Dated: November 02 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 04-30578
	)	
Homan, Inc.,	)	Chapter 11
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

ORDER RE CONFIRMATION ISSUES

On November 1, 2005, the court held a hearing on confirmation of the Debtor's proposed Amended Chapter 11 Plan filed on July 22, 2005 [Doc. #336]. Debtor filed a tabulation of the ballots. [Doc ## 383, 384]. There was only one objection to confirmation, filed by Wells Fargo Financial Leasing, Inc. ("Wells Fargo").

At the hearing, the Wells Fargo objection was resolved, with part of the resolution involving changing Wells Fargo's rejection to an acceptance in Class 8 (General Unsecured Claims). *See* Fed. R. Bankr. P. 3018(a).

Notwithstanding the resolution of the Wells Fargo objection and the absence of any other objection to confirmation, the court must still find and the Debtor must show that the plan complies with the requirements of 11 U.S.C. § 1129(a). *In re Union Meeting Partners*, 165 B.R. 553, 574 (Bankr. E.D. Pa. 1994), *aff'd* 52 F.3d 317 (3d Cir. 1995); *see In re Adkisson Village Apartments of*

Bradley County, Ltd., 133 B.R. 923, 925 (Bankr. S.D. Ohio 1991). One of the requirements for a confirmable plan mandates a finding by the court that "[w]ith respect to each class of claims or interest–(A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8).

Under the proposed plan, there are 11 classes of claims and 1 class of interests. Of those classes, 8 classes of claims are classified as impaired, as is the 1 class of interests. Therefore, to meet the requirements of § 1129(a)(8), the 8 impaired classes of claims and the 1 impaired class of interests must accept the plan. Plan acceptance is governed by 11 U.S.C. § 1126 and Fed. R. Bankr. P. 3017 and 3018. According to Debtor's ballot tabulation, as modified by the change from rejection to acceptance of Wells Fargo's ballot in Class 8, creditors in Classes 7 and 8 accepted the plan through the voting process as provided by § 1126(c). However, there were no votes at all received from Claim Classes 3, 4, 5, 6, 9 and 11 and Interest Class 12.

Debtor argues that the non-vote in each class should be deemed to constitute acceptance of the plan by each non-voting class, some of which are single creditor classes. There is a substantial split in authority concerning that proposition. The Tenth Circuit held in *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988), that a single impaired creditor class that fails to vote is deemed to accept a Chapter 11 plan. Many cases, however, hold to the contrary. *E.g., In re Higgins Slacks Co.*, 178 B.R. 853, 856-57 (Bankr. N.D. Ala. 1995); *In re Jim Beck*, 207 B.R. 1010, 1013 n.6 (Bankr. W.D. Va. 1997); *Adkisson Village Apartments*, 133 B.R. at 926. These cases generally criticize and reject *Ruti-Sweetwater*, as does *Collier on Bankruptcy*. A. Resnick and H. Sommer, 7 *Collier on Bankruptcy* ¶ 1126.04 (15th Ed. 2005). The Sixth Circuit has not addressed this issue. Given the absence of further objections and the apparent lack of interest in (or perhaps exhaustion with) this process by the affected creditors, it would obviously be simpler and certainly more expedient to adopt the Debtor's position. But the court agrees with the reasoning of those courts requiring "active" acceptance by impaired classes through the voting process, and not deemed acceptance in the absence of any vote. In addition to the persuasive reasons advanced by other courts based on analysis of the plain meaning of the applicable statutory provisions and rules of procedure, this court is loath to adopt a position that might encourage debtors to discourage or suppress plan voting, either actively

or passively, properly or improperly.[1] Therefore, the plan fails to comply with § 1129(a)(8).

Debtor may still be able to cram-down the non-accepting classes under 11 U.S.C. § 1129(b) or amend the plan or take other steps to achieve confirmation of the proposed plan. The court will allow the Debtor additional time in which to do so.

Based on the foregoing reasons and authorities,

IT IS ORDERED that on or before **November 23, 2005,** Debtor shall take such further steps as it deems necessary or appropriate to pursue confirmation of its proposed Amended Plan.

[1]The court emphasizes that there is absolutely nothing in this record to suggest that this Debtor did anything whatsoever to discourage plan voting.