

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

August 22, 2013 at 3:30 p.m.

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1. [11-93411](#)-E-11 **SANJIV/SHEENA CHOPRA** **APPROVAL OF DISCLOSURE**
RMV-25 **Robert M. Yaspan** **STATEMENT FILED BY DEBTORS**
6-19-13 [679]

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 Debtors-in-Possession, parties requesting special notice, all creditors and the Office of the United States Trustee on June 19, 2013. By the court's calculation, 64 days' notice was provided. 42 days' notice is required.

Tentative Ruling: The Approval of 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 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:

REVIEW OF THE DISCLOSURE STATEMENT PLAN TREATMENT

Case filed: September 27, 2011

Background: The Debtor was initially a real estate developer and engaged in the business of purchasing vacant real properties and constructing improvements on them. As part of its business model the Debtor would solicit investments from others and would sign individual guarantees of corporate obligations. The business was successful until the inception of the real estate recession. This is a husband and wife case that consists of two estates that will be jointly administered. Sheena and Sanjiv Chopra were living together and married at the inception of the case. The Debtors separated on September 1, 2007 and reconciled in February 2009.

August 22, 2013 at 3:30 p.m.

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Summary of Plan:

Creditor/Class	Treatment	
Unclassified Claim Administrative Expenses	Claim Amount	
	Impairment	Unimpaired
	Expenses arising in the ordinary course of business - varies Law Offices of Robert M. Yaspan: \$225,000 paid in full as ordered by court on effective date U.S. Trustee fees: estimated \$1,500 paid in full on Effective Date Court Costs: estimated \$500 paid in full on Effective Date Youfit, Inc., or claims of any affiliated company to the extent such claims are determined to be an administrative claim: estimated \$0 to be paid in full upon entry of any court order that has become final against the individual debtors calling for the payment of money to Youfit.	
Unclassified Claim Priority Tax Claims	Claim Amount	
	Impairment	Unimpaired
	<u>State of California Franchise Tax Board</u> : \$5,600.98, paid in 36 monthly installments of \$166 with interest at 3%. Calculations based on Effective Date of September 2013. <u>Internal Revenue Service</u> : Nothing Due. Paid in full on the effective date, if anything should become due.	
Class 1: Internal Revenue Service - civil penalty	Claim Amount	
	Impairment	Impaired
	\$268 to be paid in full on effective date.	

Class 2: General Unsecured Claims Claims of \$2000 or less	Claim Amount	
	Impairment	Unimpaired
	<p>This class includes creditors whose claims are \$2000 or less, or who reduce their claims to \$2000 or less. Debtors estimate there may be as many as 16 creditors in this class.</p> <p>This class shall be paid in full on the Effective Date.</p>	
Class 3: General Unsecured Claims not treated in Classes 2, 4, & 5	Claim Amount	\$4,300,000.00 (estimate)
	Impairment	Impaired
	<p>Paid 8% of their allowed claim over 60 months through monthly payments of \$5,735.</p> <p>No interest will accrue on these claims.</p>	
Class 4: General Unsecured Claim EDEN UNSECURED CLAIM	Claim Amount	\$2,511,600 (Proof of Claim amount of \$2,730,000 less \$218,400 paid in Class 3)
	Impairment	Impaired
	<p>This class shall be paid \$416,600 as provided in the Agreement at Paragraph 1.04 as follows: (a) the sum of \$100,00 down as soon as a Final Order approving the Agreement is entered (b) 59 monthly payments of \$2,860 starting one month after the allowed Class 3 creditor claimants start to get paid and (c) one payment in the 60th month of \$147,860, subject to the corrections set forth in paragraph 1.05 of the Agreement.</p> <p>The source of the Class 4 payment shall be the future stream of earnings from the personal services of the individual debtors, commencing after the confirmation of the plan of reorganization.</p> <p>No interest will accrue on these claims.</p>	
Class 5: General Unsecured Claim	Claim Amount	\$3,064,000
	Impairment	Impaired

NAGRA, LLC

	<p>This claimant claims to be a 50% partner in one of the entities managed and operated by the Debtor, GGD Oakdale Shopping Center, LLC. There is currently litigation between the parties. Debtor filed an objection to the proof of claim filed and contends that nothing is due and owing. Debtor filed a fraudulent transfer action in which it contends the transfer of the 50% interest is an avoidable transfer.</p> <p>This creditor's claims will be subordinated to the Class 2, 3 and 4 general unsecured claims and will receive nothing. Debtor contends that the allowed claim should be \$0 since the claim is based upon contingent and unsubstantiated alter ego theories. No payments will be made to the creditor until 90 days after the court has determined the allowed amount of the claim, if any, and the order establishing the amount of the claim has become final. In the event there is an allowed claim, Creditor will receive a total recovery of 8% of such allowed claim, paid out over 120 months in equal payments commencing on the start date.</p>
Classes of Interest Holders	Debtors shall retain all property of the estate and any other property to which Debtors had a right to prior to the Petition Date and as to which Debtors may obtain rights to receive in the future.

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
- Y Identity of the accountant and process used FN.1.
- 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).

LEGAL 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).

DISCUSSION

Standard

The court begins its analysis with the statutory requirements of 11 U.S.C. § 1125 for a disclosure statement. Solicitation of an acceptance or rejection of a plan may be made with a written disclosure statement which was approved by the court. The disclosure statement must provide "adequate information." The term "adequate information" is defined in 11 U.S.C. § 1125(a) (1) to be,

(1) "adequate information" 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;...

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).

2. [13-90323](#)-E-12 FRANCISCO/ORIANA SILVA

CONTINUED STATUS CONFERENCE RE:
CHAPTER 12 VOLUNTARY PETITION
2-25-13 [[1](#)]

Debtors' Atty: Peter L. Fear

Notes:

Continued from 7/18/13 to be heard in conjunction with the motion to confirm Chapter 13 plan.

[PLF-4] Motion to Value Collateral of A.I. Gilbert Company filed 7/25/13 [Dckt 39], set for hearing 8/22/13 at 3:30 p.m.

3. [13-90323-E-12](#) FRANCISCO/ORIANA SILVA MOTION TO CONFIRM CHAPTER 12
PLF-2 Peter L. Fear PLAN
7-11-13 [[30](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm Chapter 12 Plan 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 court's tentative decision is to continue the hearing on the Motion to Confirm Chapter 12 Plan to 3:30 p.m. on October 10, 2013. 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:

Debtors move to confirm their Chapter 12 plan dated June 26, 2013. Debtor states he is farming oat hay and corn on his property. Debtor states he had been close to finalizing a lease with Albert Mendes to lease the dairy facility, but he now believes it is unlikely that he will be able to lease the dairy facility to him. He states he has several other interested parties that he is currently negotiating with and anticipates that any agreement he reaches with them would be similar to the agreement he would have had with Albert Mendez. This would mean renting the dairy facility for \$5,500 to \$6,000 depending on how many houses on the facility they want to use.

Debtor states he has corn planted and anticipates selling the crop at harvest in November 2013 for approximately \$54,000.00 and use these funds to make plan payments.

NEBRASKA STATE BANK'S OPPOSITION

Creditor Nebraska State Bank filed a limited objection to confirmation on the basis of the treatment of its claim under Class 3, in that the value as of the date of the plan of the property to be distributed under the plan on account of its claim is less than the allowed amount of said claim.

Creditor also states that the plan does not reference the pre-payment restriction under the promissory note and security agreement documents relative to its claim. Creditor requests that this be included.

Creditor states that they have agreed to execute a stipulation to resolve these limited grounds of opposition and upon the execution of that Stipulation, it will withdraw its limited opposition.

STIPULATION

Debtor and Creditor filed a Stipulation re: Limited Objection to Confirmation of Chapter 12 Plan dated June 26, 2013. The parties have agreed to the terms of a 19 year amortization (rather than 20 as proposed in the plan) and retention of the pre-payment restriction until after September 17, 2017.

SUPPLEMENTAL DECLARATION

Counsel for Creditor filed a supplemental declaration requesting a continuance to allow the Debtor to further market the real property for rent as a dairy facility, as the previous prospective tenant was unable to rent. Both Creditor and Debtor's counsel have agreed to the continuance.

DISCUSSION

Upon review of the proposed Chapter 12 Plan, the evidence in the form of the declaration of Francisco Silva, the Debtor, Dckt. 44 and arguments of counsel, the court makes the following findings of fact and conclusions of law in support of confirmation of the Chapter 12 Plan pursuant to 11 U.S.C. § 1224.

- (1) the plan complies with the provisions of Chapter 12 of the Bankruptcy Code and with the other applicable provisions of this title;
- (2) any fee, charge, or amount required under chapter 123 of title 28 [28 USCS §§ 1911 et seq.], or by the plan, to be paid before confirmation, has been paid;
- (3) the plan has been proposed in good faith and not by any means forbidden by law;
- (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of the Bankruptcy Code on such date;
- (5) with respect to each allowed secured claim provided for by the plan-
 - (A) the holder of such claim has accepted the plan;
 - (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan; and

(7) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation.

Notwithstanding the objection of the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim;

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c) [11 USCS § 1222], beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

(C) the value of the property to be distributed under the plan in the 3-year period, or such longer period as the court may approve under section 1222(c) [11 USCS § 1222(c)], beginning on the date that the first distribution is due under the plan is not less than the debtor's projected disposable income for such period.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended--

(A) for the maintenance or support of the debtor or a dependent of the debtor or for a domestic support obligation that first becomes payable after the date of the filing of the petition; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business.

However, it has been reported to the court that the rental of the property upon which the proposed plan depends cannot be consummated. The Debtor-in-Possession and objecting creditor have requested a 45 day continuance for the Debtor-in-Possession to consider what possible amendments can be made to this plan.

The court grants a continuance, with the hearing on the Motion continued to October 10, 2013.

4. 13-90323-E-12 FRANCISCO/ORIANA SILVA
PLF-4 Peter L. Fear

MOTION TO VALUE COLLATERAL OF
A.L. GILBERT COMPANY
7-25-13 [[39](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee on July 25, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Value Collateral is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

Debtor seeks to value the collateral of A.L. Gilbert Company ("Creditor") described as milk products pursuant to Food and Agricultural Code § 57402. The motion is accompanied by the Debtor's declaration. The Debtor states as of the filing of the bankruptcy case, he had no milk proceeds remaining, as he sold his dairy herd and all the proceeds from the sale, along with the remaining mil proceeds before the bankruptcy was filed. Debtor asserts the monies were paid to the senior secured creditors, Nebraska State Bank and United States Farm Service Agency. Therefore, Debtor seeks to value the property at a replacement value of \$0.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the milk proceeds is secured by a loan by Creditor A.L. Gilbert Company, with a balance of approximately \$369,143.65. Therefore, the respondent creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 Valuation of Collateral filed by Debtor(s) 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 pursuant to 11 U.S.C. § 506(a) is granted and the claim of A.L. Gilbert Company secured by an asset described as milk products 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. The value of the asset is \$0.00 and is encumbered by liens securing claims which exceed the value of the asset.

5. [11-94224-E-11](#) EDWARD/ROSIE ESMAILI
David C. Johnston

CONTINUED APPROVAL OF
DISCLOSURE STATEMENT FILED BY
DEBTORS
6-5-13 [[246](#)]

CONT. FROM 7-18-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, all creditors, and Office of the United States Trustee on June 6, 2013. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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 court's tentative decision is to deny the Motion to Approve 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:

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: December 12, 2011

Background: Debtors-in-Possession, Edward and Rosie Esmaili, doing business as Crimetek Security, operate a private patrol business. The business provides security guards and patrolmen for government agencies, private businesses, and farmers, primarily in Stanislaus County. Debtors also sell monitoring equipment to customers and also provide monitoring services. Debtors state when the real estate and construction bubble burst, Debtor had too many employees, lost contracts, and their customers became insolvent, failing to pay for services performed. Debtors became indebted to the Internal Revenue Service when they failed to remit payroll taxes.

Creditor/Class	Treatment	
Class 1: Secured Claim of IRS (non-consensual lien on equity in vehicles and non- business personal property)	Claim Amount	\$73,516
	Impairment	impaired
	IRS will receive regular installment payments of total value, as of the Effective Date of the Plan, equal to the allowed amount of such claim and interest at the rate of 3% per annum Debtor will make 84 payments of \$972 each commencing on October 1, 2013	
Class 2: Secured claim of BBCN (consensual lien on tangible business personal property and junior deeds of trust on real property)	Claim Amount	\$130,000 secured, \$677,057 unsecured
	Impairment	impaired
	Creditor will receive regular installment payments of a total value, as of the Effective Date of the Plan, equal to the amount of such secured claim and interest at the rate of 5% per annum. Creditor will also receive payments totaling 20% of such unsecured claim. Debtor will make 120 payments of \$1,379 each on the secured claim and 120 payments of \$1,128 on the unsecured claim commencing on October 1, 2013.	
Class 3: Secured Claim of Bank of America, N.A. (504 Wild Tree Lane, Turlock, California)	Claim Amount	\$661,977
	Impairment	impaired

	Creditor will receive regular installment payments of a total value, as of the Effective Date of the Plan, equal to the amount of such secured claim and interest at the rate of 4% per annum. Debtor will make 360 payments of \$3,161.00 commencing on October 1, 2013.	
Class 4: Secured Claim of Key Bank, N.A. (504 Wild Tree Lane, Turlock, California)	Claim Amount	\$41,735
	Impairment	impaired
	Creditor will receive the treatment as general unsecured claim. Creditor will receive payments totaling 20% of such unsecured claim. Debtor will make 120 payments of \$70 each commencing on October 1, 2013.	
Class 5: Secured claim of Wells Fargo Bank, N.A. (1153 Kay Circle, Turlock, California)	Claim Amount	\$175,000 secured, \$112,013 unsecured
	Impairment	impaired
	Creditor will receive regular installment payments of a total value, as of the Effective Date of the Plan, equal to the amount of such secured claim and interest at the rate of 4% per annum. Creditor will also receive payments totaling 20% of such unsecured claim. Debtor will make 360 payments of \$836 each on the secured claim and 120 payments of \$187 on the unsecured claim commencing on October 1, 2013.	
Class 6: Secured Claim of Wells Fargo Bank, N.A. (2281 Aldersgate Court, Turlock, California)	Claim Amount	\$180,000 secured, \$148,744 unsecured
	Impairment	impaired
	Creditor will receive regular installment payments of a total value, as of the Effective Date of the Plan, equal to the amount of such secured claim and interest at the rate of 4% per annum. Creditor will also receive payments totaling 29% of such unsecured claim. Debtor will make 360 payments of \$860 each on the secured claim and 120 payments of \$248 on the unsecured claim commencing on October 1, 2013.	
Class 7: General Unsecured Claims	Claim Amount	\$635,000
	Impairment	impaired

	Each holder of a claim in this class shall receive a dividend of 20% of its allowed claim. Debtor shall make 120 payments of \$1,060 each to the class as a whole, with distribution to be pro rata, commencing October 1, 2013.	
Class 8: Debtor's ownership interests	Claim Amount	
	Impairment	not impaired
	The ownership interests of Debtor will not be affected by the plan.	

A. C. WILLIAMS FACTORS PRESENT

- Y Incidents that led to filing Chapter 11
- Y Description of available assets and their value
- N Anticipated future of the Debtor
- N Source of information for D/S
- N 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).

OBJECTIONS:

Bank of New York Mellon

The Bank of New York Mellon, fka the Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2006-OA19, Mortgage Pass-Through Certificates, Series 2006-OA19, ("BNY") objects to the disclosure statement on the grounds that Debtors cannot modify their loan, which is the first priority lien on the Debtors' residence pursuant to 11 U.S.C. § 1123(b) (5).

BNY also argues that the interest rate provided by Debtors is far below the market rate.

Additionally, BNY argues that the disclosure statement and plan are silent to the treatment of post-petition taxes and insurance. BNY states it has been forced to make post-petition advances for taxes and insurance and the escrow shortage is currently \$2,612.39. BNY states that if these advances are treated as administrative priority claims, they must be paid in full on the effective date of the plan.

BNY also states that Debtors have failed to tender regular monthly payments in the months of January 2012 through July 2013, and the loan is in 19 post-petition payments in arrears. BNY states the failure of Debtors to make plan payments implies that the plan is not feasible, as they are unable to maintain the regular monthly note payments.

Lastly, BNY argues that the disclosure statement does not indicate when the arrearage payments start and end or provide the monthly payment amount for their claim.

BBCN Bank

BBCN Bank, successor in interest by merger with NARA Bank ("BBCN"), objects to the disclosure statement on the grounds that it fails to contain the required adequate information necessary to enable creditors to make an informed decision in voting on the proposed plan.

BBCN states that Debtor has failed to seek the court's approval for the use of cash collateral. BBCN states that Debtors defaulted on their pre-petition payments since June 17, 2011, and Debtors have made no post-petition payments. BBCN argues that Debtor admitted spending \$130,000.00 accounts receivable without court approval.

BBCN argues that the Debtor improperly classified their claim, as BBCN became entitled to an administrative claim. This motion is pending before the court. BBCN states that its claim must be paid on the effective date. BBCN also states that the disclosure statement does not state how much cash the Debtor will have on hand on the effective date to pay claims.

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 (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).

DISCUSSION

Here, Debtors-in-Possession have failed to provide adequate information in the disclosure statement. First, Debtors-in-Possession have failed to provide the treatment of post-petition taxes and insurance. Disclosure Statement, Part P. Second, the disclosure statement does not state how much cash the Debtor will have on had on the effective date to pay claims. Disclosure Statement, Part L.

Furthermore, while the Disclosure Statement provides that Class 6 claim of Wells Fargo Bank, N.A. will receive a 20% dividend on their unsecured claim, the actual plan provides that this claim will receive a 29% dividend, which is 9% more than the other unsecured claim. Debtor should address this discrepancy.

Based on the foregoing, creditors cannot make an informed decision in voting on the proposed plan from the disclosure statement submitted.

CONTINUANCE

The court continued the hearing to allow Debtors-in-Possession to file supplemental pleadings of proposed amendments to the Disclosure Statement on or before August 1, 2013.

No proposed amendments have been filed to date.

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 the Disclosure Statement filed by the 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.

6. [12-91736-E-12](#) ANTONIO GOMES

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
6-20-12 [[1](#)]

Debtor's Atty: Thomas O. Gillis

Notes:

Continued from 6/13/13 to be heard in conjunction with other motions in this case.

[TOG-15] Motion of Thomas O. Gillis for Approval of Interim Compensation and Reimbursement of Costs filed 6/27/13 [Dckt 158]; Order granting filed 8/6/13 [Dckt 174]

[TOG-13 related to TOG-12] Ex Parte Motion for An Order Enlarging Time to File Supplemental Exhibits Showing a Historical Profit and Loss of the Dairy Farm, Updated Profit and Loss Statements, and Future Projections of Profit and Loss filed 7/29/13 [Dckt 165]; Order granting filed 8/5/13 [Dckt 171]

7. [12-91736-E-12](#) ANTONIO GOMES
[MNE-1](#) Thomas O. Gillis

CONTINUED MOTION TO DISMISS
CASE
1-16-13 [[84](#)]

CONT. FROM 6-13-13, 4-18-13, 2-21-13

Local Rule 9014-1(f)(2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on January 16, 2013. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2).

The court's tentative decision is to continue the hearing on the Motion to Dismiss to 3:30 p.m. on September 5, 2013. 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:

PRIOR RULING

On February 21, 2013 the court continued the hearing to be heard in conjunction with the motion to confirm. The court ordered opposition, if any, to be filed and served on or before March 28, 2013 with replies to be filed and served on or before April 4, 2013.

On April 8, 2013 Debtors filed an *ex parte* application to shorten time to file and serve a response to the motion to dismiss. Debtor states that his attorney did not calendar the response deadline and that the need to file a response was not discovered until April 7, 2013. Debtor states that the Trustee does not oppose the late filing of a response. On April 9, 2013 the court granted the motion and ordered Debtor to file and serve opposition by April 12, 2013.

The Chapter 12 Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on November 28, 2012.

However, a review of the docket shows that Debtor has filed an Amended Chapter 12 Plan on February 7, 2013, set for hearing April 18, 2013.

This Chapter 12 case was filed on June 20, 2012. On December 1, 2012, the court denied confirmation of the plan proposed by the Debtor in Possession in this case. The court denied the motion in part because of the Debtor in Possession's failure to comply with the minimum pleading requirements of Federal Rule of Bankruptcy Procedure 9013 (motion must state with particularity the grounds from relief). Civil Minutes, Dckt. 78. The court also denied the Motion because the Debtor in Possession was unable to provide the court with the minimum necessary testimony in his declaration to support confirmation. Given that the preparation of the declaration is so easy, the court infers that a party should be able to present the best testimony to the extent possible. Failure to include information could well be because the Debtor in Possession is attempting to hide the information or mislead the court. The court also denied confirmation based on the failure to properly provide for the secured claims of Movin' Hay and A.L. Gilbert Company.

Following the December 1, 2012 denial of confirmation, the Debtor in Possession took no action to present a new plan to the court. On January 16, 2012, the Chapter 12 Trustee filed the present motion to dismiss.

At the prior hearing the court noted the Debtor in Possession's failure to timely prosecute its case. As discussed above Debtor in Possession did not timely file an opposition to the motion to dismiss. It is a party's responsibility to respond to pleadings. Merely taking some action, and tasking the court to review the docket in each case, determine what opposition the debtor in that case may or may not have to the motion, create an opposition for that debtor, place that opposition on the record for that debtor, advocate and then consider the opposition to the motion created by the court for that debtor, and then rule on the opposition created and advocated for that debtor by the court is improper.

The court notes that on February 7, 2012, more than two months after denying confirmation of the prior plan, the Debtor in Possession filed an amended plan and motion to confirm.

The Motion to Confirm states with particularity the following grounds upon which he relies for the court to confirm the amended plan:

- A. Debtor provides his legal conclusion that "his Amended Chapter 12 Plan satisfies the requirements of 11 U.S.C. § 1222 and 1225 and all other applicable rules of law.
- B. "Wherefore, Debtor prays that: 1. His Amended Chapter 12 Plan be confirmed, and 2. He is provided such other and further relief as the Court deems to be just and proper."

Motion, Dckt. 88.

The court reviewed with Counsel and the Debtor in Possession in detail the necessity of stating with particularity the grounds upon which relief is requested in a motion. See Civil Minutes Dckt. 78. At the prior hearing the court noted Debtor in Possession's continued failure to comply with basic pleading standards and provide sufficient information in the motion to confirm.

On March 6, 2013 Debtor in Possession filed an amended motion to confirm stating grounds with particularity to address the pleading defects noted by the court with regard to the initial motion to confirm.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed its opposition as Exhibit A to the motion for leave to file late opposition. Dckt. 112. The Opposition was then never filed.

The Opposition may never have been filed because the Debtor believed it so simple. Debtor, in a four sentence opposition, states that the Trustee's motion to dismiss was based on Debtor's failure to file a plan. Debtor states that he filed a plan on February 7, 2013 as well as a motion to confirm set for hearing on April 18, 2013. Therefore, because the Debtor filed a Plan, he asserts that the Motion to Dismiss should be denied.

DISCUSSION

The court continues the hearing to 3:30 p.m. on September 5, 2013 to be heard with the continued motion to confirm.

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 to Dismiss the Chapter 12 case filed by the Chapter 12 Trustee 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 hearing on the Motion to Dismiss is continued to 3:30 p.m. on September 5, 2013.

8. [12-91736-E-12](#) ANTONIO GOMES
TOG-12 Thomas O. Gillis

CONTINUED AMENDED MOTION TO
CONFIRM CHAPTER 12 PLAN
3-6-13 [[105](#)]

CONT. FROM 6-13-13

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

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 12 Trustee, all creditors, and Office of the United States Trustee on March 6, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(b).

The court's tentative decision is to continue the hearing on the Motion to Confirm the Plan to 3:30 on September 5, 2013. 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:

The Debtor seeks confirmation of his Chapter 12 Plan. Creditor Movin' Hay, Inc. objects to confirmation.

SERVICE

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 lists only the following addresses as those used for service on the Internal Revenue Service:

Internal Revenue Service
PO BOX 21126
Philadelphia PA 19114

Dckt. 107. The proof of service states that the addresses used for service are the preferred addresses for the Internal Revenue Service specified in a Notice of Address filed by that governmental entity.

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.

PLEADING WITH PARTICULARITY

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. Debtor moves the court for an Order confirming his Chapter 12 plan filed on February 7, 2013;

- B. A copy of the plan is attached hereto and incorporated herein by reference;
- C. The Motion is made pursuant to the provisions of 11 U.S.C. §§ 1224, 1225, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of California; and
- D. A copy of the plan has been served on Debtor, all creditors, the Chapter 12 Trustee, the US Trustee and parties requesting special notice.

The Motion to Confirm does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief (confirmation) is based. The motion merely states that the court has authority to approve the plan, states that the plan is attached and has been served, and what code sections the Motion is made pursuant to. This is not sufficient to establish the right to confirmation of the plan.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2)), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a

creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent

on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

CREDITOR MOVIN' HAY, INC.'S OPPOSITION

Creditor Movin' Hay, Inc. opposes confirmation on the following grounds:

- a. The plan provides for disparate treatment of similarly situated creditors. Creditor states that the plan provides for payment to Creditor in Class 2.9 at an interest rate of 4%. Creditor states that the plan provides for payment to Seterus Servicing at a rate of 4.25% even though Seterus is in a more secure position since Seterus holds a first priority deed of trust. Creditor states that the plan does not set forth any logical basis for differentiating between the interest rate among secured creditors. Creditor states that some of the more secured creditors are receiving a higher interest rate than some of the less secured creditors.

- b. The expenses and payments exceed the projected income set forth on Exhibit B. See docket number 92. Creditor states that the subtotal for payments by Debtor through the Trustee are incorrect since payments to various classes of creditors actually totals \$5,173.44 and not \$4,436 as stated on Exhibit B. Creditor states the Class 2.3 payment is incorrectly stated in Exhibit B as \$555.28 and should instead be \$390.28 as stated in the Amended Chapter 12 Plan. Creditors states that the payments are actually \$137.44 more than the amount set forth on Exhibit B. Creditor states that Debtor in Possession does not have sufficient reserve funds to cover expenses.

CONTINUANCE

On April 15, 2013 the Debtor filed a motion to continue the hearing to resolve the objection of Creditor. On April 16, 2013 the court granted the motion and continued the hearing to June 13, 2013. Nothing had been filed before the hearing. The court continued the hearing again to allow Debtor-in-Possession to file and serve supplemental pleadings in support of this motion on or before July 12, 2013. Debtor was to commence making plan payments in the amount of \$3,946.00 to the Chapter 12 Trustee commencing with June 2013 and each month thereafter until further order of the court, confirmation of the plan, conversion of the case or dismissal of the case.

DEBTOR'S SUPPLEMENTAL PLEADINGS

Debtor filed supplemental dairy profit and loss statements, prepared by Debtors-in-Possession CPA, Hillberg and Company in Turlock, California. Debtor-in-Possession also provided a current profit and loss statement with future projections of profit and loss. Debtors filed a proof of service that these were served on July 31, 2013.

MOVIN' HAY, INC.'S SUPPLEMENTAL OBJECTION

Creditor Movin' Hay, Inc. objects, stating that neither counsel or Creditor were served with Debtor's supplemental documents and they discovered on August 7, 2013 that the documents had been filed and it has not had enough time to analyze the exhibits to determine the feasibility of the projected cash flow in comparison with the historical data provided.

Counsel for Creditor asserts that Debtor failed to file a supplemental pleading as required by the court, as none were served on counsel. Counsel states he was not served with Debtor's Ex Parte Motion for an order enlarging time to file supplemental exhibits either and was not aware of the extension.

A.L. GILBERT COMPANY'S OPPOSITION

A.L. Gilbert Company filed an objection stating that he checked the docket on July 29, 2013 at 2:12 and did not see any supplemental pleadings filed by the Debtor. Counsel asserts that neither he nor his client were ever served with any supplemental pleadings by the Debtor, or were served with the ex parte motion for enlarging time to file supplemental exhibits.

Creditor A.L. Gilbert Company states its has not had sufficient time to analyze the supplemental pleadings filed by Debtor. Creditor also states that Debtor has not made all of the required monthly payments to the Chapter 12 Trustee pursuant to the Court's order.

DISCUSSION

Both objecting creditors assert that they were not served with the Debtors-in-Possession supplemental pleadings filed with the court on July 29, 2013. The amended proof of service filed on July 31, 2013 provides a list of creditors served, which includes both Movin' Hay, Inc. and A.L. Gilbert Company and their respective counsel. Dckt. 170. It does appear peculiar that both creditors appear not to have received the supplemental exhibits.

Based on the foregoing, the court continues the hearing on the Motion to Confirm to September 5, 2013, to allow the parties in interest to review the supplemental data provided by the Debtor-in-Possession in support of confirmation. If there is any further opposition, it should be served and filed by August 30, 2013.

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 to Confirm the Chapter 12 Plan filed by the 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 hearing on the Motion to Confirm the Plan is continued to 3:30 p.m. on September 5, 2013.

9. [13-90643](#)-E-12 GARY/CHRISTINE TAYLOR
ADJ-4 Anthony D. Johnston

MOTION TO CONFIRM CHAPTER 12
PLAN
7-3-13 [[51](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 50 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm Chapter 12 Plan 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 court's tentative decision is to deny the Motion to Confirm Chapter 12 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:

Debtors move to confirm their Chapter 12 plan dated July 3, 2013. Debtors farm almonds as sole proprietors on 40 acres in Stanislaus County and also own a 50% membership interest in G&J Farms, LLC, which farms almonds on 150 acres of land in Stanislaus County on a long-term lease.

WELLS FARGO BANK, N.A.'S OPPOSITION

Creditor Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor") opposes the plan on the grounds that its claim for deficiency balance should be allowed because in the absence of overruling federal law, state and contract law created and defines all interest in claims.

Creditor argues that the plan proposes to surrender its collateral, Debtor's 2006 Travel Supreme Select, to satisfy the claim and Creditor would receive no other distribution. The plan proposes to pay unsecured creditors a 6% dividend. Creditor states that the surrendering of the vehicle does not satisfy its claim.

Creditor seeks that the plan be denied or amended to allow Creditor's unsecured claim for any deficiency balance remaining on Debtor's account after disposition of the vehicle.

DEUTSCHE BANK NATIONAL TRUST COMPANY'S OPPOSITION

Deutsche Bank National Trust Company, as Trustee of the Indymac INDX Mortgage Trust 2007-AR15, Mortgage Pass-through Certificates, Series 2007-AR15 Under the Pooling and Servicing Agreement dated June 1, 2007, as serviced by OneWest Bank, FSB, ("DBNTC") opposes the motion to confirm on the grounds that the plan fails to correctly provide for its claim, as the plan provides for its claim in the amount of \$750,000.00, when the parties agreed at the Motion to Value that the value is \$800,000.00. DBNTC also argues that the plan does not reflect the other terms that have been agreed to by the parties, including the interest rate of 5%.

Based on these terms, the monthly payments under the plan to DBNTC are incorrect and should be amended. DBNTC expects this to be resolved by Stipulation before the hearing.

STIPULATION

Debtor and Creditor Wells Fargo Bank, N.A. filed a stipulation agreeing that Debtor will provide for the unsecured claim to be included in Class 8 for similarly situated unsecured claims at a 6% dividend for any deficiency balance remaining on Debtor's account after disposition of the vehicle.

No stipulation has been filed to date regarding Deutsche Bank National Trust Company's opposition.

DISCUSSION

On August 1, 2013, the Debtor and Deutsche Bank National Trust Company agreed at the hearing on the Motion to Value Collateral that the value of the real property commonly known as 4124 S. Gratton Road, California, had a value of \$800,000.00. Civil Minutes, Dckt. 85. As the plan does not provide for the full value of the obligation as determined by the court and both parties, the Chapter 12 plan cannot be confirmed.

The Plan does not comply with 11 U.S.C. § 1225 and is not 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 to Confirm Chapter 12 Plan filed by 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 without prejudice.

10. [12-91564-E-11](#) POCH TAN AND SAMEAN CHUM CONTINUED CONFIRMATION OF PLAN
RHS-1 Anthony D. Johnston OF REORGANIZATION FILED BY
DEBTORS
4-4-13 [[118](#)]

CONT. FROM 8-1-13

Correct Notice Provided. The Proof of Service states that the Order Approving Disclosure Statement, Amended Plan, Amended Disclosure Statement and Ballot were served on Debtor, all creditors, and Office of the United States Trustee on May 17, 2013. By the court's calculation, 76 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm Plan of Reorganization has been set for hearing by the court's Order Approving Disclosure Statement and Fixing Time for Filing Acceptance or Rejections of Plan, Combined with Notice Thereof, dated May 3, 2013.

The court's decision is to grant the Motion to Confirm Plan of Reorganization. No appearance at the August 22, 2013 hearing is required.

PRIOR HEARING

Pursuant to the court's Order Approving Disclosure Statement and Fixing Time for Filing Acceptance or Rejections of Plan, Combined with Notice Thereof, dated May 3, 2013, Debtor was to file and serve its argument and evidence in support of confirmation, replies to any opposition and a ballot tabulation by July 12, 2013. No argument, evidence (such as a Declaration) or a ballot tabulation had been filed at the time of the hearing.

CONTINUANCE

The court continued the hearing to allow Debtor to file evidence in support of confirmation. Debtor filed a Declaration on July 30, 2013.

REVIEW OF PLAN

The Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

<u>May 17, 2013</u>	Plan, Disclosure Statement, Disc Stmt Order, and Ballots Mailed
<u>June 21, 2013</u>	Last Day for Submitting Written Acceptances r Rejections
<u>June 21, 2013</u>	Last Day to File Objections to Confirmation
<u>July 12, 2013</u>	Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service.

Tabulation of Ballots:

Class	Voting	Ballot Percentage Calculation	Claim Percentage Calculation
1: Secured Claim of Cushman Rexrode Capital Corporation	For: 1 Against: 0	100% accepted	100% accepted
2: Secured Claim of Bank of America, N.A.	For: 0 Against: 0	n/a	n/a
3: Secured Claim of Bank of America, N.A.	For: 0 Against:0	n/a	n/a
4: Secured Claim of Bank of America, N.A.	For:0 Against:0	n/a	n/a
5: Secured Claim of Gonor Funding, Inc.	For: 1 Against: 0	100% accepted	100% accepted
6: Secured claim of Internal Revenue Service	For: 0 Against:0	n/a	n/a
7: Secured Claim of Citibank, N.A.	For: 0 Against: 0	n/a	n/a
8: General Unsecured Claims	For: 0 Against:2	100% rejected	100% rejected

Two impaired classes of claims, Class 1 and Class 5 (both secured claims) accepted the plan. One impaired class (general unsecured claims in the sum of \$30,477.37) rejected the plan. Debtor states that the under the plan, the unsecured creditors will receive a 5% dividend whereas in liquidation they would receive a 1% dividend.

The Declaration of Poch Paul Tan (Dckt. 150) filed in support of confirmation provides evidence of the compliance with the necessary elements for confirmation in 11 U.S.C. § 1129:

1. The plan complies with the applicable provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.
2. The proponents of the plan complies with the applicable provisions of the Bankruptcy Code.
3. The plan has been proposed in good faith and not by any means forbidden by law.

4. Any payment made or to be made by the proponent for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

5. The proponent of the plan has disclosed the identity of the Plan Administrators.

6. No governmental regulatory commission, after confirmation of the plan, has jurisdiction over the rates of the debtor. Evidence: Declaration, 2:12

7. With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 et seq., on such date; or

Evidence: Declaration, 2:13-17

8. Not all classes of holders with impaired claims have voted to accept the plan. Evidence: Declaration, 2:18 - 3:20, Tabulation of Ballots.

9. With respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of the Bankruptcy Code, on the effective date of the plan, or as agreed, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim. There are no claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of the Bankruptcy Code for payment under this Plan. For the claims of a kind specified in section 507(a)(8) of the Bankruptcy Code, the holder of such claim will receive on account of such claim regular installment payments in cash equal to the present value of such claim, over a period not to exceed 5 years, and not in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan.

10. The Class 1 (secured) and Class 5 (secured) non-insider claims have accepted the plan.

11. Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. Evidence: Declaration, 4:5-7

12. All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan. Evidence: Declaration, 4:8-9

13. There are no retiree benefits, as that term is defined in section 1114 of title 11 to be provided for after confirmation. Evidence: Declaration, 4:10-11

14. There are no domestic support obligation claims filed or disclosed in this case.

15. No objection has been filed by the holder of an allowed unsecured claim contesting the payments to be made under this plan and the issue of computing the Debtors' projected disposable income has not been presented to this court.

Confirmation of Plan for Non-Accepting Classes - 11 U.S.C. § 1129(b)

1. The court, on request of the proponent of the plan, determines that the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. Evidence: Declaration, 4:12-15, 23-27; Chapter 11 Plan, Disclosure Statement.

2. The Debtors shall receive or retain their interests in property of the estate returned to them under the plan for new value given in the performance of the plan.

Based on the foregoing evidence provided by Debtor, the court grants the Motion to Confirm and the Chapter 11 Plan filed April 4, 2013 is confirmed.

Counsel for the Debtors shall prepare an order confirming the Amended Plan of Reorganization (April 4, 2013), to which a copy of the Amended Plan shall be attached as an exhibit, and lodge said proposed order with the court. The proposed order shall state that the "court's findings of fact and conclusions of law are stated in the civil minutes for the August 22, 2013 confirmation hearing," and the proposed order shall not recite findings of fact and conclusions of law.

11. [12-92570-E-12](#) COELHO DAIRY

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
9-28-12 [[1](#)]

Debtor's Atty: Thomas O. Gillis

Notes:

Continued from 7/18/13 to be heard in conjunction with the motion to confirm Chapter 12 Plan.

[KFV-1] Motion of Creditor Bank of the West to Prohibit the Continued Use of Cash Collateral and for Relief from the Automatic Stay filed 7/24/13 [Dckt 177], set for hearing 8/22/13 at 10:00 a.m.

[TOG-15] Objection to Claim of Black Rock Milling, Claim #24 filed 8/8/13 [Dckt 191], set for hearing 8/22/13 at 10:00 a.m.

[TOG-9] Notice of Erratea to the: Motion for Post-Petition Financing filed 8/15/13 [Dckt 211], set for hearing 8/22/13 at 10:00 a.m.

12. [12-92570-E-12](#) COELHO DAIRY
TOG-16 Thomas O. Gillis

MOTION TO CONFIRM CHAPTER 12
PLAN
6-21-13 [[145](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, and Office of the United States Trustee on June 21, 2013. By the court's calculation, 62 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm Chapter 12 Plan 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 court's tentative decision is to deny the Motion to Confirm Chapter 12 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:

Debtors move to confirm their Chapter 12 plan dated June 21, 2013. Debtor is an organic dairy business located in Modesto, California.

BLACK ROCK MILLING CO., LLC'S OPPOSITION

Creditor Black Rock Milling Co., LLC ("Black Rock") objects to the motion to confirm on the grounds that Debtor breached the Settlement Agreement and Black Rock is now entitled to full repayment of its outstanding debt.

Black Rock asserts that its claim arises from a written contract for providing feed to Debtors in exchange for payment. Debtors failed to pay for the goods. Black Rock then filed a complaint in Stanislaus Superior Court for breach of contract seeking \$332,608.51 in damages. On March 22, 2013, Black Rock and Debtors went to mediation in an attempt to resolve the litigation prior to trial and an agreement was reached signed by all parties. The agreement called for Debtors to make a payment of \$50,000.00 to Black Rock by May 10, 2013, and Debtors were to begin to pay Black Rock \$3,400.00 a month for 60 months. Black Rock states that none of these payments were made despite being almost three months after the payment deadline.

Black Rock stated that it agreed to take a reduced amount based on Debtor's promise to pay a lump sum by May 10, 2013 and made plans to use the payment to satisfy outstanding debts with its own creditors. Black Rock states it now has been sued for its inability to pay its debts as a result of Debtors failure to make timely payments.

Black Rock asserts that Debtor's failure to make a payment was a condition precedent to the settlement agreement, which makes the agreement unenforceable.

Additionally, Black Rock states that the Amended Plan contains minimal changes from the original plan which was denied. Black Rock argues that Debtors intend to continue to operate the business without any significant changes to the dairy operation and without refinancing. Black Rock argues that Debtors have not shown evidence that they will be profitable in future years.

Lastly, Black Rock argues that Debtors have failed to identify all of their assets in the bankruptcy schedules, including the 32.89 acre parcel on Claribel Road, Modesto, California, owned by Frank and Bernadette Coelho. Black Rock states that this shows bad faith on the part of the Debtors.

WESTAMERICA BANK'S OPPOSITION

Creditor Westamerica Bank ("Westamerica") opposes the plan on the grounds that it suffers from the same objectionable infirmities and the original plank, which was denied.

Westamerica argues that the plan is not feasible as Debtors business operations do not generate sufficient income to fund the proposed payments to its creditors under the amended plan. Westamerica states that Debtor has:

- (1) Debtor has breached the cash collateral orders in this case;

(2) Debtor's accountant refuses to perform accounting services because he is owed \$8,000 for work compiling Debtor's 2012 finances;

(3) Debtor has incurred a past due bill for silage chopping in the amount of \$11,000;

(4) Debtor breached a settlement agreement it entered into with its largest unsecured creditor, Black Rock Milling, by failing to make a \$50,000 payment in May 2013;

(5) Debtors have been unable to obtain post-petition financing from Bank of Stockton, Union Bank, and Bank of Nebraska to pay off Bank of the West's claims.

Westamerica also argues that the plan fails to provide a market rate of interest on account of its claims and fails to adequately compensate it for the risks presented. The Bank claims that the interest should be no less, and much greater, than the 6.5% interest rate agreed under the Bank's loan documents.

Lastly, Westamerica argues that the plan unfairly discriminates against it, as all the other secured creditors are to be paid in no less than 20 years, when the plan provides for a 30 year pay off on Westamerica's claim.

BANK OF THE WEST'S OPPOSITION

Creditor Bank of the West ("BOTW") opposes the plan on the grounds that the plan is not feasible as Debtor does not provide sufficient evidence to support its overly optimistic budget projections and has Debtor has incurred significant liabilities that could affect its cash collateral. BOTW states that it has become aware that Debtor's accountants have not been paid and are owed \$8,800 for the preparation of records up to December 31, 2012, a past due silage bill of \$11,000, breach of settlement agreement with Black Rock, and that Debtor has only paid \$2,208 in total administrative expenses.

BOTW also states that the plan includes an unnecessary and uncertain balloon payment that is contingent on future financing.

Additionally, BOTW argues that the proposed settlement agreement with Black Rock and the Motion for post-petition financing have not been approved by the court and should be denied.

BOTW also argues that the proposed plan was not offered in good faith, as Debtor has failed to comply with court orders regarding cash collateral and Debtor has failed to comply with bankruptcy court requirements. BOTW contends that Debtor has used its cash collateral to make unauthorized payments to itself, unsecured creditors, and third-parties, including paychecks to Frank Coelho, draws by Mr. Coelho to himself, payments to Discover Card, Bank of America, and payments on life insurance and satellite television.

Lastly, BOTW objects to its treatment under the proposed plan of amortization of the debt over 20 years at 4.75% and full payment within 7 years, which BOTW states is worse than the treatment provided in the prior

plan. BOTW argues this must be because Debtor's financial condition has declined in the last five months.

DEBTOR'S OPPOSITIONS

Debtor filed evidentiary objections to the Declaration of Kurt Vote filed by Bank of the West. Debtor states that Mr. Vote is attempting to testify as to the validity and accuracy of documents and reports filed by third parties and is thus hearsay.

Kurt F. Vote submitted a declaration on August 8, 2013, Dckt. 202, in support of Bank of the West's objection to confirmation. Mr. Vote is a shareholder with the law firm of Wanger Jones Helsley PC, counsel for Creditor Bank of the West. Mr. Vote's declaration is 11 pages in length and Debtor has failed to provide which paragraph or section in which Mr. Vote testifies as to the validity and accuracy of documents that third parties prepared. The court will not find and argue the alleged hearsay statements for Debtor's counsel. Therefore, this objection is overruled as vague.

Debtor also filed an evidentiary objection to the Declaration of Walter C. De Bruyn in support of Bank of the West's objection to confirmation. Debtor argues the exhibits are inadmissible as they show a dairy appraisal report and liquidation analysis that was prepared and reviewed by third parties and there is no evidence verifying the evidence presented.

Walter C. De Bruyn submitted a declaration on August 8, 2013, Dckt. 203, in support of Bank of the West's objection to confirmation. Mr. De Bruyn is Vice President in the Agri Business/Managed Assets Division of for Creditor Bank of the West. In his role, Mr. De Bruyn testifies that the appraisal and liquidation analysis were prepared by his company BOTW.

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Federal Rule of Evidence 901(a). As Vice President in the Agri Business/Managed Assets Division of BOTW, Mr. De Bruyn is qualified as record keeper to testify as to whether the documents prepared by his company are true and accurate copies. Therefore, these documents are properly authenticated and Debtor's objection is overruled.

DISCUSSION

First, Debtor's plan is depended on a Motion for Approval of Compromise and a Motion for Approval of Post-Petition Financing. The court has denied both of these motions. As the plan is based on these motions being granted, it is currently not feasible.

Second, Debtor is proposing to pay a lump sum into the plan on or before month 60 in the amount of \$89,370.00, from a refinance of his real property. Debtor does not provide evidence as to what real property will be refinanced in order to obtain the funds, when such loan will be taken out, or for how much the Debtor will be able to qualify. The court is not satisfied that this treatment is feasible. Debtor has not shown sufficient evidence to the court regarding the refinance. Therefore, the plan is not presently feasible.

The evidence provided in support of confirmation is insufficient. Debtor has provided the court with yearly financial statements 2009-2012, which is illegible. The Debtor provides the court with a Typical Annual Profit and Loss Projection intended to show that the plan is feasible. Exhibit C, Dckt. 149. The court is unable to determine even if the one month "projection" is at all plausible. Mr. Coelho does not provide any information on how he determined these projections. Declaration, Dckt. 148. The lack of providing even minimal competent evidence is an indication that the plan has been proposed and prosecuted in bad faith.

The Plan does not comply with 11 U.S.C. § 1225 and is not 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 to Confirm the Chapter 12 Plan filed by the 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 Motion to Confirm the Plan is denied and the proposed Chapter 12 Plan is not confirmed.

13. [13-91297-E-11](#) ARIANA AVESTA, INC.

**PRELIMINARY STATUS CONFERENCE
RE: VOLUNTARY PETITION
7-11-13 [1]**

STATUS CONFERENCE SUMMARY

SUMMARY OF SCHEDULES

Real Property Schedule A	FMV	LIENS	
Combination Residential and Commercial Property Located at 8048 & 8050 Highway 12, Wallace, California	\$970,000	(\$1,042,584)	

Personal Property Schedule B	FMV	LIENS	
Checking Account	\$1,000		
Shelving, Coolers, Cash Registers	\$10,000		
Groceries and tobacco Products	\$30,000		

Secured Claims Schedule D	TOTAL CLAIM AMOUNT	FMV	UNSECURED CLAIM PORTION
BaySierra Financial First Deed of Trust	(\$1,030,279)	\$970,000	(\$72,584)
Calaveras County Tax Collector Tax Lien	(\$12,305)		
David Atwal Second Deed of Trust	(\$450,000)		(\$450,000)
Pawnee Leasing Computer Equipment	(\$12,299)	\$5,000	(\$7,299)

PRIORITY UNSECURED CLAIMS SCHEDULE E	TOTAL CLAIM AMOUNT	PRIORITY	GENERAL UNSECURED
California Board of Equalization	(\$25,000)	(\$25,000)	
Franchise Tax Board	(\$10,000)	(\$10,000)	
Internal Revenue Service	(\$8,000)	(\$8,000)	

GENERAL UNSECURED CLAIMS SCHEDULE F	TOTAL CLAIM AMOUNT		
Valley Pacific Petroleum Services	\$103,000		
Payten E. Reed Dog Bite Law Suit	Unknown		

STATEMENT OF FINANCIAL AFFAIRS

Question 1 Income

2013 YTD	\$500,000	
2012	\$1,500,000	
2011	\$1,854,347	

Question 2 Non-Business Income

2013 YTD	none	
2012	none	
2011	none	

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Question 3 Payments within 90 days

Creditor	Amount	Date
	None	

Payments within one year

Creditor	Amount	Date
	None	

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