

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

2500 Tulare Street
Department A, Courtroom 11
Fresno, California

WEDNESDAY

JUNE 17, 2015

1:30 P.M. CHAPTER 11 CASES

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [09-15064](#)-A-11 ALEXANDRU/CLAUDIA DENES MOTION FOR ENTRY OF DISCHARGE
PLF-15 5-20-15 [[228](#)]
ALEXANDRU DENES/MV
PETER FEAR/Atty. for dbt.
CLOSED: 04/01/2015

Final Ruling

Motion: For Order Entering Chapter 11 Discharge
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by the movant

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

For the reasons stated in the motion and supporting declaration, the court will grant the discharge of both the individual debtors in this case under § 1141(d)(5)(B) and (C). Under § 1141(d)(5)(B), the value of property actually distributed to unsecured creditors comports with the confirmed Plan. Denes Decl. ¶ 6, ECF No. 230. Because all payments under the plan have been completed to all creditors except for one creditor, a secured creditor who is to be paid for a term of 80 months, the plan is substantially consummated, and modification under § 1127(b) is not permitted. Further, the debtors have represented that § 522(q)(1) is inapplicable and that no pending proceeding exists in which they may be found guilty of a felony or liable for a debt of the type described in § 522(q)(1)(A)-(B).

For the reasons stated in the motion and supporting declaration, the court will grant the discharge of Denes DDS, Inc. Section 1141(d)(3) does not preclude Denes DDS, Inc. from receiving a discharge as the debtor has engaged in business after consummation of the Plan and the Plan does not liquidate all or substantially all of the property of the estate.

2. [15-10366](#)-A-11 ELLIOTT MANUFACTURING CONTINUED STATUS CONFERENCE RE:
COMPANY, INC. VOLUNTARY PETITION
2-2-15 [[1](#)]
PETER FEAR/Atty. for dbt.

No tentative ruling.

3. [14-11595](#)-A-11 RAY FISHER PHARMACY, CONTINUED STATUS CONFERENCE RE:
INC. VOLUNTARY PETITION
3-31-14 [[1](#)]
- ALAN KINDRED/Atty. for dbt.

No tentative ruling.

4. [14-11595](#)-A-11 RAY FISHER PHARMACY, AMENDED DISCLOSURE STATEMENT
PWC-4 INC. 5-6-15 [[183](#)]
ALAN KINDRED/Atty. for dbt.

Tentative Ruling

Motion: Approval of Disclosure Statement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Debtor in possession Ray Fisher Pharmacy, Inc.; New Investors, Scott Hiroshi Asai, Amy Toshiko Asai, and Katie Hisako Asai; Pride Mobility; Randy Asai and Nancy Asai (collectively "plan proponents") seek approval of the Second Amended Disclosure Statement for the Second Amended Joint Chapter 11 Plan of Reorganization, filed May 6, 2015, ECF # 183.

DISCUSSION

Chapter 11 Plan

The Second Amended Joint Chapter 11 Plan of Reorganization, filed May 6, 2015, ECF # 185 contains the following issues to be addressed before the court will approve the disclosure statement.

Section 1.1: Definition of Plan

The plan appears to a prior version of the plan, and not the Second Amended Joint Chapter 11 Plan of Reorganization, filed May 6, 2015, ECF # 185. The definition describes the plan as the "Joint Chapter 11 Plan of Reorganization Dated November 19, 2014," which is not the plan offered for consideration. Second Amended Joint Chapter 11 Plan of Reorganization § 1.1, p. 7, filed May 6, 2015, ECF # 185.

Section 2.1: Administrative Expense Claims

Two problems are present. First, the treatment of McKesson Medical-Surgical Minnesota Supply, Inc. and Leech Tishman make reference to the "Debtor's financial projections attached hereto as Exhibit C." Second Amended Joint Chapter 11 Plan § 2.1 Administrative Expense Claims ¶¶ 3,4. But the plan has no Exhibit C. Presumably the reference is to the exhibits in support of the Second Amended Disclosure Statement. Exhibits to Second Amended Disclosure Statement, filed May 6, 2015, ECF # 184. A copy of that exhibit needs to be attached to the plan, and not merely referenced in it.

Second, aside from the optional payment of 25% of the debtor's net earnings, the plan's representation of the payment schedule to Leech Tishman and the representation in Exhibit C are inconsistent. The

plan provides, "However, the Debtor and Leech Tishman have agreed that any balance of its allowed Administrative Expense claims following the Effective Date shall be paid via monthly installments in an amount no less than \$4,000 per month and such installments are reflected in the Debtor's projections attached hereto as Exhibit C." This is not consistent with the schedule included in Exhibit C to the Disclosure Statement, which provide for four monthly payments of \$5,000 each followed by monthly payments of \$1,000 each. Exhibits to Second Amended Disclosure Statement, Exhibit C, filed May 6, 2015, ECF # 184.

Section 2.2: Allowed Priority tax Claims

The plan does not appear to comply with 11 U.S.C. § 129(a)(9)(C),(D). Those provisions state, "Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash--(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C)." But the plan is cryptic as to compliance with these provisions. It states, "On the Effective Date each holder of an Allowed Priority Tax Claim shall receive their Por-Rata distribution of deferred quarterly cash payments of \$58,507.59 over a period not exceeding five (5) years equal to the Allowed amount of such claim." Second Amended Joint Chapter 11 Plan § 2.2 Allowed Priority Tax Claims. Since the payments appear to start on the Effective Date, payment over five years violates § 1129(a)(9)(C),(D), at least absent the consent of each such affected creditor.

Section 3.0: Classifications of Claims and Equity Interests

Both the debtor's schedules and the register for the Proof of Claims reflects a secured debt in favor of Invacare. Compare Schedule D, filed April 14, 2015, ECF # 36, with Proof of Claim No. 14. But the plan does not appear to treat that claim.

Sections §§ 10.1, 11: Vesting and Jurisdiction

Section 10.1 provides that the debtor and its assets are "released from the custody and jurisdiction of the Bankruptcy Court" Second Amended Joint Chapter 11 Plan § 10.1, filed May 6, 2015, ECF #185. But Section 11.0 purports to retain jurisdiction. Id. at § 11.0. These need to be clarified.

Section 10.3 & 10.4: Injunctions

Section 10.3, paragraph 2 and Section 10.4 each purport to enjoin creditors. But the plan fails to comply with Federal Rule of Bankruptcy Procedure 3016(c), which provides, "If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and

conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction."

Section 10.8: Bankruptcy Filing

Section 10.8 restricts the right of the reorganized debtor and certain of its principals to file bankruptcy, or at the very minimum purports to waive certain of the protections afforded by the Bankruptcy Code. Second Amended Joint Chapter 11 Plan § 10.8, filed May 6, 2015, ECF # 185. Such a restriction violates public policy and must be stricken. *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173 9th Cir. 2002); *Wank v. Gordon (In re Wank)*, 505 B.R. 878 (9th Cir. BAP 2014).

General Comments

First, for all provisions of the plan which require the consent of an affected creditor, e.g. the Post-Confirmation First Priority Loan by the New Investors given "with the consent of the Secured Creditors" as not later than the date prescribed for submission of the tabulation ballots the plan proponents will file the affirmative written consent of the affected creditor to each specific provision of the plan. The court will not imply consent either from the creditor's silence or vote in favor of the Second Amended Joint Chapter 11 Plan of Reorganization, filed May 6, 2015, ECF # 185. Failure to do so will result in an inference that consent that consent has not been given and, if confirmation is posited on consent confirmation will be denied.

Among those provisions requiring affirmative written consent are: (1) Post-Confirmation First Priority Loan secured by a first priority lien, Second Amended Joint Chapter 11 Plan §§ 1.1, 6.2 Post Confirmation First Priority Loan; (2) payment of administrative claim of McKesson Medical-Surgical Minnesota Supply other than on the effective date of the plan, Second Amended Joint Chapter 11 Plan § 2.1 Administrative Expense Claims; (3) payment of administrative claim of Leech Tishman other than on the effective date of the plan, Second Amended Joint Chapter 11 Plan § 2.1 Administrative Expense Claims; and (4) payment of priority tax claims for over more than 5 years, Second Amended Joint Chapter 11 Plan § 2.2 Priority Tax Claims.

Second, the court will not allow the debtor in possession to augment the terms of the plan by with supplemental documents yet attached to the plan but to be negotiated and filed with the court before confirmation. By way of example, the plan provides for a Post-Confirmation First Priority Loan. The definitions section includes the following verbiage, "The loan documents setting forth the terms and conditions of the Post-Confirmation First Priority Loan will be filed as a supplement to the Plan." Second Amended Joint Chapter 11 Plan § 1.1, p. 8, filed May 6, 2015, ECF # 185. The plan contains numerous other examples of documents that will be negotiated and later filed with the court. See Second Amended Joint Chapter 11 Plan §§ 4.2, 4.3, filed May 6, 2015, ECF # 185. The plan must be transmitted to creditors. Fed. R. Bankr. P. 3017(d). The rights and duties of the debtor in possession vis-à-vis other creditors, particularly those whose rights are secured by assets of the debtor, is a material plan provision that must be disclosed to creditors prior to voting. Those documents must be attached as an exhibit to the plan.

Disclosure Statement

"An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets." 11 U.S.C. § 1125(b).

Adequate information means "means information of a kind, and in sufficient detail, as 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, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information." 11 U.S.C. § 1125(a)(1).

Overlapping Issues

To the extent that the Second Amended Disclosure Statement, filed May 6, 2015, ECF # 183 reiterates provisions of the plan that would not be approved, corresponding corrections should be made in the disclosure statement.

Misstatement of Number of Classes

The disclosure statement mistakenly refers to six classes of claims and interests. See Second Amend Disclosure Statement, Art. 1 & Art. IV § 4.3, filed May 6, 2015, ECF # 183. There are only five such classes and this should be corrected.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The plan proponent's request for approval of the Second Amended Disclosure Statement for the Second Amended Joint Chapter 11 Plan of Reorganization, filed May 6, 2015, ECF # 183, has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the matter,

IT IS ORDERED that the approval of the Second Amended Disclosure Statement for the Second Amended Joint Chapter 11 Plan of Reorganization, filed May 6, 2015, ECF # 183 is denied.

