UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 23, 2016 at 3:00 p.m.

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1. 15-28108-E-11 WILLARD BLANKENSHIP
RLC-6

CONTINUED APPROVAL OF DISCLOSURE STATEMENT FILED BY DEBTOR
4-1-16 [82]

No Tentative Ruling: The Motion to Approve Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors, parties requesting special notice, and Office of the United States Trustee on April 4, 2016. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Approve Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Disclosure Statement is xxxxx

JUNE 23, 2016 HEARING

At the hearing, xxxxx

Amended Plan and Amended Disclosure Statement

On June 17, 2016, the Debtor-in-Possession filed a "First Amended Plan of Reorganization Dated June 17, 2016." Dckt. 117. This amended plan differs from the one filed on June 6, 2016. The Debtor in Possession filed First Amended Disclosure Statement on June 6, 2016. Dckt. 113.

The Amended Plan and Amended Disclosure Statement are the result of significant work of adversaries - a debtor in possession and judgment lien creditor. Though the efforts of these parties and their counsel, they have successfully advanced this case, demonstrative the constructive give and take of a reorganization envisioned by Congress.

While making significant strides, there remain several points which the court believes needs to be clarified in the Plan and Disclosure Statement before the Disclosure Statement can be approved. The court summarizes the Plan and proposed treatment of claims, identifying the issues to be addressed as follows.

I. Funding of Plan

A. The funding of the plan is clear. The Plan Administrator, the Debtor, will obtain a reverse mortgage on his residence (to be funded in two tranches - the initial reverse mortgage and one year later drawing the maximum amount available on a credit line for the reverse mortgage), sell real property located in Indiana, and sell his interest in an entity identified as Apnea Associates.

The First Amended Plan states that all non-exempt assets, "including" the above will be sold. It is not clear in the Plan what other assets will be required to be sold under the Plan. The court has approved a settlement for the Debtor in Possession in which the estate has recovered $1,029.00. Order, Dckt. 73. Those monies are being held in the attorney for the Debtor in Possession client trust account. It is not clear from the Plan how this asset is to be disbursed.

In the Plan, the timing of the reverse mortgage is anticipated to be in August 2016. Class 1 Treatment, First Amended Plan pg. 4; Dckt. 117. However, in the Means for Implementation Section of the Plan, p. 8:17-19, it is stated that the reverse mortgage is projected to be funded in June 2016. FN.1.

FN.1. The court recognizes that the development of this plan has taken time, and most likely these conflicting references exist due to the time it has taken in the good faith negotiations and collaboration in coming up with the current plan. However, avoiding as much ambiguity as possible will benefit everyone in the performance of the confirmed plan.

For the sale of the Apnea Associates Stock and the Indiana farm property, no provisions are made for how the property will be marketed, the method used for sale, or any time line for the sale to be completed. As

drafted, the projected distribution of the proceeds from the sale will be "whenever the heck the property may be sold, however it may be marketed, and with whomever and on whatever terms (whether commercially reasonable or not) may be set by the Plan Administrator-Debtor. While the court does not believe there is a secret, nefarious intention in the drafting of these plan terms, getting it right from the start will avoid possible good faith disputes later over what creditors and the Plan Administrator-Debtor may believe are reasonable. (As well as saving the court what would have been an otherwise avoidable headache of having to decide such dispute.)

II. Administrative Expenses

A. The Plan states that there is a $3,821.73 administrative expense owed someone because Debtor in Possession used an American Express Card to pay unidentified "ordinary" expenses, including a computer. First Amended Plan, Sec. II, ¶ 3; *Id.* There is no explanation as to why Debtor's "ordinary expenses" are elevated to administrative expense status.

Additionally, the court has not approved the allowance of an administrative expense for the Debtor or Debtor in Possession for the $3,821.73.

It is not clear from the Plan that such administrative expense, if any, is first subject to being allowed by the court. To avoid any misunderstanding that confirmation of the plan may be a stealth allowance of an administrative expense, it must first be allowed by the court pursuant to a separate motion and order.

III. Treatment of Secured Claims

A. Class 2, the Secured Claims of Michael Kletchko and Patrick Ruiedin

1. To be paid from the initial distribution on the reverse mortgage, with no minimum amount stated. It is projected that the reverse mortgage will close and payment made within thirty days of the effective date of the plan.

The court will not confirm a plan which does not specify an amount, or method of computing an amount of a distribution, through the Chapter 11 Plan. As written (clearly not intentionally), the Plan Administrator-Debtor could get a $1.00 reverse mortgage and pay such amount to the creditor.

2. The second payment to the Class 2 Creditors shall be made a year later from the credit line/loan facility that is part of the reverse mortgage. Again, it does not state the amount, or method of computing the amount of the credit facility distribution for the Class 2 secured claim.

From the prior hearings and the constructive discussions by counsel for the respective parties, the court "knows" that it is intended for the initial

reverse mortgage distribution to be the maximum amount available and for the credit line/loan facility to draw the maximum amount for distribution to the Class 2 claim. However, that is not provided for in the Plan, the new "contract" between the Debtor and his creditors.

3. As part of the consideration for this treatment, the Class 2 Creditors have agreed to "release" their judgment liens against the Indiana Property and the residence which is the subject of the refinance. The Debtor in Possession has an adversary proceeding pending to avoid the lien pursuant to 11 U.S.C. § 547 as a preference.

The terms of the Plan do not state how the release of the liens will be given, when it will be given, and how this provision will be enforced. Additionally, it is not clear whether the "release" of the lien is being obtained by a judgment avoiding the liens. If so avoided, then the liens are preserved for the benefit of the bankruptcy estate and creditors pursuant to 11 U.S.C. § 551. If not so avoided, the Plan and Disclosure Statement are not clear that the Debtor in Possession and Plan Administrator-Debtor would be waiving or not enforcing such rights and interests of the estate.

4. The Plan treatment also states that the Class 2 Creditors are voluntarily reducing their (asserted to be avoidable) secured claim to $916,762.16.

The Plan does not specify how such reduction is to be documented.

5. The Plan treatment also provides for all rights and remedies of the estate against Prudential Reality and "any other known or unknown tortfeasors" to the Class 2 Creditors. These assigned rights ***include*** all liabilities for which Debtor was responsible in *Kletchko v. Blankenship*.

From the prior hearings, the court understood that the assigned rights related to the sale of property to the Class 2 creditors and the defense of Debtor in *Kletchko v. Blankenship*. As drafted, this Plan provision appears to include any and all possible claims and rights of the Estate, against any person in the world, for any possible event (such as a claim for breach of duty by an investment broker, whiplash claim for a parking lot rear ender, and the like - even if "unknown" and undisclosed in the bankruptcy case). It also includes giving standing to the Class 2 Creditors to object to the claim of Debtor's defense counsel for the services rendered in the *Kletchko v. Blankenship* action.

For the court to include a plan with such a provision is merely the court closing its eyes and telling the parties to do whatever they want, and the plan distributes whatever these parties say at some later date.

IV. Class 3 General Unsecured Claims.

A. The plan provides that general unsecured claims will receive two distributions from the reverse mortgage. Plan, p. 6:16-18. Additionally, distributions will be made from the sale of

Indian Property (but apparently from no other assets).

This language appears to be inconsistent for the treatment of the Class 2 secured claim, which is to be funded from the reverse mortgage and the credit line/loan facility. Additionally, this leaves hanging how the proceeds of the liquidation of other non-exempt assets (such as the Apnea Associates) will be disbursed, if at all.

B. It further states that the Class 2 Claims will be paid pro rata with the allowed Class 3 Claims. However, the Class 3 Claims will be paid only from the second reverse mortgage distribution (the credit line/loan facility).

This conflicts with the first sentence in the treatment. Also, if the Class 2 claims are dividing the proceeds pro rata, such is: (1) not true for the first distribution in 2016 from the reverse mortgage and (2) no provision is made for how the Class 2 Claim will participate "pro rata." Will it be the gross amount of the Class 2 Claim? Will it be the remaining balance after application of the additional distributions the Class 2 Claim is receive, such as the initial reverse mortgage payment and monies received on the claims and rights assigned to the Class 2 Claim.

V. Marketing and Sale of Indiana Property and Apnea Associates Interest.

A. No provision is made in the Plan for the marketing of the Indiana Property and the stock. The Debtor in Possession has not obtained authorization to engage the services of a real estate broker to begin evaluating the property and marketing it for sale. The court, as well as creditors, is not provided with any benchmark for the good faith marketing and sale of these assets through the Plan.

A. C. WILLIAMS FACTORS PRESENT

__Y__Incidents that led to filing Chapter 11
__Y _Description of available assets and their value
____Anticipated future of the Debtor
__Y__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
____Identity of the accountant and process used

__N__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).

DISCUSSION:

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 (Bank. 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).

Determination of whether there is "adequate information" is a subjective determination made by the bankruptcy court on a case by case basis. In re Texas Extrusion Corp., 844 F.2d 1142 (5th Cir. 1988), cert. denied 488 U.S. 926 (1988). Non-bankruptcy rules and regulations concerning disclosures do not govern the determination of whether a disclosure statement provides adequate information. 11 U.S.C. § 1125(d), *Yell Forestry Products, Inc. v. First State Bank*, 853 F.2d 582 (8th Cir. 1988).