

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 5, 2014 at 3:00 p.m.

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1. [12-28879-E-11](#) ANNETTE HORNSBY APPROVAL OF AMENDED DISCLOSURE
SK-51 Sunita Kapoor STATEMENT FILED BY DEBTOR
4-15-14 [[236](#)]

No Tentative Ruling: 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.

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 April 15, 2013. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Disclosure Statement and Plan of Reorganization was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

The court's decision is to ~~xxxxxxx~~ the Motion to Approve the Disclosure Statement.

SERVICE

This notice of the hearing for this disclosure statement does not appear to be served on the Franchise Tax Board. Proof of Service, Dckt. 238. 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.

Furthermore, Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified:

**LOCAL RULE 2002-1
Notice Requirements**

(a) Listing the United States as a Creditor; Notice to the United States. When listing an indebtedness to the United States for other than taxes and when giving notice, as required by FRBP 2002(j)(4),

the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

For Cases filed in the Sacramento Division:

United States Attorney
(For [insert name of agency])
501 I Street, Suite 10-100
Sacramento, CA 95814

For Cases filed in the Modesto and Fresno Divisions:

United States Attorney
(For [insert name of agency])
2500 Tulare Street, Suite 4401
Fresno, CA 93721-1318

. . .

(c) Notice to the Internal Revenue Service. In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

- (1) United States Department of Justice
Civil Trial Section, Western Region
Box 683, Ben Franklin Station
Washington, D.C. 20044
- (2) United States Attorney as specified in LBR 2002-1(a)
above; and,
- (3) Internal Revenue Service at the addresses specified
on the roster of governmental agencies maintained by
the Clerk.

The proof of service does not list any address for the Internal Revenue Service.

A motion is a contested matter. See Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

Additionally, it does not appear that several of the creditors were not served with the Disclosure statement, including Capital One, City of Oakland, Credit One Bank, First Premier Bank, and Pro Solutions. See Proof of Service, Dckt. 238.

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: May 8, 2012

Background: Debtor-in-Possession 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: \$4,500 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. Secured by first deed of trust on 2319 Bennington Drive, Vallejo, CA	Claim Amount	\$462,000.00
	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>	
<p>Class 2 Stan Shore Trust</p> <p>Secured by second deed of trust on 2319 Bennington Drive, Vallejo, CA</p>	<p>Claim Amount</p>	<p>\$125,000.00</p>
	<p>Impairment</p>	<p>Impaired</p>
	<p>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.</p>	
<p>Class 3 Franchise Tax Board</p> <p>Secured by tax lien on 2319 Bennington Drive, Vallejo, CA</p>	<p>Claim Amount</p>	<p>\$6,642.49</p>
	<p>Impairment</p>	<p>Impaired</p>
	<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 ten days from the effective date of the plan. 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>	

<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
	<p>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.</p>	
<p>Class 6 General Unsecured Claims</p>	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. Thus, unsecured creditors will receive approximately \$97.61 per month, over 60 months, for a total of approximately \$5,856.60 Payments to begin on the 1st of the month following the effective date of Debtor's Plan.</p>	
Class 7 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 Debtor Filed Chapter 11 in the individual capacity. 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

Wells Fargo Bank, N.A.

Wells Fargo Bank, N.A. ("Creditor"), which holds a claim secured by a first deed of trust against the Debtor's residence, 2319 Bennington Drive, Vallejo, California, opposes Debtor's Second Amended Disclosure Statement. Creditor states that the disclosure statement and plan contain the incorrect monthly principal and interest payment about, as stated the in loan modification between the parties. Creditor states the amount is \$1,966.95, not \$1,965.95.

Creditor also argues that Debtor alleges that the Bennington Property generates monthly rental income of \$1,500. Creditor states it is unclear from the Debtor's monthly operating reports ("MOR") on file in this case if the rental income has been/is being segregated.

Further, Creditor states this case was commenced in May 2012 and Debtor has not obtained a court order allowing Debtor to use Creditor's cash collateral. No motion to use Creditor's cash collateral has been filed. Creditor has not consented to Debtor's use of its cash collateral. If Debtor has been collecting rental income of \$1,500.00 per month since the inception of this case through and including (at least) April 2014, the total rental income should be \$34,500.00. Creditor states that Debtor needs to account for Wells Fargo's cash collateral.

However, Creditor does not direct the court to any motions it has filed to protect its interests or other steps if it was not "consenting" to the known use of cash collateral by the Debtor in Possession. The asserted "non-consented to" use of cash collateral for the past two years is not a basis for denying approval of a disclosure statement.

Stan Shore Creditor Objection

Stan Shore, in pro per, filed an objection to the amended disclosure statement. Mr. Shore filed the objection under an incorrect Docket Control Number SK 5-1; the correct DCN for this motion is DCN SK-51. Mr. Shore states that he has set aside \$97,000.00 loaned to the Debtor for his son's college education. Mr. Shore states he proposes a plan that will waive all previously unpaid interest and unpaid late fees, postpone future payments of principal and interest and reduce future interest. Mr. Shore states the "above proposed plan" eliminates any and all financial hardship related to this loan and allows the Debtor to stay in her home without monthly interest payments. Mr. Shore states that this is a fair resolution and asks the court to approve the Creditor's plan and allow Creditor's loan terms.

ANALYSIS

There are severe service issues that must be addressed by the Debtor-in-Possession.

In addition to the service issues, Creditor has raised a an issue regarding the cash collateral of Wells Fargo Bank, N.A. While a review of the docket reveals that the court has not approved the use of the cash collateral of Wells Fargo Bank, N.A., the court notes that it has been two years since the filing of this case. Creditor's argument that Debtor-in-Possession was using its cash collateral, it did nothing, and now it disapproves of the disclosure statement is not persuasive. Creditor chose not to act over the past two years in this case and therefore the court considers it tacitly authorized the use of its cash collateral.

As for Mr. Shore's proposal, it appears he is attempting to state alternative plan terms, not an objection to the proposed Disclosure Statement. First, under the terms of the current proposed plan, the Stan Shore Trust, 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. Order, Dckt. 150. Mr. Shore objects to the proposed plan which would pay him \$0.00 on his secured claim and an approximate 0.15% dividend on the general unsecured claim. However, the objection to the

proposed plan treatment is not necessarily an objection to the disclosure statement.

The court also notes that the Debtor in Possession has been prosecuting state court litigation against the persons who assert they purchased real property commonly known as 950 Harrison Street, Unit 207, San Francisco, California. The Debtor listed this property on Schedule A, asserting that the foreclosure thereon was wrongful and that she owned the property. Dckt. 24 at 1. On Schedule D the Debtor listed Deutsche Bank AG as a creditor having a claim secured by the Harrison Street Property. Dckt. 27 at 2.

At the April 16, 2014 Status Conference it was reported by the Purchasers that they prevailed on a summary judgment in the State Court Action and obtained a determination that they were the owners of the property. Counsel for the Debtor in Possession reported that the Debtor in Possession had engaged counsel to prosecute an appeal of that summary judgment granted for the Purchasers.

The Disclosure Statement does not include information of the State Court litigation, the asserted interests of the estate in the Harrison Street Property, the prosecution of an appeal, the funding of counsel and the appeal, and provision for the Harrison Street Property if it is determined that the estate has an interest in that Property. The Disclosure Statement, in the "Events Leading Up to Chapter 11 Filing" section states,

"The Debtor in Possession has a possible contingent claim in a condominium at 950 Harrison St., Ste 207, San Francisco, California, 94107 for \$525,000 in 2000. If Debtor can establish this contingent claim, then she reserves the right to amend the plan."

Disclosure Statement, pg. 7:19-22. No other reference is made to the property, claim, or how it is to be prosecuted, or how creditors and this court will be advised of the post-confirmation debtor prevailing on this claim. Further, no information is provided as to the nature of the claim, only a statement that it is a contingent claim (without identifying any contingencies to the claim maturing into a ripe, actionable claim) which dates back to 2000.

The Debtor in Possession has not obtained authorization to employ counsel to prosecute an appeal. Such counsel is not entitled to compensation for the services he or she is providing the Debtor in Possession. 11 U.S.C. §§ 327, 329, 330, and 331.

The Disclosure Statement includes a proposed budget, which includes detailed information for the Debtor's projected monthly post-confirmation expenses. These expenses stated in the Disclosure Statement and stated in the most recent Monthly Operating Report are broken down as follows:

Expense	Disclosure Statement (Dckt. 236)	April 2014 Monthly Operating Report (Dckt. 249)
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Bennington Dr. PITI, HOD, Repairs, Maintenance	(\$3,875.00)	
Moonraker Dr. PITI, Repair, Maintenance	(\$1,878.00)	
Real Property Rent/Lease		(\$4,004.00)
Living Expenses	(\$2,895.00)	
General Monthly Expenses		(\$8,353.00)
	_____	_____
	(\$8,648.00)	(\$12,357.00)

The April 2014 Monthly Operating Report lists the Debtor in Possession having \$145,470 in general monthly expenses (excluding a Rent/Lease expense, which the court interprets to be the monthly mortgage payments) for the period June 2012 through April 2014 (a 24 month period). This averages \$6,061.25 in non-Rent/Lease/mortgage payments per month. Because this court requires plan proponents to provide evidence to establish future income and expense projections are credible, often times the monthly operating reports are provided as part of that evidence.

The Debtor in Possession has not provided any breakdown on the Monthly Operating Report of what constitutes "General Monthly Expenses." No expenses are listed for payment of any rental property related expenses. No explanation is provided for how the Debtor's post-confirmation living expenses are \$3,100 less than the average general monthly expenses shown on the Monthly Operating Report. This raises an issue which the Debtor in Possession will have to address for the confirmation hearing.

Using the Debtor in Possession's budget stated in the Disclosure Statement, she has income of \$10,198.00 a month and Living Expenses of (\$2,895.00) a month, which generates \$7,303.00 of monthly net monies to fund a plan. As the court reads the Plan, the following payments are required for Administrative Expenses, Priority Claims, and Secured claims.

	Monthly Average For 60 Month Plan
U.S. Trustee Fees of \$650.00 FN.1.	\$10.83
Counsel for Debtor in Possession, \$4,500.00 Administrative Claim FN.1.	\$75.00
Franchise Tax Board Priority Claim	\$125.60
Wells Fargo Bank, N.A. Secured Claim, Bennington Dr.	\$2,902.64

Wells Fargo Bank, N.A. Secured Claim, Moonraker Dr.	\$1,514.28
California Franchise Tax Board Secured Claim	\$125.60

Average Monthly Total Plan Payments for Administrative Expenses, Priority Claims, and Secured Claims Stated by Debtor in Possession	\$4,753.95

 FN.1. The court does not expect the Administrative Expenses for the U.S. Trustee and Counsel for Debtor in Possession to be amortized over 60 months, but to be paid as required by the Bankruptcy Code. The above model is used just to determine the average monthly projected disposable income which the Debtor in Possession states that she is generating under the Chapter 11 Plan.

With \$7,303.00 of monthly net income to fund a plan, it appears that there is \$2,549.05 a month to fund payment to creditors holding general unsecured claims. Over 60 months this totals \$152,942.00. The Disclosure Statement identifies there being only \$97.61 a month being deposited for distribution to creditors holding general unsecured claims - which totals \$5,856.60. The Disclosure Statement does not identify how the additional \$147,085.00 of monies is distributed during the 60 month term of the proposed Plan.