

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

April 10, 2014 at 3:30 p.m.

1. [11-92004-E-11](#) GREGORY/CYNTHIA SHINKWIN STATUS CONFERENCE RE: VOLUNTARY
PETITION
6-3-11 [[1](#)]

Debtors' Atty: David C. Johnston

Final Ruling: The court having ordered that the case be administratively closed, **the Status Conference is removed from the calendar.** No appearance at the April 10, 2014 Status Conference is required.

Notes:

Set by court order filed 3/11/14 [Dckt 217]. Debtors to address (1) why post-confirmation quarterly operating reports have not been filed (U.S. Trustee Notice, Dckt 215), and (2) why this case has not been administratively closed. Post-confirmation status report to be filed by 3/27/14.

Operating Reports filed: 3/20/14 [period ending Sept 2013; period ending Dec 2013; period ending Mar 2014]

Debtors' Post-Confirmation Status Report filed 3/27/14 [Dckt 225]

[DCJ-3] Debtors' Motion to Administratively Close Chapter 11 Case filed 3/27/14 [Dckt 223], no hearing set

April 10, 2014 at 3:30 p.m.

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2. [11-94224-E-11](#) EDWARD/ROSIE ESMAILI
RHS-1 David C. Johnston

CONTINUED CONFIRMATION OF
AMENDED PLAN OF REORGANIZATION
FILED BY DEBTORS
9-13-13 [[339](#)]

CONT. FROM 3-6-14, 1-16-13

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, Debtor's Attorney, all creditors, and Office of the United States Trustee on November 14, 2013. By the court's calculation, 63 days' notice was provided.

Tentative Ruling: The Motion to Confirm Plan of Reorganization 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 confirm the Amended Plan of Reorganization. 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 Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

<u>11-15-13</u>	Plan, Disclosure Statement, Disc Stmt Order, and Ballots Mailed
<u>12-16-13</u>	Last Day for Submitting Written Acceptances or Rejections
<u>12-16-13</u>	Last Day to File Objections to Confirmation
<u>12-30-13</u>	Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

Tabulation of Ballots Filed 1/15/14:

Class	Voting	Ballot Percentage Calculation	PercentageClaim Calculation
1 - IRS	For: 0 Against: 0		
2 - BBCN	For: 0 Against: 1	100% against	100% against

3 - Bank of America, N.A.	For:0 Against:0		
4 - Key Bank, N.A.	For:0 Against:0		
5- Wells Fargo Bank, N.A.	For:0 Against:1	100% against	100% against
6 - Wells Fargo Bank, N.A.	For:0 Against:1	100% against	100% against
7 - General Unsecured	For: 1 Against: 0	100% for	100% for
8 - Debtors' ownership interests	For: 0 Against: 0		

At the hearing, the Debtors in Possession advised the court that only one ballot, for a \$2,000.00 general unsecured claim was filed voting for the Plan. Four other ballots voting no were filed for classes of secured claim. One Creditor, BBCN, asserts that it also has a general unsecured claim for hundreds of thousands of dollars which would swamp the one \$2,000 claim. No ballot was returned by BBCN for the general unsecured claim.

EVIDENCE

The declaration of Edward Esmaili was filed in support of confirmation providing evidence of the compliance with the necessary elements for confirmation in 11 U.S.C. § 1129. Dckt. 410.

OPPOSITION

Wells Fargo Bank, N.A. (Kay Circle Property)

Wells Fargo Bank, N.A., holding a first priority deed of trust against the real property commonly known as 1153 Kay Circle, Turlock, California, objects to the plan on the basis that it fails to comply with 11 U.S.C. § 1129(a)(11). Creditor states that while Debtors address how they intend to pay post-confirmation property taxes and insurance but have failed to address if they intend to pay the post-petition, pre-confirmation tax and insurance advances made by Creditor.

Creditor also argues that it is unclear if the rental properties listed by Debtors are income generating properties. If so, Debtors need to disclose which properties do and why Debtors should be allowed to retain and subsidize a negative cash flow property instead of surrendering it.

Lastly, Creditor states Debtors' Amended Plan cannot be confirmed on the grounds that the Debtors appear to have commingled Secured Creditor's cash collateral and/or used Wells Fargo's cash collateral without obtaining

Wells Fargo's consent or prior Court approval. According to monthly operating report for month ending November 31, 2013, the cumulative (Case to Date) rents/leases collected is \$29,200.00. The bank account statement (account ending 8493) attached to the MOR where the rental income of \$1,100.00 appears to have been deposited, shows a beginning balance of \$761.83 and ending balance of \$559.65. Creditor argues that Debtor should explain and account for all of Creditor's cash collateral.

Creditor withdrew its opposition on April 3, 2014, Dckt. 453.

Wells Fargo Bank, N.A. (Aldersgate Property)

Wells Fargo Bank, N.A., holding a first priority deed of trust against the real property commonly known as 2281 Aldersgate, Turlock, California, objects to the plan on the basis that it fails to comply with 11 U.S.C. § 1129(a)(11). Creditor states that while Debtors address how they intend to pay post-confirmation property taxes and insurance but have failed to address if they intend to pay the post-petition, pre-confirmation tax and insurance advances made by Creditor.

Creditor also argues that it is unclear if the rental properties listed by Debtors are income generating properties. If so, Debtors need to disclose which properties do and why Debtors should be allowed to retain and subsidize a negative cash flow property instead of surrendering it.

Lastly, Creditor states Debtors' Amended Plan cannot be confirmed on the grounds that the Debtors appear to have commingled Secured Creditor's cash collateral and/or used Wells Fargo's cash collateral without obtaining Wells Fargo's consent or prior Court approval. According to monthly operating report for month ending November 31, 2013, the cumulative (Case to Date) rents/leases collected is \$29,200.00. The bank account statement (account ending 8493) attached to the MOR where the rental income of \$1,100.00 appears to have been deposited, shows a beginning balance of \$761.83 and ending balance of \$559.65. Creditor argues that Debtor should explain and account for all of Creditor's cash collateral.

Creditor withdrew its opposition on April 3, 2014, Dckt. 451.

BBCN Bank

Creditor BBCN Bank, successor in interest by merger with Nara Bank, objects to Debtors' Plan because it fails to contribute all of the Debtors' post-petition earnings to fund the plan and because the plan violates the absolute priority rule.

As explained in the Plan, the Bank holds a claim of \$130,000 as either an administrative claim or a secured claim. If the Bank's claim is allowed as an administrative claim, it will allegedly be paid on the Effective Date. If it is merely secured, it will be paid over ten years. Additionally, the Bank holds a general unsecured claim of \$677,057 which should fall into Class 7. It is not clear why the Debtors have placed secured and unsecured classes in the same class or whether this is even proper.

Creditor argues that the Plan only provides for payment of 20% to unsecured claims, yet the numbers provided by the Debtors indicate that they can contribute far more. Creditors state the Debtors claim a monthly net income of \$18,724 but only propose to pay \$14,110 into the Plan; a monthly disparity of \$4,614 that should also be paid to creditors. Furthermore, Creditor objects to several of the monthly expenses identified by the Debtors, including depreciation of \$1,365.00; administrative expense of \$10,421; equipment repairs of \$2,348; fees and charges of \$1,145; and professional fees of \$1,161. Creditor states that these are not explained and are not supported by any documentation whatsoever. Neither the Plan nor the accompanying Disclosure Statement attaches a single exhibit to support the business expenses claimed by the Debtors. Moreover, the Debtors provide themselves with a \$6,000 monthly draw with no discussion of their monthly expenses whatsoever even though this case is an individual Chapter 11 case.

CONTINUANCE

The Debtors-in-Possession did not provide a tabulation of ballots in support of plan confirmation. Furthermore, the Debtors-in-Possession did not provide evidence in support of confirmation.

The court continued the Confirmation Hearing to allow the Debtors in Possession and BBCN Bank (the one remaining objecting creditor) to address the true underlying economic issues for the treatment of this claim. The Debtors in Possession and Wells Fargo Bank, N.A. advised the court and parties in interest that the Wells Fargo objection had been resolved. The Debtors in Possession will propose plan amendments for the surrender of the collateral to Wells Fargo Bank, N.A.

AMENDED PLAN OF REORGANIZATION

On March 31, 2014, Debtors-in-Possession filed an Amended Plan of Reorganization. Dckt. 447. The Amended Plan states that Creditor BBCN has agreed to different treatment, namely payment within 45 days of the Effective Date of the Plan. The plan also allows Creditor Wells Fargo Bank, N.A. to exercise its contractual rights under state law of their claims against the real properties in the estate.

CHAPTER 11 CONFIRMATION STANDARDS

Confirmation of a Chapter 11 Plan is governed by 11 U.S.C. § 1129. The court begins its confirmation analysis of the proposed Chapter 11 Plan with the requirements of 11 U.S.C. § 1129(a). Debtor Edward Esmaili's declaration was filed in support of confirmation. Dckt. 410.

1. The plan complies with the applicable provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

Evidence: Declaration, Dckt. 410, the Court's file in this case ("Declaration").

2. The proponent of the plan complies with the applicable provisions of the Bankruptcy Code.

Evidence: Declaration, Order Approving Disclosure Statement (Dckt. 375), Certificate of Service, Dckt. 376

3. The plan has been proposed in good faith and not by any means forbidden by law.

Evidence: Declaration, Court's file in this case.

4. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, 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.

Evidence: Not applicable, individual debtors. Declaration.

5. (A) (I) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

Evidence: No such representative or successor. Debtors to serve as Plan Administrators. Declaration, Amended Plan Part IV (Dckt. 447).

6. Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

Evidence: Not Applicable. Declaration ¶ 9.

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

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Evidence: Declaration ¶ 10; Tabulation of Ballots (Dckt. 409); Amended Chapter 11 Plan (Dckt. 447); Withdrawals of Opposition by Wells Fargo Bank, N.A. (Dckts. 451, 453).

8. With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

Evidence: Declaration ¶ 10; Tabulation of Ballots; Withdrawals of Opposition by Wells Fargo Bank, N.A. (Dckts. 451, 453).

9. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) 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, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of 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, each holder of a claim of such class will receive--

(I) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim 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--

(I) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

Evidence: Declaration ¶ 10; Amended Plan (Dckt. 447) Part III Unclassified Claims and Class 1 treatment.

10. If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

Evidence: Tabulation of Ballots - Class 7, impaired general unsecured claims.

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; Monthly Operating Reports; Amended Chapter 11 Plan.

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 ¶ 15.

13. The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor

has obligated itself to provide such benefits.

Evidence: Not Applicable - Declaration ¶ 16.

14. If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

Evidence: Not Applicable - Declaration, Schedules, and Proofs of Claim filed in the case.

15. In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

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

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

Evidence: No Objection by a creditor holding a general unsecured claim has been filed. (All objections have been withdrawn based upon final amendments to the Chapter 11 Plan.)

16. All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

Evidence: Not Applicable - No Transfers Provided. Amended Chapter 11 Plan.

11 U.S.C. § 1129(b) - "Cramdown"

The court notes that the following impaired Classes of Claims have not voted for the Plan: Class 1, Class 2, Class 3, Class 4, Class 5, and Class 6. Those creditors voting against the Plan have withdrawn their oppositions.

The impaired Classes of Claims voting for confirmation of the Plan are: Class 7, general unsecured.

Therefore, confirmation must proceed by "cram down."

After a specific request for nonconsensual confirmation, and a

showing that all other confirmation requirements of section 1129(a) are met, section 1129(b)(1) requires that the plan proponent prove, as to the dissenting class, that the plan is both fair and equitable and not unfairly discriminatory. 11 U.S.C. § 1129(b)(2) assists in this determination by providing specific examples of possible fair and equitable treatment. (Thereby "cramming down the throats" of the non-accepting creditors confirmation of the plan.) The Ninth Circuit has adopted the following test: after looking at all the facts and circumstances, the court examines (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) the treatment of the classes discriminated against. *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. Pshp. (In re Ambanc La Mesa Ltd. Pshp.)*, 115 F.3d 650 (9th Cir. Ariz. 1997).

Additionally, there is the requirement that if a class of claims is not paid in full, there cannot be any payment to a junior class of claims or interests, including the Debtor being revested with property based solely on his or her pre-petition interests.

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

11 U.S.C. § 1129(b)(2)(B)(ii). This is commonly referred to as the "Absolute Priority Rule."

While it otherwise appears to be a daunting task to confirm a Chapter 11 Plan over a non-accepting creditor, the court's have recognized the "New Value Exception," by which a debtor puts "new value" into a plan and thereby "buys" the revesting of the property based on the new value, not the pre-petition interests. A leading commentator defines the Absolute Priority Rule of 11 U.S.C. § 1129(b)(2)(B)(ii) as:

A plan of reorganization may not allocate any property whatsoever to any junior class on account of the members' interest or claim in a debtor unless all senior classes consent, or unless such senior classes receive property equal in value to the full amount of their allowed claims, or the debtor's reorganization value, whichever is less. In most cases, this formulation will not cause any problems.

7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). To constitute new value, the contribution offered by the equity holders must be:

- A. New,
- B. Substantial,
- C. Money or money's worth,
- D. Necessary for successful reorganization, and

E. Reasonably equivalent to the value or interest received.

In re Bonner Mall Partnership, 2 F.3d 899, 908 (9th Cir. 1993).

Debtor-in-Possession argues that the plan is fair and equitable because secured creditors retain their liens and receive full payment with interest and unsecured creditors will receive just as much as they would in a Chapter 7 Liquidation.

CONSIDERATION OF NEW VALUE EXCEPTION EVIDENCE

The Amended Plan will be funded from existing cash generated during the pre-confirmation period and by the Debtors post-confirmation. This will be from the operation of their business and the properties. The monthly payments generated by the Debtors from their post-petition work will be approximately \$10,532.00 each.

These individual Debtors have provided the court with evidence of substantial new value consistent with the standards set by the Ninth Circuit Court of Appeals in *Bonner Mall Partnership*. Though some of these activities could be called "sweat equity," they are necessary costs and expenses which must be undertaken for a successful reorganization. If not providing those services to the Plan Administrator, those services would have to be obtained from another service and paid for with monies generated under the Plan. The Debtors could be selling his services elsewhere, generating money in hand income. These are new, substantial, or monies worth, and necessary for a successful reorganization

The value of these services are reasonably equivalent to the value of the interest in the reorganized assets under the Second Amended Plan. Through the valuation of the secured claims, the liens against the assets of the estate are equal to the value of the properties.

The court finds that the Debtors in Possession have complies with the requirements of 11 U.S.C. § 1129(a) and (b), and the Amended Chapter 11 Plan is confirmed.

Counsel for the Debtors in Possession shall prepare and lodge with the court an order confirming the Amended Plan, with a copy of such plan attached thereto as an exhibit.

3. [12-91442](#)-E-11 ALEXANDRINO/DURVALINA
VASCONCELOS

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
5-18-12 [[1](#)]

Debtors' Atty: Thomas O. Gillis

Notes:

Continued from 1/16/14 to allow sufficient time for the court to rule on counsel's fee application and for the Plan Administrator, the former Debtors in Possession, to move for the case to be administratively closed.

No attorney fee application filed as of 4/3/14.

No motion to administratively close case filed as of 4/3/14.

JANUARY 16, 2014 STATUS CONFERENCE

The Status Conference was continued to 3:30 p.m. on April 10, 2014. Counsel for the Debtors in Possession must file his final fee application. The Status Conference is continued to allow sufficient time for the court to rule on the fee application and for the Plan Administrators, the former Debtors in Possession, to move for the case to be administratively closed.

The Chapter 11 Plan was confirmed by order of this court filed on December 19, 2014. Dckt. 198.

4. [12-92570-E-12](#) COELHO DAIRY
TOG-28 Thomas O. Gillis

MOTION TO CONFIRM CHAPTER 12
PLAN
2-24-14 [[424](#)]

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, all creditors, and Office of the United States Trustee on February 24, 2014. By the court's calculation, 45 days' notice was provided.

Tentative Ruling: The Motion to Confirm 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 grant 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:

Debtor-in-Possession filed an Amended Chapter 12 plan on February 24, 2014. Debtor states the plan pays 100% to all approved creditors. No opposition has been filed.

Upon review of the proposed Chapter 12 Plan, as amended, the evidence in the form of the declaration of Frank Coelho, the Debtor, 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, 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), 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)], 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.

EVIDENCE IN SUPPORT OF CONFIRMATION

Frank Coelho, one of the general partners of the Debtor and Debtor in Possession, has provided his Declaration (Dckt. 46) in support of the Motion to Confirm. He provides testimony as to how the Debtor will perform

as plan administrator. FN.1.

FN.1. The court notes that the Debtor in Possession persists in erroneously listing that Coelho Dairy is also Frank Coelho and Bernadette Coelho. The court recalls that earlier in this case counsel for the Debtor in possession contended that assets of the general partners were part of this bankruptcy case for purposes of the automatic stay. Such contentions were rejected by the court. 11 U.S.C. §§ 541, 362(a).

Mr. Coelho's declaration is suspect in several regards. He states under penalty of perjury that "**I operate** a [sic] organic dairy business for 14 years. **I will operate my organic dairy business** during the term of my Chapter 12 Plan of February 24, 2014 ("the Plan"). Declaration ¶ 2, Dckt. 426. He also states that "**I filed** a Voluntary Petition under Chapter 12 on September 28, 2012...No other trustee has been sought or appointed **in my case.**" *Id.* ¶ 1. These statements are clearly false. Mr. Coelho is a general partner of the Debtor and Debtor in Possession. It is not "my business," but is currently the "estate's business" and was the "partnership's business." In his fiduciary capacity as a general partner and in fulfilling the fiduciary duties for Coelho Dairy, a general partnership, as the Debtor in Possession, it is not "Frank Coelho's business." These misstatements continue throughout the Declaration. FN.2.

FN.2. These testimony shortcomings, and making it appear that Mr. Coelho disregards his fiduciary duties, rest at the doorsteps of the attorneys for the Debtor in Possession. It also demonstrates that Mr. Coelho has not been educated as to what it meant for Coelho Dairy, a general partnership to file bankruptcy, and his fiduciary duties. The court is unsure as to what other legal liberties that Mr. Coelho has been allow to take in connection with this case.

Mr. Coelho does provide testimony⁷ as to the increase in milk production by the herd and the financial projections provided in Exhibits A, B, C and D. Dckt. 428. The court has reviewed each of these Exhibit.

Exhibit A - Historical Milk Production

This chart is consistent with Mr. Coelho's testimony, but provides the production only through May 2013, a year ago. Though Mr. Coelho testifies that the cows "now give 5.8 gallons per cow," the court cannot tell if that is a one month aberration or a solid production trend.

Exhibit B - Coelho Dairy Financial Highlights

Exhibit B is described as the "yearly financial statements which were prepared by "my CPA, Genske Mulder, L.L.C." Declaration, ¶ 4. Exhibit B does not appear to consist of the 2009, 2010, 2011, 2012 and 2013 Financial Statements, but a composite of those multiple years into a summary of some kind. Exhibit B is footnoted "See account's report," however there do not appear to be any "accountant's reports" included as part of Exhibit B.

Taken on its face, the total income for 2013 is stated to be \$29.69 and the Income after payment of Operating Expenses was only \$0.64. Presumably this is a fraction of the actual amount, but the court cannot tell from Exhibit B if it is 1/10, 1/100, 1/1,000, 1/10,000, or some other fraction.

Exhibit C - Income and Expense Projections During Plan Period

Mr. Coelho testifies that Exhibit C is a projection of expenses and income during the five years of the Chapter 12 Plan. He states that he believes that "he" will be to operate "my dairy business" consistent with these projections.

The Revenue Projections are relatively consistent, around \$119,000 a month, with several winter months projected to be \$127,000 for the first year, and every year, of the Plan.

However, upon review, it appears that all Counsel and the Mr. Coelho have done is create a budget for the first 12 months under the plan and then copied it for each of the following four years. It appears that all of the data for each year is identical. The court does not find this to be very credible, but more indicative of made up information to justify the Debtor in Possession, and its principals getting what they want, irrespective of the actual facts.

Exhibit D - Copy of a Check Register

No testimony is provided as to how this Exhibit was prepared or its significance. Exhibit D goes on for 11 pages. The court is separately addressing the Objection to the Claim of Black Rock Milling.

TERMS OF AMENDED CHAPTER 12 PLAN

The Proposed Amended Chapter 12 Plan provides for the following payments to be made for expenses and claims:

- A. Administrative Expenses to be paid in full upon approval by the court.
- B. Secured Claims will have their liens and rights preserved, with a requirement that a detailed statement will be required for additional fees or expenses asserted as part of the secured claim going forward.
 - 1. Class 2.1 - Nebraska State Bank. The terms of the existing loan are maintained, and Mary Coelho, who is a general capacity as the trustee of a family trust, is to sell property she owns to pay this claim in full. (The plan does not specific at time or methodology for any sale.) The Creditor will retain its lien on real property.
 - 2. Class 2.2 - WestAmerica Bank. The Claim, secured by real property, will be amortized paid over a period

of 25 years at an annual interest rate of 5.25%, with the loan being due in full seven years from confirmation. All post-petition defaults are to be cured within 60 days of confirmation. The Creditor will retain its lien.

3. Class 2.3 - CNH Capital. The Claim (projected to be \$3,252.30), secured by farm equipment, will be paid in full within 60 days of confirmation. The Creditor will retain its lien.
4. Class 2.4 - Wells Fargo Dealer Services. The Claim, secured by a truck, will be amortized over 5 years at 5% annual interest. The Creditor will retain its lien.

C. Priority Claims - None.

D. General Unsecured Claims will be pro rata payments for a 100% dividend, with interest at 5% per annum, to be completed during the five year term of the Plan.

No creditors have objected to the present Motion. Though that does not guaranty that the court will blindly grant the motion and abdicate its duty to find that there has been compliance with the Bankruptcy Code, the court does consider it to be significant. FN.3.

FN.3. See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); see also *Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

It may be that the Creditors believe that the Plan terms are fair and the Debtor, as Plan Administrator, will be able to comply. It may be that the Debtor in Possession and general partners have refinanced the Bank of the West claim and the other claims are to be paid within a year or two, otherwise the creditors will go after their collateral.

Whatever the case may be, the court is convinced that the Debtor in Possession and its general partners will not get a Chapter 12 Plan before the court in any better form or with better evidence than is now before the court. This is not because the court concludes that such better evidence does not exist, but that this Debtor in Possession is incapable of producing, and having produced for it, such evidence.

The court grants the Motion and confirms the Amended Chapter 12 Plan. Counsel for the Debtor in Possession shall prepare an order confirming the Plan, with the Amended Chapter 12 Plan attached as an exhibit, and lodge it with the court.

5. [13-91588](#)-E-12 MARY JO MEIRINHO

CONTINUED STATUS CONFERENCE RE:
CHAPTER 12 VOLUNTARY PETITION
8-29-13 [[1](#)]

Debtor's Atty: Scott A. CoBen

Final Ruling: The court having set the Confirmation Hearing, the Status Conference is continued to 3:30 p.m. on May 22, 2014. No appearance at the April 10, 2014 Status Conference is required.

Notes:

Continued from 1/30/14

[SAC-2] Application to Approve Compensation of Debtor's Counsel on a Fixed Fee Basis filed 10/25/13 [Dckt 51]; Order granting filed 2/6/14 [Dckt 98]

[EDC-1] Motion to Dismiss Case filed by Creditor Kay Vlach [Dckt 61] continued to 10:30 a.m. on 7/24/14 [Dckt 105]

[SAC-6] Motion to Authorize Trustee to Disburse Funds to Creditor Kay Vlach filed 2/7/14 [Dckt 100]; Order granting filed 2/16/14 [Dckt 109]

[SAC-4] Application for Order Authorizing Debtor to Employ Real Estate Agent filed 1/23/14 [Dckt 82]; Order granting filed 2/17/14 [Dckt 110]

[SAC-3] Amended Order for Continued Confirmation Hearing [Dckt 114], set for 5/22/14 at 3:30 p.m.

6. [13-91189](#)-E-11 MICHAEL/JUDY HOUSE

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
6-25-13 [[1](#)]

Debtors' Atty: Robert M. Yaspan

Notes:

Continued from 2/13/14

Operating Reports filed: 3/11/14

Status Conference Report filed 3/27/14 [Dckt 98]

[RMY-7] Declaration of Michael House re Timeshare Sale and Charitable Contributions filed 3/27/14 [Dckt 100]

MONTHLY OPERATING REPORT CONFERENCE SUMMARY

February 2014 Report		Filed: March 11, 2014		
INCOME	Current		Cumulative	
Wages	\$ 28,010.00		\$ 194,452.00	
Sales	\$ 1,995.00		\$ 13,061.00	
Interest	\$ 1.00		\$ 5.00	
Wages	\$ 297.00		\$ 6,256.00	
Sale of Assets			\$ 8,051.00	
Liquidation of Silver Bullion	\$ 5,000.00		\$ 5,000.00	
Gifts From Family			\$ 2,000.00	
Returns & Allowances	\$ (45.00)		\$ (45.00)	
Rounding	\$ _____		\$ <u>1.00</u>	
Total	\$ 35,258.00		\$ 228,781.00	
EXPENSES	\$ (28,018.00)		\$ (253,749.00)	
PROFIT/(LOSS)	\$ 7,240.00		\$ (24,968.00)	
Specific Expenses		Current		Cumulative
Professional Fees		\$ 0.00		\$ 10,485.00
Asset Investment		\$ 0.00		\$ 13,179.00

The Monthly Operating Report raises several items of concern for the court. These include the liquidation of assets by the Debtors in Possession (with no order authorizing the sale having been issued by the court), the investing of \$13,179.00, and the payment of \$10,485.00 in Professional Fees (without the court having issuing an order approving any such fees or authorizing the payment).

From the latest Monthly Operating Report the Debtors in Possession appear to be operating at a financial loss, being able to continue only with gifts from family members and liquidating assets (without court authorization).