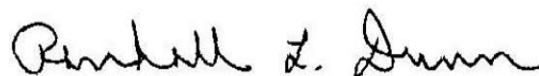


Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
Data Systems, Inc.) No. 16-30477-rld11
Debtor.) MEMORANDUM OPINION

On November 22, 2016, I held the confirmation hearing ("Confirmation Hearing") with respect to the First Amended Plan of Reorganization (Docket No. 155) ("Plan") proposed by the duly appointed chapter 11¹ trustee Amy Mitchell ("Trustee") for the debtor-in-possession Data Systems, Inc. ("DSI"). At the Hearing, I heard the testimony of Richard Kreitzberg ("Mr. Kreitzberg"), the Trustee, and special counsel Robert J. McGaughey ("Special Counsel") in support of confirmation of the Plan and the testimony of William F. Holdner ("Mr. Holdner") in opposition to confirmation. In addition, I heard argument from the

¹ Unless otherwise indicated, all chapter and section references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Trustee's counsel, counsel for the United States Trustee, and Mr.
2 Holdner.

3 In deciding the confirmation issues raised in this case, I have
4 considered carefully the testimony presented at the Confirmation Hearing,
5 the admitted exhibits (Trustee's Exhibit 1 with Exhibits A through E
6 attached; and Mr. Holdner's Exhibits A and B), and the arguments
7 presented at the Hearing. I also have taken judicial notice of the
8 docket and documents filed in DSI's main chapter 11 case, Case No. 16-
9 30477-rld11, for the purpose of confirming and ascertaining facts not
10 reasonably in dispute. Federal Rule of Evidence 201; In re Butts, 350
11 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006). In addition, I have reviewed
12 relevant legal authorities, both as cited to me by the parties and
13 discovered through my own research.

14 In light of that consideration and review, this Memorandum
15 Opinion sets forth the court's findings of fact and conclusions of law
16 under Civil Rule 52(a), applicable in this contested matter under Rules
17 7052 and 9014. I will enter an order confirming the Plan for the
18 following reasons.

19 I. FACTUAL BACKGROUND²

20 1) DSI early history, operations and assets

21 DSI was formed as an Oregon corporation, and for a number of
22 years, it operated to provide computer and related services to
23 businesses. DSI stock previously was publicly traded on the NASDAQ, and
24

25 ² The background information set forth herein comes primarily from
26 the Trustee's Second Amended Disclosure Statement (Docket No. 161)
("Disclosure Statement"), approved by order (Docket No. 164) entered on
October 6, 2016.

1 it has approximately 300 shareholders. However, it ultimately was
2 delisted, and the company went private. Mr. Holdner and Jane Baum ("Ms.
3 Baum") served as DSI's directors and as its president and secretary,
4 respectively. Mr. Holdner has held these positions for over 50 years,
5 and Ms. Baum, for over 20 years. DSI has operated since 1993 with less
6 than the minimum four directors required by its by-laws, and, for many
7 years, no shareholders meetings were noticed or held. Of the
8 approximately 599,900 outstanding shares of DSI common stock, Ms. Baum
9 holds 149,362 shares (approximately 24%); Mr. Holdner holds 135,100
10 shares (approximately 22%); and Mr. Kreitzberg holds 238,555 shares
11 (approximately 39%). The balance of approximately 15% of DSI's
12 outstanding stock is held in small lots by the remaining several hundred
13 shareholders. There is no public market for DSI common stock.

14 In 1973, DSI built a two-story office complex on Sandy
15 Boulevard in Portland ("Main Office"). DSI used the Main Office to
16 store, manage and operate very large mainframe computers and maintained
17 additional space for expansion. However, in 1993, IBM stopped supporting
18 and servicing mainframe computers like the ones owned and operated by
19 DSI. Consequently, according to Mr. Holdner, he and DSI recognized that
20 DSI would need to change its focus in order to survive. Under the
21 direction of Mr. Holdner and Ms. Baum, DSI was repurposed to become a
22 property management company, relying on increasing value of its real
23 estate and its potential for regular income through commercial leasing.

24 DSI's commercial tenants include Mr. Holdner and Ms. Baum's
25 accounting firm ("Accounting Firm"), which occupies 2,400 square feet in
26 the Main Office, half of which is devoted to storage for DSI rent-free,

1 with the other half rented to the Accounting Firm at the same rent
2 charged since 1986. DSI collects some rents from other month-to-month
3 tenants, but much of the Main Office is unoccupied. Based on her
4 business judgment in light of the potential costs and disputes involved,
5 the Trustee has not increased the Accounting Firm's rent to reflect a
6 market rate or taken other steps to address the Accounting Firm's lease
7 pending this court's consideration of confirmation of the Plan.

8 DSI's value is in its real estate holdings, including the Main
9 Office and five smaller properties, which all are located within two
10 blocks of the Main Office property. In its schedules, DSI valued all of
11 its real estate holdings at a total of \$7,500,000, with \$5,000,000 value
12 allocated to the Main Office. See Docket No. 59. Liens totaling only
13 approximately \$270,000 encumber DSI's real property assets. See id.

14 2) Prepetition litigation

15 In March 2015, after learning that Mr. Holdner had signed a
16 purchase and sale agreement for the Main Office property, the proceeds of
17 whcih Mr. Holdner intended to distribute as dividends, Mr. Kreitzberg
18 filed a derivative lawsuit on behalf of DSI in Multnomah County Circuit
19 Court, case no. 15CV07240 ("State Court Litigation"). In the State Court
20 Litigation, Mr. Kreitzberg alleged that Mr. Holdner did not have
21 shareholder authorization to sell substantially all of DSI's assets or to
22 liquidate DSI. He also alleged that Mr. Holdner and Ms. Baum had
23 breached their fiduciary duties to DSI, had engaged in self-dealing, and
24 had mismanaged DSI through conflict of interest transactions. Through
25 the State Court Litigation, Mr. Kreitzberg sought to remove Mr. Holdner
26 and Ms. Baum as DSI directors and requested damages. The court in the

1 State Court Litigation entered a preliminary injunction preventing Mr.
2 Holdner and Ms. Baum from selling any property of DSI without first
3 taking certain required actions. On the eve of a hearing before the
4 state court to deliver its decision on Mr. Kreitzberg's request for
5 further injunctive relief, DSI filed its chapter 11 petition, effectively
6 staying the State Court Litigation. The stay of § 362(a) remains in
7 place as to the State Court Litigation.

8 Meanwhile, in January 2016, DSI, at the direction of Mr.
9 Holdner, filed a lawsuit against Mr. Kreitzberg and his affiliate, RAK
10 Investments, LLC, in the United States District Court for the District of
11 Oregon, case no. 16-cv-00110-SI ("District Court Litigation"). In the
12 District Court Litigation, DSI, through Mr. Holdner, alleged that Mr.
13 Kreitzberg wrongfully and fraudulently attempted to gain control over DSI
14 by making a tender offer to purchase shares of DSI's common stock for
15 \$7.00 per share. DSI's prayer for relief in the District Court
16 Litigation does not include a claim for damages. See Exhibit 1, Exhibit
17 C attached. I denied without prejudice Mr. Kreitzberg's motion for
18 relief from stay to allow the District Court Litigation to proceed by
19 order entered on April 25, 2016 (Docket No. 76), and no subsequent order
20 has been entered to allow the District Court Litigation to move forward.

21 At the time of DSI's bankruptcy filing, it had cash and
22 deposits totaling \$4,043.32, an amount clearly inadequate to fund defense
23 of the State Court Litigation or prosecution of the District Court
24 Litigation.

25 3) DSI's bankruptcy filing and relevant postpetition events

26 DSI filed its petition for protection under chapter 11 on

1 February 11, 2016. See Docket No. 1. Shortly thereafter, Mr. Kreitzberg
2 filed a motion to dismiss ("Motion to Dismiss") DSI's chapter 11 case or,
3 in the alternative, to appoint a chapter 11 trustee to manage DSI in
4 chapter 11 on the grounds that 1) DSI's chapter 11 case was filed without
5 proper authorization; 2) the case was filed for an improper purpose; and
6 3) DSI was being "grossly mismanaged." See Docket No. 17. DSI opposed
7 the Motion to Dismiss. See Docket No. 30. Following an evidentiary
8 hearing on April 25, 2016, the court denied the Motion to Dismiss but
9 ordered the United States Trustee to appoint a chapter 11 trustee for
10 reasons stated orally on the record. See Docket Nos. 75, 76 and 78. Ms.
11 Mitchell was appointed as the Trustee effective May 4, 2016. See Docket
12 Nos. 79 and 80.

13 In the meantime, DSI had filed a motion to approve a sale of
14 the Main Office property ("Sale Motion") for \$5,000,000, net of broker's
15 commission, free and clear of liens. See Docket No. 64. The terms of
16 sale included a downpayment of \$1,000,000, interest at 5%, and a balloon
17 payment at the end of five years of approximately \$4,000,000. See id. at
18 3. Following her appointment, the Trustee withdrew the Sale Motion. See
19 Docket No. 88. Mr. Holdner subsequently filed a motion ("Holdner Sale
20 Motion") seeking approval of a sale of the Main Office property on
21 essentially the same terms as the Sale Motion. See Docket No. 95. The
22 Trustee and Mr. Kreitzberg objected to the Holdner Sale Motion. See
23 Docket Nos. 106 and 107. In her objection, the Trustee advised that in
24 her business judgment, the proposed sale of the Main Office property
25 would not be in the best interests of DSI's estate. Following a hearing,
26 the court denied the Holdner Sale Motion by order entered on June 21,

1 2016. See Docket Nos. 117 and 119. That order was not appealed.

2 Following a period where the Trustee explored options for
3 settling the disputes among the feuding DSI shareholders, the Trustee
4 concluded that she needed to proceed to propose a reorganization plan for
5 DSI. Accordingly, the Trustee filed a proposed disclosure statement and
6 a proposed plan of reorganization on August 5 and 8, 2016, respectively.
7 See Docket Nos. 132 and 133. On August 9, 2016, the Trustee filed
8 objections to the claims filed by Mr. Holdner and Mr. Kreitzberg. See
9 Docket Nos. 134 and 135. Mr. Holdner objected to the Trustee's proposed
10 disclosure statement, and shareholder Gary Maffei joined in Mr. Holdner's
11 objections. See Docket Nos. 143 and 151. The Trustee filed the Plan and
12 a First Amended Disclosure Statement on September 30, 2016. See Docket
13 Nos. 155 and 156. The Trustee further filed a response to the objections
14 to the proposed disclosure statement filed by Mr. Holdner and Mr. Maffei
15 ("Trustee Disclosure Statement Response"). See Docket No. 159.

16 Following the duly noticed disclosure statement hearing, the court
17 approved the Disclosure Statement, modified as discussed at the hearing,
18 and the Confirmation Hearing was scheduled. See Docket Nos. 160 and 164.

19 The Plan upon which DSI creditors and shareholders voted,
20 includes the following main provisions: 1) The allowed claims of general
21 unsecured creditors (Class 1) will be paid in full, without interest, no
22 later than 60 days after the effective date of the Plan. Because the
23 general unsecured creditors receive no interest on their allowed claims
24 under the Plan, their claims are treated as impaired for voting purposes.
25 2) The claims of DSI insiders, Mr. Holdner and Mr. Kreitzberg (Class 2),
26 will be paid in full plus interest in their allowed amounts as soon as

1 reasonably practicable after the effective date of the Plan, and the
2 allowed amounts of their claims are determined. The insider Class 2
3 claims are not treated as impaired under the Plan. 3) Administrative
4 expenses, secured property tax claims (Class 3) and the secured claim of
5 Bank of the West (Class 4) will be paid in full in their allowed amounts,
6 plus allowed interest, as soon as reasonably practicable after the
7 effective date of the Plan, and the allowed amounts are determined. All
8 are unimpaired under the Plan. 4) Shareholders (Class 5) are given a
9 choice under the Plan: They can retain their equity interests in the
10 reorganized DSI, or they can sell their shares for \$7.00 per share. The
11 Plan will be funded by a sale of approximately 160,000-170,000 shares of
12 DSI treasury stock to Mr. Kreitzberg at \$7.00 per share to allow for
13 payment of Plan obligations and to recapitalize DSI. However, the Plan
14 provides a mechanism whereby interested parties, including Mr. Holdner
15 and Ms. Baum and any other DSI shareholder, can overbid Mr. Kreitzberg
16 and substitute for him to fund the Plan. In the event of a successful
17 overbid, the purchase price to be received by selling DSI shareholders
18 would be increased accordingly.

19 In Plan balloting, all voting members of Class 1 voted in favor
20 or the Plan. In Class 5, 92% of voting class members (23 of 25) voted in
21 favor of the Plan, but the Plan was not accepted by the class because
22 less than two-thirds of the voting shares (62%) voted in favor of the
23 Plan. See Docket No. 191 and § 1126(d).

24 Mr. Holdner filed an Objection to Any Proposed Cramdown in an
25 Amended Plan of Reorganization ("Objection") (Docket No. 183), making a
26 number of assertions but arguing primarily that the Plan could not be

1 confirmed because 1) it discriminates among DSI shareholders by diluting
2 their equity interests in favor of Mr. Kreitzberg; 2) the Plan is too
3 speculative and is not feasible; 3) the Plan is not proposed in good
4 faith; and 4) the Plan cannot be confirmed because it is a "tax avoidance
5 scheme," unlawful "under Chapter 5 of SECURITIES EXCHANGE ACT OF 1933."
6 The Trustee responded to the Objection in her Memorandum in Support of
7 Confirmation ("Confirmation Memorandum") (Docket No. 196).

8 Mr. Holdner further filed a renewal of his objections to the
9 Disclosure Statement ("Renewal") (Docket No. 181). The Trustee responded
10 to the Renewal in the Confirmation Memorandum and in a separate response
11 ("Response") (Docket No. 193), relying in part on the previously filed
12 Trustee Disclosure Statement Response but further arguing that since the
13 court had approved the Disclosure Statement in a final order that was not
14 appealed, the arguments raised in the Renewal were moot.

16 II. JURISDICTION

17 This court has jurisdiction over the matters to be decided at
18 the Confirmation Hearing under 28 U.S.C. §§ 1334 and 157(b)(2)(L).
19 Confirmation of a plan in chapter 11 specifically is within the core
20 jurisdiction of bankruptcy courts.

22 III. CONFIRMATION STANDARDS

23 The requirements for confirmation of a reorganization plan in
24 chapter 11 are set forth in § 1129 of the Bankruptcy Code. The court has
25 an affirmative duty to make sure that all requirements for confirmation
26 under § 1129 have been met. Liberty Nat'l Enterprises v. Ambanc La Mesa

1 Ltd. Partnership (In re Ambanc La Mesa Ltd. Partnership), 115 F.3d 650,
2 653 (9th Cir. 1997). The court must confirm a plan if the plan proponent
3 proves by a preponderance of the evidence that all applicable
4 requirements of § 1129(a) have been met. Id. However, if the only
5 confirmation standard that has not been met is the § 1129(a)(8)
6 requirement that, with respect to each class of claims or equity
7 interests, "(A) such class has accepted the plan; or (B) such class is
8 not impaired under the plan," the court further must determine that the
9 plan satisfies the standards for "cramdown" under § 1129(b), i.e., the
10 plan "does not discriminate unfairly" against and is "fair and equitable"
11 with respect to each impaired class that has not accepted the plan.
12

13 **IV. THE EVIDENCE PRESENTED**

14 In advance of the Confirmation Hearing, counsel for the Trustee
15 submitted the Confirmation Memorandum, supported by the declaration of
16 the Trustee. See Docket No. 196 and Exhibit 1 with attached Exhibits A
17 through E. In addition, the Trustee testified at the Confirmation
18 Hearing to address each of the applicable confirmation requirements under
19 § 1129 as follows:

20 She testified that the Plan, including its provisions for
21 classification of creditor claims and shareholder equity interests, and
22 she, as Plan proponent, complied with all applicable provisions of the
23 Bankruptcy Code. §§ 1129(a)(1) and (2).

24 She testified that the Plan was proposed in good faith and not
25 by any means proscribed by law. § 1129(a)(3).

26 She testified that any payments to be made under the Plan for

1 administrative expenses in connection with the case would be subject to
2 court review for reasonableness. § 1129(a)(4).

3 She testified that she would serve as plan agent for DSI
4 postconfirmation and would notice a shareholders meeting for election of
5 a new Board of Directors, consistent with the requirements of DSI's by-
6 laws. § 1129(a)(5).

7 She testified that the sole impaired class of creditors under
8 the Plan (general unsecured creditor Class 1) had voted to accept the
9 Plan, and the shareholder class (Class 5) that had not voted to accept
10 the Plan by the requisite amount would receive more under the Plan (\$7.00
11 per share to selling shareholders) than in a chapter 7 liquidation (\$6.58
12 per share) based on her analysis, as set forth in Exhibit A to the
13 Disclosure Statement. See Exhibit 1, at 2. § 1129(a)(7).

14 She testified that all classes of creditors either were
15 unimpaired or had voted to accept the Plan. The single shareholder
16 class, Class 5, did not vote to accept the Plan. §§ 1126(d) and
17 1129(a)(1)(8). Accordingly, to confirm the Plan would require the
18 Trustee to satisfy the requirements for "cramdown" under § 1129(b).

19 She testified that all administrative claims would be paid in
20 full as soon as reasonably possible after the effective date of the Plan
21 and any necessary court approvals. § 1129(a)(9).

22 She testified that the noninsider class of general unsecured
23 claims (Class 1) had accepted that Plan. § 1129(a)(10).

24 She testified that she was satisfied that the Plan is feasible.
25 In particular, she testified that she had reviewed Mr. Kreitzberg's
26 recent Charles Schwab investment account statements and was comfortable

1 that he had readily available assets to fund implementation of the Plan.
2 In his testimony, Mr. Kreitzberg likewise testified that he had assets
3 available to fund the Plan obligations. § 1129(a)(11).

4 She testified that all United States Trustee fees had been paid
5 to date and would continue to be paid through the effective date.
6 § 1129(a)(12).

7 §§ 1129(a)(6), (13), (14), (15) and (16) do not apply.

8 In her declaration in support of confirmation, the Trustee
9 declared that based on her own investigation, corroborated by advice of
10 counsel, the Plan did not present any securities law problems. See
11 Exhibit 1, at 2.

12 As to the requirements for "cramdown," she testified that all
13 creditors would be paid in full under the Plan, and shareholders would
14 have the option of selling their shares of DSI common stock for an above-
15 market price or retain their DSI shares. § 1129(b).

16 Since DSI went private and was delisted from the NASDAQ, there
17 is no recognized "market" for DSI common stock. In such circumstances,
18 outside of the Plan, such stock might be sold in private placement
19 transactions, but determining the price could be problematic. Section
20 1145 of the Bankruptcy Code provides an exemption from the registration
21 requirements of the Securities Act of 1933 ("Securities Act") and state
22 securities law for "certain securities issued, distributed and sold
23 during chapter 11 cases or under plans of reorganization." See § 1145
24 and 8 Collier on Bankruptcy ¶ 1145.01[2] (Alan N. Resnick & Henry J.
25 Sommer eds., 16th ed.). Under § 1129(d), the Securities and Exchange
26 Commission ("SEC") has standing to object to confirmation of a chapter 11

1 plan "if the principal purpose of the plan is the avoidance of taxes or
2 the avoidance of the application of section 5 [registration requirements]
3 of the Securities Act" Counsel for the Trustee advised at the
4 outset of the Confirmation Hearing that the SEC was provided with copies
5 of the Plan and Disclosure Statement and notified of the date of the
6 Confirmation Hearing as part of the general notice process for the
7 Confirmation Hearing. I note that the SEC has not appeared in this case,
8 did not file an objection to confirmation of the Plan and did not appear
9 at the Confirmation Hearing. Special Counsel testified that he had
10 reviewed the Plan and Disclosure Statement and the notices with respect
11 to the Plan and Confirmation Hearing, and he did not perceive any
12 securities law problems. Specifically, he did not perceive the Plan as
13 presenting any problems with respect to securities law registration
14 requirements.

15 Mr. Holdner testified in opposition to confirmation,
16 reiterating a number of claims he has asserted consistently in this case:
17 First, he argued from his demonstrative Exhibit B that the \$7.00 offering
18 price per share of DSI common stock included in the Plan is too low, as
19 by closing a sale of the Main Office property now for \$5,000,000, payable
20 \$1,000,000 down, with 5% interest on the deferred balance of \$4,000,000,
21 and a balloon payment at the end of 5 years, the "projected value per
22 share" would be \$9.55. In light of Mr. Holdner's professional experience
23 as a CPA since 1968, I find it both surprising and disingenuous that in
24 his calculations to arrive at his \$9.55 per share value, he deducts
25 nothing for payment of DSI's liabilities, including his personal claim
26 for \$1,518,262.81 (Claim No. 10 on the claims register); he does not

1 discount to present value the \$4,000,000 deferred portion of the proceeds
2 from his projected \$5,000,000 sale of the Main Office property; and he
3 does not discount for the risk of nonpayment of the deferred balance of
4 the Main Office sale proceeds. The Trustee testified that she rejected
5 Mr. Holdner's \$9.55 per share valuation as not realistic because it did
6 not incorporate a deduction for any of DSI's liabilities. I ultimately
7 conclude that Mr. Holdner's \$9.55 per share projected valuation for the
8 DSI common stock is not credible, particularly considering its failure to
9 incorporate any deduction for DSI liabilities, either existing or on-
10 going.

11 Mr. Holdner further testified that he did not consider the Plan
12 fair to shareholders in that it only offered them \$7.00 per share,
13 consistent with a tender offer Mr. Kreitzberg made earlier to the
14 shareholders that Mr. Holdner views as fraudulent. See Exhibit A. Mr.
15 Holdner asserts that the Plan is the embodiment of a scheme to allow Mr.
16 Kreitzberg to avoid paying taxes on dividends that otherwise would be
17 distributed from Main Office property sale proceeds. The Plan would
18 allow Mr. Kreitzberg to obtain control of DSI and dilute the ownership
19 interests of shareholders who elect to retain their shares.

20 In addition, Mr. Holdner asserted that the Trustee had done an
21 inadequate job of investigating Mr. Kreitzberg's ability to fund the
22 recapitalization of DSI mandated by the Plan and had not provided
23 adequate evidence that the Plan was feasible.

24 Following the testimony of witnesses and confirmation from
25 Trustee's counsel and Mr. Holdner that they had no additional witnesses
26 to call, I closed the record.

1 During oral argument, Trustee's counsel argued that the Trustee
2 had met her burden of proof to establish all of the confirmation
3 requirements under § 1129, and the Plan should be confirmed, relying on
4 the Confirmation Memorandum; Exhibit 1 and the attached Exhibits A
5 through E; and the testimony of the Trustee and Mr. Kreitzberg. Counsel
6 for the UST advised that she was appearing to confirm that amendments to
7 the Plan being proposed by the Trustee to allay the UST's concerns about
8 the treatment of potential claims against the Trustee and her
9 professionals were satisfactory to the UST and appeared consistent with
10 Bankruptcy Code requirements.

11 I asked Mr. Holdner during his argument to identify the
12 particular provisions of § 1129 that he felt the Trustee did not meet her
13 burden of proof to satisfy. In response, Mr. Holdner deflected the
14 question and returned to his arguments that the Plan was speculative and
15 not feasible; that the Plan violated tax law because its principal
16 purpose was tax avoidance, and the Plan violated federal securities laws;
17 the Plan was not fair to DSI shareholders; and the value that
18 shareholders would receive under the Plan was too low. He further
19 asserted that a main basis for his opposition to confirmation was the
20 inadequacies of the Disclosure Statement. Following argument, I took the
21 matter under advisement.

22

23 **V. DISCUSSION**

24 1) Compliance with law and good faith

25 The Trustee testified, without objection, that the Plan and
26 she, as the Plan proponent, complied with all applicable provisions of

1 the Bankruptcy Code. Mr. Holdner objects, alleging violations of
2 securities and tax laws. In her Declaration in support of confirmation,
3 the Trustee declared that based on her own investigation and advice of
4 Special Counsel, she was "not aware of any securities-related issues with
5 the Plan." Exhibit 1, at 2. Special Counsel likewise testified that he
6 did not perceive any securities law problems. In light of that evidence
7 and the exemption from registration provided for in § 1145, I am
8 unpersuaded by Mr. Holdner's lay opinions that the Plan violates the
9 registration provisions of the Securities Act and the securities fraud
10 provisions of SEC Rule 10b-5.

11 I understand Mr. Holdner's argument that confirmation of the
12 Plan may further the purpose of Mr. Kreitzberg to avoid paying taxes on
13 DSI dividends at ordinary income tax rates, but I do not agree that
14 avoidance of taxes is the Plan's primary purpose. The Trustee proposed a
15 plan that will pay all creditor claims in full in the short term and will
16 provide a market for sale of the DSI share holdings of minority
17 shareholders, a market that does not exist currently. The Trustee
18 presented evidence that the \$7.00 per share offering price for DSI stock
19 under the Plan provides a premium over what shareholders could expect to
20 receive in a liquidation - possibly a substantial premium. The evidence
21 submitted through Mr. Holdner's Exhibit B does not present a credible
22 alternative. The Plan provides means to recapitalize DSI with working
23 capital in addition to amounts required to fund the payments of creditor
24 claims and stock buyouts. It further provides a mechanism for resolving
25 the contentious corporate governance issues that have plagued DSI in
26 recent times. Accordingly, I conclude that the Trustee has met her

1 burden of proof to establish that the Plan and the Trustee, as Plan
2 proponent, have complied with applicable law.

3 "[F]or purposes of determining good faith under section
4 1129(a)(3) . . . the important point of inquiry is the plan itself and
5 whether such plan will fairly achieve a result consistent with the
6 objectives and purposes of the Bankruptcy Code." In re Madison Hotel
7 Assocs., 749 F.2d 410, 425 (7th Cir. 1984). I find that the Plan will
8 achieve such results, and I conclude in the totality of the circumstances
9 that the Plan was proposed in good faith.

10 2) Feasibility

11 The Trustee testified that she had examined Mr. Kreitzberg's
12 recent Charles Schwab investment account statements and was comfortable
13 that he could fund the capital investments required by the Plan. Mr.
14 Kreitzberg corroborated her assessment in his testimony. Mr. Holdner
15 argued that the Trustee's investigation of Mr. Kreitzberg's finances was
16 inadequate, making the Plan too speculative to be confirmed. However,
17 Mr. Holdner provided no evidence to support his assertions.

18 Under Ninth Circuit law, the "feasibility" standard in
19 § 1129(a)(11) is very forgiving. "In this circuit, all a debtor need
20 demonstrate is that the plan 'has a reasonable probability of success.'" Wells Fargo Bank, N.A. v. Loop 76, LLC et al. (In re Loop 76, LLC), 465
21 B.R. 525, 544 (9th Cir. BAP 2012), quoting Acequia, Inc. v. Clinton (In
22 re Acequia, Inc.), 787 F.2d 1352, 1364 (9th Cir. 1986). "[A] relatively
23 low threshold of proof will satisfy § 1129(a)(11) so long as adequate
24 evidence supports a finding of feasibility." In re Loop 76, LLC, 465
25 B.R. at 544, citing Computer Task Group, Inc. v. Brotby (In re Brotby),

1 303 B.R. 177, 191 (9th Cir. BAP 2003). I find that the Trustee submitted
2 adequate evidence to support Plan feasibility, and I conclude that the
3 feasibility confirmation requirement in § 1129(a)(11) is satisfied.

4 3) Cramdown

5 As noted above, the Plan provides current DSI shareholders with
6 two options: They can retain their shares of common stock in the
7 reorganized DSI or they can sell their DSI stock for a purchase price not
8 less than \$7.00 per share. Although the Plan specifically provides for
9 an overbid option for any interested parties, including Mr. Holdner and
10 Ms. Baum (see particularly § 7.2 of the Plan), the Plan at the outset
11 relies on Mr. Kreitzberg to fund Plan obligations, including shareholder
12 buyouts, through purchasing 160,000-170,000 shares of DSI treasury stock
13 for \$7.00 per share. Mr. Holdner objects that the Plan is unfair to
14 shareholders because it will allow Mr. Kreitzberg to obtain control of
15 DSI and dilute the share ownership interests of shareholders who elect to
16 retain their stock in DSI.

17 I find that the Plan does not discriminate unfairly among the
18 DSI shareholders: They have the option to retain their shares or sell
19 them for \$7.00 a share, giving them a market for their shares at a
20 premium over liquidation value. Those shareholders who retain their DSI
21 shares will have their ownership interests diluted through the
22 recapitalization of the company, and I find nothing inequitable about
23 that: the injection of funds through implementation of the Plan will
24 allow DSI to pay its creditors and administrative expense claimants, to
25 pay selling shareholders for their shares, and to retain working capital
26 to fund operations going forward. In these circumstances, I conclude

1 that the Trustee has met her burden of proof to establish that the Plan
2 is fair and equitable and, again, is not unfairly discriminatory in its
3 treatment of the DSI shareholders. The requirements for cramdown have
4 been met.

5 4) Other § 1129 requirements

6 The Trustee submitted evidence that the requirements of
7 §§ 1129(a)(4), (5), (7), (9), (10) and (12) are satisfied, and Mr.
8 Holdner has raised no discernible or effective arguments to the contrary.
9 As noted above, the requirements of §§ 1129(a)(6), (13), (14), (15) and
10 (16) do not apply. Accordingly, I conclude that the confirmation
11 requirements of § 1129 have been satisfied.

12 5) Renewal of objections to the Disclosure Statement

13 Mr. Holdner filed the Renewal of his objections as to the
14 adequacy of the Disclosure Statement in advance of the Confirmation
15 Hearing, and in his argument at the Confirmation Hearing, he referenced
16 the objections stated in the Renewal as a principal basis for denying
17 confirmation of the Plan. As previously noted, in her Response to the
18 Renewal, the Trustee argued that since my order approving the Disclosure
19 Statement was not appealed, the objections stated in the Renewal were
20 moot.

21 Under the Federal Rules of Bankruptcy Procedure, an order
22 approving a disclosure statement is recognized as an immediately
23 appealable final order. See, e.g., Rule 8002(d)(2)(E) and the Advisory
24 Committee notes to Rule 8002. However, the Ninth Circuit, relying on
25 Fifth Circuit authority, Texas Extrusion Corp. v. Lockheed Corp. (In re
26 Texas Extrusion Corp.), 844 F.2d 1142, 1154-56 (5th Cir. 1988), has held

1 that alleged inadequacies in a disclosure statement can be raised at
2 confirmation because "the inadequacy of disclosure can only injure a
3 [party in interest] if the plan is eventually confirmed." Everett v.
4 Perez (In re Perez), 30 F.3d 1209, 1216-17 (9th Cir. 1994). Accordingly,
5 I have considered Mr. Holdner's objections to the Disclosure Statement
6 stated in the Renewal but not previously addressed in this Memorandum
7 Opinion, including the following:

8 a) "[T]he Trustee fails to disclose the immediate pending sale
9 of [the Main Office property] to Portland Fashion Institute, LLC and
10 immediate availability of funds." Although Mr. Holdner clearly wishes it
11 were otherwise, as stated in the Trustee Disclosure Statement Response,
12 there is no pending sale of the Main Office property. I denied the
13 Holdner Sale Motion by order entered on June 21, 2016. That order was
14 not appealed, and no further motion to approve a sale of the Main Office
15 property has been filed. In any event, as noted by the Trustee, the
16 proposed sale of the Main Office property was described in Section III.C.
17 of the Disclosure Statement.

18 b) "[T]he Trustee fails to disclose the potential claim for
19 damages against [Mr.] Kreitzberg in the federal lawsuit that would
20 benefit the [DSI] estate." DSI's prayer for relief in the Complaint in
21 the District Court Litigation does not assert a claim for damages. See
22 Exhibit 1, Exhibit C attached. I perceive no error in the failure of the
23 Disclosure Statement to include a description of Mr. Holdner's
24 unsupported contentions that damages might be asserted (let alone
25 collected) in claims to be added in the District Court Litigation beyond
26 what already is included in Section II.B. of the Disclosure Statement.

1 c) "[T]he Trustee fails to disclose a filing of a lis pendens
2 by [Mr. Kreitzberg] that was later determined to be invalid." Mr.
3 Holdner fails to explain what relevance such disclosure would have to
4 consideration of the Plan by interested parties, and I do not perceive
5 any relevance.

6 d) "The Trustee has stated in the draft plan of reorganization
7 that if [Mr.] Holdner and [Ms.] Baum refuse to sell their shares they
8 will be sued, an act of extortion." The Plan says no such thing.

9 The Renewal goes on at length to state a further litany of
10 allegations as to defects in the Disclosure Statement and Plan that are
11 similarly materially inaccurate, irrelevant or both. Ultimately, I
12 conclude that I did not err in approving the Disclosure Statement as
13 containing adequate information to allow interested parties to make an
14 informed decision on acceptance or rejection of the Plan, and I will
15 overrule Mr. Holdner's confirmation objections based on alleged
16 inadequate information in the Disclosure Statement.

17 18 **VI. CONCLUSION**

19 For the foregoing reasons, I conclude that the Trustee has met
20 her burden of proof with respect to all applicable standards for
21 confirmation of the Plan, and I will enter an order confirming the Plan.
22 Counsel for the Trustee should submit for signature an order confirming
23 the Plan, completed and substantially in the form attached to the
24 Confirmation Memorandum, with attached appendices, within the next week.
25
26