

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

January 9, 2014 at 3:00 p.m.

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1. [12-41713](#)-E-11 MARVIN/ARNELLE BROWN APPROVAL OF SECOND AMENDED
Stephen M. Reynolds DISCLOSURE STATEMENT FILED BY
DEBTORS
11-12-13 [[97](#)]

**APPEARANCE OF COUNSEL FOR DEBTORS IN POSSESSION
REQUIRED FOR JANUARY 9, 2014 HEARING**

Telephonic Appearance Permitted

**COUNSEL SHALL ADVISE THE COURT OF PROPOSED AMENDMENT,
IF ANY, AND THE PROCEDURES TO BE TAKEN TO INSURE THAT
AN APPROVED DISCLOSURE STATEMENT, NOTICE OF CONFIRMATION
HEARING, AND RELATED PLEADINGS ARE PROPERLY SERVED**

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Proper Notice Provided. The Proof of Service states that the Plan, Disclosure Statement, and supporting pleadings were served on all creditors and the Office of the United States Trustee on November 12, 2013. By the court's calculation, 58 days' notice was provided. 42 days' notice is required.

Tentative Ruling: The Disclosure Statement was properly set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 9014-1(f)(1).

The court's tentative decision is to deny the Motion to Approve the Disclosure Statement. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

SERVICE OF PROCESS ISSUES

Federal Rule of Bankruptcy Procedure 7004(h) and 9014 require that service be made on federally insured financial institutions by certified

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mail. Even if certified mail is not required, corporations, partnerships, and other fictitious entities need to be served on officers, partners, managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h). From reviewing the certificate of service, Dckt. 122, for the present motion, several issues arise.

First, the certificate of service does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process." Rather, the address descriptions look like any other typical business junk mail address. The court does not rely upon mail room personnel to determine that correspondence from counsel is intended to be direct to an officer or agent for service of process.

Second, for some entities, the court cannot tell if there was any effort made to send the notice to any office for that entity in which there could be an officer, partner, managing member, or agent for service of process. Examples include:

(1) Dell Financial Services - mailed to a post office box.

(2) Wells Fargo Bank, N.A. - mailed to post-office boxes and to a law firm. Nothing sent by certified mail and not sent to the address provided by either the FDIC or the California Secretary of State for this federally insured financial institution.

(3) Navy Federal Credit Union - mailed to a post office box.

(4) GE Capital Retail Bank - not certified mail and mailed to a post office box.

Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: December 20, 2012

Background: Debtors-in-Possession are individuals. Mr. Brown is employed full time as a federal law enforcement officer while Mrs. Brown is not employed outside of the home. Debtors in Possession have two residential rentals. Mr. Brown will be eligible for retirement during the term of the plan. Debtors in Possession anticipate that Mr. Brown's retirement earnings and rental income will be adequate to fund the proposed plan. This case was precipitated by significant loss in equity in the residential rental home while expenses for the rentals exceeded projections. Debtors in Possession

state that this resulted in unsecured borrowing to maintain the rentals as well as the family residence.

Summary of Plan:

Creditor/Class	Treatment	
Class 1 Ally Bank Secured by Chevy Cruz	Claim Amount	
	Impairment	Unimpaired
	Monthly payments in the contract amount of \$220.	
Class 2 Bank of America, N.A. Secured by first deed of trust on 2000 Daybreak Court, Fairfield, California (Debtors' residence)	Claim Amount	
	Impairment	Unimpaired
	Monthly payments in the contract amount of \$2,469.89.	
Class 3 Nationstar Secured by first deed of trust on 1943 Northwood Drive, No. 1, Vacaville, California	Claim Amount	
	Impairment	Unimpaired
	Monthly payments in the contract amount of \$399.20.	
Class 4 Pentagon Federal Credit Union Secured by third deed of trust on 2000 Daybreak Court, Fairfield, California (Debtors' residence)	Claim Amount	
	Impairment	Impaired
	Secured portion of the claim was determined to be zero by order of this court entered January 24, 2013. The unsecured portion will be treated as a Class 7 general unsecured claim.	

Class 5 Self Help Federal Credit Union	Claim Amount	
	Impairment	Impaired
	The secured portion of the claim was determined to be zero by order of this Court entered January 24, 2013. The unsecured portion shall be treated as a Class 7 general unsecured claim.	
Class 6 Acura Financial Services	Claim Amount	
	Impairment	Unimpaired
	secured by 2012 Acura MDX Secured claim to receive monthly payments in contract amount of \$828.00.	
Class 7 Redwood Credit Union	Claim Amount	
	Impairment	Unimpaired
	Secured by Honda Odyssey Secured claim to receive monthly payments in the contract amount of \$176.00.	
Class 8 General Unsecured Creditors	Claim Amount	
	Impairment	Impaired
	To receive monthly distributions from income of Debtor for 60 months following Effective Date of the Plan. Debtor to pay no less than \$750.00 per month. First administrative priority claims will be paid first, then pro rata to general unsecured creditors.	

A. C. WILLIAMS FACTORS PRESENT

Y Incidents that led to filing Chapter 11

Y Description of available assets and their value

Y Anticipated future of the Debtor

N Source of information for D/S

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Y Disclaimer

Y Present condition of Debtor in Chapter 11

Y Listing of the scheduled claims

Y Liquidation analysis

N Identity of the accountant and process used

Y Future management of the Debtor

Y The Plan is attached

In re A.C. Williams, 25 B.R. 173 (Bankr. N.D. Ohio 1982); see also *In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

BACKGROUND

1. Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

2. "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

3. Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g.*, *In re A.C. Williams, supra*.

4. There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D.Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *In re Michelson*, 141 B.R. 715, 718-19 (Bankr. E.D.Cal. 1992).

5. The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D.Pa. 1982).

ANALYSIS

Though no creditor has filed an opposition, the court has identified several items which must be addressed by the Debtors in Possession.

Treatment of Administrative Expenses and Priority Claims

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Debtors-in-Possession do not address the administrative expenses, such as professional fees, including attorney fees and how these are to be treated in the plan. Taken on its face, the combined disclosure statement and plan provide that no administrative expenses have been paid and that counsel has worked pro bono for the benefit of his client and creditors. Clearly, this is not a pro bono case for this counsel and he should not be expected to work for free.

Treatment of Secured Claims

Second, it is unclear whether Debtors in Possession have provided for all scheduled claims. The court's review of the Claims Register indicates that there are secured claims (such as that of Wells Fargo Bank, N.A., Claim No. 9) which are not discussed in the Plan or Disclosure Statement:

(1) Proof of Claim No. 16 - Wells Fargo Bank, N.A., secured claim in the amount of \$372,834.22. The collateral is stated to be the real property commonly known as 2000 Day Break Court, Fairfield, California. This appears to be the Class 2 claim for which Bank of America, N.A. is identified as the creditor.

(2) Proof of Claim No. 9 - Wells Fargo Bank, N.A., secured claim in the amount of \$6,605.87. The collateral is stated to be "QUALITY FIRST HOME IMPROVE," with the nature of the property checked to be "other." The basis of perfection is stated to be "sales contract." The attachment to Proof of Claim No. 9 states that the lien is a Purchase Money Security Interest for unidentified items purchased from Quality First Home Improve.

(3) The Class 1 creditor is identified as Ally Bank. However, Proof of Claim No. 3 has been filed by an entity identified as Ally Financial, Inc. The FDIC on-line directory for federally insured financial institution lists Ally Bank and Ally Financial, Inc. as a related entity thereto. It appears that the Plan and Disclosure Statement make provision for payment to a non-creditor in this case.

The Disclosure Statement does not provide adequate information for creditors to determine whether they should approve or reject the proposed plan. The Disclosure Statement is not approved.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Approval of Disclosure Statement filed by Marvin and Arnelle Brown, Debtors in Possession and Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied and the Disclosure Statement (November 12, 2013) is not approved.

2. [12-28879-E-11](#) ANNETTE HORNSBY CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
5-8-12 [[1](#)]

Debtor's Atty: Sunita Kapoor

Notes:

Continued from 11/13/13

Monthly Operating Reports filed: 11/23/13; 12/23/13; 12/23/13 [amd Oct]

Amended Plan filed 11/27/13 [Dckt 186]

Amended Disclosure Statement filed 11/27/13 [Dckt 187]

[MDE-1] Stipulation re: Avoidance of Junior Lien filed 12/19/13 [Dckt 209];
Order granting filed 12/24/13 [Dckt 224]

3. [12-28879-E-11](#) ANNETTE HORNSBY APPROVAL OF AMENDED DISCLOSURE
SK-5 Sunita Kapoor STATEMENT FILED BY DEBTOR
11-27-13 [[187](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Proper Notice Provided. The Proof of Service states that the Plan, Disclosure Statement, and supporting pleadings were served on creditors and the Office of the United States Trustee on November 27, 2013. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

Tentative Ruling: The Disclosure Statement and Plan of Reorganization was properly set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 9014-1(f)(1).

The court's tentative decision is to deny the Motion to Approve the Disclosure Statement and deny confirmation of the Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

SERVICE

This disclosure statement does not appear to be served on the Franchise Tax Board. Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on certain governmental agencies shall be mailed to particular addresses on a roster of agencies. Form DEC 2-785, Roster of Governmental Agencies states that the California Franchise Tax Board must be served at Bankruptcy Section, MS: A340, PO Box 2952, Sacramento, California, 95812-2952.

While counsel may want to argue, "hey, the Debtor provided for this claim so the FTB does not need to properly be served," the court will not be drawn into a "sometimes we do and sometimes we don't require parties to comply with notice rules." That will lead to the inevitable situation of a debtor completing years of a plan and the Franchise Tax Board contending that the plan treatment was not proper, it still is owed a substantial amount of money, and the debtor (and possibly the debtor's counsel) left in tears after having funded a plan which could have properly paid the claim but did not because of the defective service.

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: December 20, 2012

Background: Debtor-in-Possession is a retired nurse and the widow of a deceased fire captain. She receives income from her retirement, social security, the rental part of her home and one residential property. Debtor-in-Possession states the collapse of the real estate market in addition to difficulty negotiating with Wells Fargo Bank, N.A., which secures two of the three real properties owned by Debtor-in-Possession and that started foreclosure proceedings, caused the filing of the petition. Debtor-in-Possession has a pending State Court Action for a wrongful foreclosure against Deutsche Bank National Trust Company in relation to the real property known as 950 Harrison Street, Suite 207, San Francisco, California.

Summary of Plan:

Creditor/Class	Treatment	
Administrative Claims US Trustee and Attorney Fees	Claim Amount	
	Impairment	
	UST: \$650 estimated Attorney: \$2,500 estimated Under this plan, Administrative Expenses shall be paid in full on the effective date of the plan.	
Class 1 Wells Fargo Bank, N.A.	Claim Amount	\$462,000.00

Secured by first deed of trust on 2319 Bennington Drive, Vallejo, CA

	Impairment	Impaired
	<p>Under the proposed plan, the Debtor will retain this property secured by Class 1 claimant.</p> <p>Debtor has obtained a loan modification. The new principal value of the note will be \$467,807.28, \$5,807.28 of the new principal shall be deferred and treated as a non interest bearing principal forbearance. The new principal balance less the deferred principal balance is \$462,000.</p> <p>The new interest rate is 4.125%. Under the plan, Debtor shall pay Wells Fargo Bank a monthly principal and interest payment of \$1,965.95 plus an escrow payment for taxes and insurance of \$936.69, which may adjust periodically.</p>	
Class 2 Stan Shore Trust Secured by second deed of trust on 2319 Bennington Drive, Vallejo, CA	Claim Amount	\$125,000.00
	Impairment	Impaired
	Stan Shore Trust, Stan Shore Trustee a secured by a second Deed of Trust against the real property commonly known as 2319 Bennington Drive Vallejo California 94591 is determined to be a secured claim in the amount of 0.00 and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. This property is encumbered by a senior lien securing claims which exceed the value of this property.	
Class 3 Franchise Tax Board Secured by tax lien on 2319 Bennington Drive, Vallejo, CA	Claim Amount	\$6,642.49
	Impairment	Impaired

	<p>A secured claim has been filed by the Franchise Tax Board in the amount of \$6,642.49. The Franchise Tax Board has agreed to debtor making a monthly payment of \$125.60 including 3% interest, starting January 3, 2014. Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete. In the event of a default, this Claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor maintains all rights and protections of California Real Property and Foreclosure Law.</p>
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<p>Class 4 Wells Fargo Bank, N.A.</p> <p>Secured by first deed of trust on 324 Moonraker Drive, Vallejo, CA</p>	Claim Amount	\$310,577.37
	Impairment	Impaired
	<p>The Moonraker Drive property has a value of \$212,000, pursuant to a stipulation [Doc# 163] with Wells Fargo Bank, N.A. Wells Fargo Bank N.A.'s first secured claim against this property is limited to \$212,000. The remaining portions of Wells Fargo Bank N.A.'s first secured claim and second secured claim are now unsecured and shall receive the treatment of other general unsecured claims as described below in class 7. Under the Plan, Debtor shall pay Wells Fargo Bank N.A. the full amount of its secured claim as follows: Monthly Payments of: \$1,057.61 for P & I plus insurance and property taxes (\$456.67) for a total monthly payment of \$1,514.28</p> <p>Calculated at 5.25% interest for a period of 40 years.</p> <p>Material default of either treatment includes missing a payment, as well as failure to maintain taxes and insurance post-confirmation. This default can be cured if, within 10 days of receiving notice of such default, Debtor makes the payment. Payments to begin on December 1st, 2013.</p>	

<p>Class 5 Wells Fargo Bank, N.A.</p> <p>Secured by second deed of trust on 324 Moonraker Drive, Vallejo</p>	Claim Amount	\$310,577.37
	Impairment	Impaired

	Wells Fargo Bank, N.A. second Deed of Trust secured against the real property commonly known as 324 Moonraker Drive, Vallejo California is determined to be a secured claim in the amount of 0.00 and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. This property is encumbered by a senior lien securing claims which exceed the value of this property.	
Class 6 Deutsche Bank, A.G. secured by deed of trust on 950 Harrison Street, Suite 207, San Francisco, CA	Claim Amount	\$525,000.00
	Impairment	Impaired
	Under the proposed plan, the Debtor will retain this property secured by Class 6 claimant. \$1,500.00 are being placed into a blocked account by debtor pending a determination of who the creditor is or used to pay the damages arising from that party being wrongfully enjoined from exercising its rights or interests in the Harrison Property. \$1,500.00 represents a good faith determined amount, in the light of the fact that the debtor is unable to receive any rental income from this property and the payment that would likely be due under a loan modification. Claimant shall retain its lien on the collateral until the payments proposed under this plan are complete. In the event of a default, this Claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor maintains all rights and protections of California Real Property and Foreclosure Law.	
Class 7 General Unsecured Claims	Claim Amount	\$381,277.23 estimated
	Impairment	Impaired

	<p>Debtor shall make sixty (60) monthly payments to the general unsecured class. Each participating member of the unsecured class shall receive a pro rata share of these monthly payments in accordance with the ratio in the amount of their claim against the Debtor and the total overall amount of the general unsecured claims against the Debtor.</p> <p>Unsecured creditors will receive 5% of the excess income left over after payment of debtors administrative claims, priority tax claims and secured creditors. Unsecured creditors will receive approximately \$97.61 per month, over 60 months, for a total of approximately \$5856.60. Payments to begin on the 1st of the month following the effective date of Debtor's Plan.</p>
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Class 8 Equity Interests	Claim Amount	
	Impairment	Unimpaired
	<p>Debtor shall retain all property of the estate and any other property to which Debtor had a right to prior to filing Bankruptcy and to which Debtor's may obtain rights to receive in the future.</p> <p>Application to Absolute Priority Rule: Debtor submits that the absolute priority rule does not bar the viability of this Plan under the particular circumstances of the case. Pursuant to 11 U.S.C. § 1129(b)(2)(B)(ii): " The Absolute priority rule does not apply to an individual Chapter 11 Debtor, provided the plan allocates at least 5 years worth of the Debtor's projected disposable income to fund plan payments to unsecured creditors." March & Ahart, CAL. PRAC. GUIDE: BANKRUPTCY, § 11:1634.1; (The Rutter Group 2010).</p> <p>Debtor Filed Chapter 11 in the individual capacity. As discussed below, Debtor proposes to apply all of her disposable income for the five year duration of the plan to make payments to unsecured creditors. Therefore, the restrictions of the absolute priority rule should not limit this Plan.</p>	

A. C. WILLIAMS FACTORS PRESENT

Y Incidents that led to filing Chapter 11

Y Description of available assets and their value

Y Anticipated future of the Debtor

N Source of information for D/S

 Y Disclaimer

 Y Present condition of Debtor in Chapter 11

 Y Listing of the scheduled claims

 Y Liquidation analysis

 N Identity of the accountant and process used

 Y Future management of the Debtor

 Y The Plan is attached

In re A.C. Williams, 25 B.R. 173 (Bankr. N.D. Ohio 1982); see also *In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

BACKGROUND

1. Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

2. "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

3. Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g.*, *In re A.C. Williams, supra*.

4. There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D.Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *In re Michelson*, 141 B.R. 715, 718-19 (Bankr. E.D.Cal. 1992).

5. The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D.Pa. 1982).

OPPOSITION

Victor Li and Yao Lun Jiang ("Interested Parties") submit an objection to the proposed amended plan of reorganization. Interested parties allege the purchased the real property located at 950 Harrison Street, Unit

207, San Francisco, California from Deutsche Bank National Trust Company on June 3, 2013. Interested Parties state that on December 18, 2013, the San Francisco Superior Court entered an order granting Deutsche Bank National Trust Company's motion for summary judgment on Debtor's complaint, finding no triable issues of material fact to support Debtor's claim to the property.

Therefore, the Interested Parties object to Debtor's plan and disclosure statement which states that Debtor will retain the subject real property secured by Class 6 claimant. Interested parties claim they hold both fee title and lawful possession of the real property, Debtor lost the property to foreclosure four years ago and the property is not property of the estate.

Interested Parties also object to the plan based on that the plan is not proposed in good faith. Interested Parties state that Debtor is unable to offer any evidence to support her claim of wrongful foreclosure and should not be permitted to continue manipulating the bankruptcy process.

ANALYSIS

In addition to the service issue, Interested Parties have raised a valid issue, that the proposed Plan of Reorganization asserts that Debtor-in-Possession has some right, title and interest in the real property commonly known as 950 Harrison Street, Unit 207, San Francisco, California. It appears that the wrongful foreclosure action in State Court was recently concluded with the court granting summary judgment for Deutsche Bank National Trust Company, stating no triable issues exist as to the wrongful foreclosure action and granting judgment in favor of Deutsche Bank National Trust Company and against Annette Hornsby. Because the treatment of the proposed plan purports to reorganize property that is not property of the estate, the plan cannot be confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Approval of Disclosure Statement and Plan of Reorganization filed by Debtor in Possession, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied and the Disclosure Statement and Plan of Reorganization is not approved.