plan, "as written," meets the test of § 1129(a)(7). However, Coast Grain proceeds to allege that the matter "is an open issue as [Debtor's] assumptions are disputed." Discussion of the best interest of creditors test

under § 1129(a)(7) is a pointless exercise at this juncture as an impaired class has rejected Debtor's Chapter 11 Plan, and thus, Debtor must satisfy the more rigorous financial standards set forth under 11 U.S.C. § 1129(b).

Next, Coast Grain questions the feasibility of Debtor's Chapter 11 Plan. The feasibility requirement is set forth at 11 U.S.C. § 1129(a)(11), which requires that: "(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." Debtor's Chapter 11 Plan proposes both reorganization and partial liquidation.

Under § 1129(a)(11), this Court is not required to determine that the future commercial success of a reorganized debtor is inevitable in order to find that a Chapter 11 plan is feasible. *See In re WCI Cable, Inc.*, 282 B.R. 457, 486 (Bankr. D. Ore. 2002).

> "Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11). Most debtors emerge from reorganization with a significant handicap. But a plan based on impractical or visionary expectations cannot be confirmed.... All that is required is that there be reasonable assurance of commercial viability." *In re The Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr.S.D.N.Y.1986).

WCI Cable, 282 B.R. at 486; *In re Mont-Mill Operating Company*, 16 Mont. B.R. 61, 63-64 (Bankr. D. Mont. 1997); *In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir.1986); *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir.1985) ("The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation."); *see also In re Sagewood Manor Assoc. Ltd. Partnership*, 223 B.R. 756, 762-63 (Bankr. D. Nev.1998)

("While a reviewing court must examine 'the totality of the circumstances' in order to determine whether the plan fulfills the requirements of § 1129(a)(11), ... only 'a relatively low threshold of proof [is] necessary to satisfy the feasibility requirement.' ... The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan of reorganization can be performed."). As with other provisions, the debtor has the burden of proof under § 1129(a)(11). *In re Mont-Mill Operating Company*, 16 Mont. B.R. at 64; *In re The Prudential Energy Co.*, 58 B.R. at 862.

Factors that the court should consider in evaluating evidence as to feasibility include "(1) the adequacy of the financial structure; (2) the earning power of the business; (3) economic conditions; and (4) the ability of management." *WCI Cable*, 282 B.R. at 486; *In re Crown Oil, Inc.,* 16 Mont. B.R. 534, 540 (Bankr. D. Mont. 1998); *In re Agawam Creative Marketing Assoc. Inc.*, 63 B.R. 612, 619-20 (Bankr. D. Mass.1986) *quoting from In re Merrimack Valley Oil Co., Inc.*, 32 B.R. 485, 488 (Bankr. D. Mass.1983).

Applying the above standards to the instant case and after reviewing the totality of the circumstances this Court finds and concludes that Debtor's Chapter 11 Plan meets the threshold of proof necessary to satisfy the feasibility requirement of § 1129(a)(11), in that a reasonable probability exists that the provisions of the Plan can be performed. Specifically, the record shows that Debtor's current management has the demonstrated ability to attain the level of earning power necessary to fund the proposed plan under the current economic conditions. Moreover, Debtor is in the process of liquidating its nonessential assets. Additionally, Debtor no longer competes for construction jobs which require a bonding expense, and has reduced its other expenses. The foregoing facts, combined with Debtor's demonstrated ability to secure and finish

construction projects convinces this Court that Debtor's Chapter 11 Plan is more than just visionary.

Also under § 1129(a), Coast Grain argues that Debtor's Chapter 11 Plan does not make a provision for payment of U.S. Trustee Fees as required by § 1129(a)(12). Both Debtor's Chapter 11 Plan and Amended Chapter 11 Plan provide under ¶ 3.01 that Debtor "has been paying fees to the office of the U.S. Trustee when and as due, and accrued but unpaid fees owed to the U.S. Trustee shall be paid upon confirmation and thereafter until [Debtor's] Chapter 11 case is closed by order of the Court." While Debtor's plan clearly provides for the fees owed to the U.S. Trustee, 7 COLLIER ON BANKRUPTCY, ¶ 1129.03[12], contends that 11 U.S.C. § 1129(a)(12) is an unnecessary provision of the Bankruptcy Code:

> The fees in question are first priority claims covered under § 507(a)(1) of the Bankruptcy Code. Administrative expenses, under section 1129(a)(9), must be paid in full or honored according to their terms in order for the plan to confirm. Thus, the result intended with paragraph (12) could already have been obtained without its addition to section 1129(a). There is simply no need for this provision.

Based upon the foregoing passage from COLLIER'S and given the fact that Debtor's Chapter 11 Plan does provide for the payment of U.S. Trustee fees, the Court finds that Coast Grain's objection lacks merit.

Coast Grain's remaining objections fall under § 1129(b). 11 U.S.C. § 1129(b), provides:

> [I]f all of the applicable requirements of subsection (a) of [1129(a)] other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

The above provision is commonly referred to as the "cram down" provision of Chapter

11. There are two conditions for a judicial cram down under § 1129(b). First, all requirements of § 1129(a) must be met, except for the plan's acceptance by each impaired class of claims or interests, *see* § 1129(a)(8). Secondly, the objection of an impaired creditor class may be overridden only if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." § 1129(b)(1). As to a dissenting class of impaired unsecured creditors, such a plan may be found to be "fair and equitable" only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if "the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property," § 1129(b)(2)(B)(ii). *See Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 441-42, 119 S.Ct. 1411, 1415-16 (1999). The latter condition set forth in § 1129(b)(2)(B)(ii) is the core of what is known as the absolute priority rule. *Id.*

Coast Grain's objection under § 1129(b) does not allege unfair discrimination. Rather, Coast Grain argues that Debtor's Chapter 11 plan "fails to provide for interest, does not provide for full payment and allows the interest holders to retain their claims or interests." With regard to the application of § 1129(b), while Debtor's Chapter 11 Plan does not preclude payment in full of the unsecured claims, Debtor's Chapter 11 Plan also does not specifically provide for payment in full of the general unsecured claims. Absent payment in full to all creditors in Class G, which includes any potential claim of Coast Grain, Debtor's Chapter 11 Plan can only be confirmed if nobody in Classes A through F gets more than payment in full and if Class G gets everything that is left, essentially wiping out any payment to Debtor's stockholders, who are by definition, junior

in priority to unsecured creditors. *See In re South Village, Inc.*, 25 B.R. 987, 999 (Bankr. D. Utah 1982).

Debtor counters Coast Grain's absolute priority rule objection, asserting: (1) that the Chapter 11 Plan "proposes full payment of allowed unsecured claims through distribution of a very substantial share of net recovery expected from [Coast Grain] and a large proportion of Debtor's expected 'net profits' during the Plan term"; (2) that Debtor's Chapter 11 Plan provides for interest on the unsecured claims at the Federal Judgment Rate from the date of confirmation; and that (3) the stockholders, namely Robert, Janice and Matthew Hamlin, are injecting "new value" into Debtor[3]. It appears from a review of Cost Grain's Post Confirmation Hearing Brief that Coast Grain has appropriately abandoned its argument that Debtor's Chapter 11 Plan does not provide for interest on the unsecured claims.

With regard to Coast Grain's remaining 2 arguments, the Court agrees with Coast Grain that Debtor's Chapter 11 Plan does not specifically provide for payment in full of all allowed unsecured claims. However, Debtor contends that the unsecured claims, exclusive of any claim that Coast Grain may have, total roughly $500,000. If Debtor is successful in obtaining a ruling against Coast Grain in excess of $1 million, there is little doubt that the unsecured creditors will be paid in full. However, if Debtor is unsuccessful in the litigation against Coast Grain, Debtor would have to generate "net profits", as defined in ¶ 6.07 of Debtor's Amended Chapter 11 Plan,[4]

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[3] At the present time, the new-value exception to the absolute priority rule remains valid in the Ninth Circuit, despite intra and inter-circuit disagreements as to whether the new value exception is a vital principal of bankruptcy law. *See In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993).

[4] Paragraph 6.07(ii) of Debtor's Amended Chapter 11 Plan provides that "holders of Allowed General Unsecured Claims shall receive their respective *pro-rata* shares of forty percent

in excess if of $1,250,000 before the unsecured creditors would be paid in full.[5]

As mentioned earlier, this Court will not derail Debtor's Chapter 11 Plan over a claim that may or may not exist. Nevertheless, with regard to the absolute priority rule and other unsecured creditors, Debtor's Chapter 11 Plan does need to be amended to specifically provide that unsecured creditors will be paid in full. In addition, Debtor needs to produce some quantum of financial evidence substantiating its decision to withhold distribution to unsecured creditors absent a ruling against Coast Grain in excess of $1 million. Similarly, Debtor must provide financial justification for its desire or need to retain 60 percent of its net profits. At this juncture, Debtor's distribution number of 40% is totally arbitrary, particularly in light of Matthew's testimony that Debtor has no set amount of reserve that is necessary for working capital.

Once Debtor satisfies the foregoing, and given the uncertainty of the outcome of the Coast Grain litigation, the Court finds that the better course of action is to confirm Debtor's Chapter 11 Plan, after amendment as provided herein, and allow Debtor to proceed with its reorganization, particularly given the estimation by this Court, at this time for voting and allowance purposes and prior to a final decision by the federal district court, that the Coast Grain claim is zero. At the time the Coast Grain litigation is concluded, Debtor may need to further amend its Plan to address the final allowance of any Coast Grain claim, its treatment under the plan and any issue involving the absolute priority rule. Consistent with the foregoing, Debtor's Chapter 11 plan should be amended to provide that, if necessary, Debtor will immediately amend

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(40%) of [Debtor's] net profit from operations during the five (5) years following the Distribution Date."

[5] This assertion does not account for any claim that Coast Grain may be awarded in the pending litigation.

its Chapter 11 Plan to properly provide for any settlement or ruling arising from the Coast Grain litigation. In accordance with the foregoing, the Court will enter a separate order as follows:

IT IS ORDERED that Coast Grain's objections to confirmation of Debtor's Amended Chapter 11 Plan based upon 11 U.S.C. §§ 1129(a)(1), (a)(3), (a)(5), (a)(7), (a)(11), 1126, and 1123(a) are overruled; and Coast Grain's 11 U.S.C. § 1129(b) objection to Debtor's Chapter 11 Plan may be considered after the litigation between Debtor and Coast Grain, which is now pending in the United States District Court for the Eastern District of California, is concluded and a final determination is made as to the allowance of Coast Grain's claim and Debtor has an opportunity to subsequently amend its Plan to deal with the treatment of Coast Grain's claim.

IT IS FURTHER ORDERED that confirmation of Debtor's Amended Plan of Reorganization and Partial Liquidation filed June 23, 2005, is DENIED; and Debtor shall file a Second Amended Plan of Reorganization and Partial Liquidation on or before September 9, 2005.

IT IS FURTHER ORDERED that:

1. On or before **September 9, 2005**, Debtor's counsel shall transmit a copy of this Order, the Second Amended Chapter 11 Plan the Disclosure Statement, and a ballot conforming substantially to the appropriate official form as approved by the Court, by mail to creditors, equity security holders, the United States Trustee, and other parties in interest as provided in F.R.B.P. 3017(d). Debtor's ballot shall direct that ballots be returned to the Clerk of Court, for tabulation. On or before September 13, 2005, Debtor's counsel shall file a certificate of service verifying that the foregoing was timely completed.

2. Hearing on confirmation of the Second Amended Chapter 11 Plan will be held on

Thursday, October 6, 2005, **at 09:00 a.m., or as soon thereafter as the parties can be heard, in the 2ND FLOOR COURTROOM, FEDERAL BUILDING, 400 N. MAIN, BUTTE, MONTANA**.

3. Pursuant to F.R.B.P. 3020(b)(1), October 3, 2005, is fixed as the last day for filing and serving written objections to confirmation of the Second Amended Chapter 11 Plan, and for filing written acceptances or rejections of the Plan. A copy of any objection to confirmation shall be mailed to counsel for the proponent at the address listed on that Plan, to the United States Trustee at: Office of the United States Trustee, 301 Central Avenue, Great Falls, Montana, 59401.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re

AGRI SYSTEMS,

Debtor.

Case No. **04-60069-11**

BALLOT REPORT

CLASS	CREDITOR	ACCEPTS	REJECTS
A	US BANK NATIONAL ASSOCIATION	$2,746,028.39	
B	LIBERTY MUTUAL INSURANCE CO	$ 750,000.00	
C	CIT CORPORATION - No ballot		
D	BIG HORN COUNTY, MONTANA - No ballot		
E	ROBERT HAMLIN	$ 250,000.00	
F			
(i)	MONTANA DEPARTMENT OF REVENUE - No ballot		
(ii)	COLORADO DEPARTMENT OF REVENUE - No ballot		
(iii)	SOUTH DAKOTA DEPARTMENT OF REVENUE LABOR/UNEMPLOYMENT INSURANCE DIV	$ 2,201.06	
(iv)	SOUTH DAKOTA DEPARTMENT OF REVENUE - No ballot		
(v)	PENNSYLVANIA DEPARTMENT OF REVENUE - No ballot		
(vi)	UNITED STATES INTERNAL REVENUE SERVICE - No ballot		
G	COAST GRAIN*		$0.00
	CONKLIN COMPANY	NO AMOUNT	
	FARMERS UNION COOPERATIVE ELEVATOR	131,646.23	
	HYDRACRETE	89,005.00	
	CRANE CONSTRUCTION NORTHWEST	82,159.80	
	FOSTER POULTRY FARMS**		178,422.40

AIRCO GAS & WELDING SUPPLY	6,629.74	
KEVIN PETERSEN/FASTENAL	284.13	
DAKOTA SUPPLY GROUP	27,016.69	
	$ 336,741.59 (7)	**$178,422.40 (2)**

Creditors in Class G that filed ballots which will not be counted as the creditors did not file proofs of claim:

EATHERTON MASONRY INC	0.00
I D CORPORATION	10,000.00
LYNCH FLYING SERVICE	2,920.00
HOMESTEAD BUILDING SUPPLIES	600.00
MUTH ELECTRIC INC	81,010.00
MINERS NEWS	0.00
ADH	NO AMOUNT
	$ 94,530.00 (7)

* Coast Grain's claim has been set at $0.00 for voting and allowance purposes pursuant to this Court's Order, dated June 2, 2005, subject to the federal district court litigation finally be concluded.

** Foster Farms' claim is allowed in the sum of $178,422.40 per the Arbitrator's Reasoned Award entered June 15, 2005, and per this Court's Order entered June 23, 2005.