

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Fresno Federal Courthouse  
2500 Tulare Street, 5<sup>th</sup> Floor  
Courtroom 11, Department A  
Fresno, California

**PRE-HEARING DISPOSITIONS**

**DAY: TUESDAY**  
**DATE: SEPTEMBER 15, 2015**  
**CALENDAR: 1:30 P.M. CHAPTER 11 CASES**

**GENERAL DESIGNATIONS**

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

**COURT'S ERRORS IN FINAL RULINGS**

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

1. [15-12705](#)-C-11 GEORGE SALWASSER MOTION FOR COMPENSATION FOR  
HLF-3 JUSTIN D. HARRIS, DEBTORS  
ATTORNEY(S)  
8-17-15 [[64](#)]
- JUSTIN HARRIS/Atty. for dbt.

**Final Ruling**

The case reassigned, the matter is continued to September 23, 2015, at 10:00 a.m., before The Honorable Christopher M. Klein, Department C, Courtroom 35, Sacramento, California.

2. [15-12705](#)-C-11 GEORGE SALWASSER MOTION FOR RELIEF FROM  
THA-1 AUTOMATIC STAY  
CHARLOTTE SALWASSER/MV 8-6-15 [[43](#)]  
JUSTIN HARRIS/Atty. for dbt.  
THOMAS ARMSTRONG/Atty. for mv.

**Final Ruling**

The case reassigned, and pursuant to Notice filed August 27, 2015, ECF No. 79, this matter is dropped from calendar and will be renoticed by moving party.

3. [13-17136](#)-A-11 BHAVIKA'S PROPERTIES, CONTINUED STATUS CONFERENCE RE:  
LLC VOLUNTARY PETITION  
11-1-13 [[1](#)]
- ELAINE NGUYEN/Atty. for dbt.

**Final Ruling**

This matter is continued to September 23, 2015, at 1:30 p.m.

4. [15-10366](#)-A-11 ELLIOTT MANUFACTURING CONTINUED STATUS CONFERENCE RE:  
COMPANY, INC. VOLUNTARY PETITION  
2-2-15 [[1](#)]
- PETER FEAR/Atty. for dbt.

**Final Ruling**

This matter is continued to November 10, 2015, at 1:30 p.m. In the event a plan and disclosure statement have not been filed, not later than 7 days prior to the continue status conference the debtor in possession shall file a status report.

5. [14-11595](#)-A-11 RAY FISHER PHARMACY,  
INC.

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
3-31-14 [[1](#)]

ALAN KINDRED/Atty. for dbt.

**No tentative ruling.**

6. [14-11595](#)-A-11 RAY FISHER PHARMACY,  
PWC-4 INC.

CONFIRMATION HEARING RE:  
CHAPTER 11 PLAN BY PLAN  
PROPONENTS: RAY FISHER  
PHARMACY, INC., SCOTT HIROSHI  
ASAI, AMY TOSHIKO ASAI, KATIE  
HISAKO ASAI, PRIDE MOBILITY  
PRODUCTS CORPORATION, RANDY  
ASAI AND NANCY ASAI  
7-1-15 [[202](#)]

ALAN KINDRED/Atty. for dbt.  
RESPONSIVE PLEADING

### **Tentative Ruling**

**Motion:** Confirmation of Chapter 11 Plan

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Denied

**Order:** Civil minute order

Ray Fisher Pharmacy, Inc. moves for confirmation of its Third Amended Joint Chapter 11 Plan of Reorganization.

### **LEGAL STANDARDS**

The bankruptcy court shall only confirm a Chapter 11 plan if it satisfies all of the requirements of § 1129. 11 U.S.C. § 1129(a). The plan proponent bears the burden of proving by a preponderance of the evidence that each of the elements of § 1129 have been satisfied.

"The party proposing the Chapter 11 plan has the burden of proving it meets all § 1129 confirmation requirements by a *preponderance of the evidence*. [*In re Arnold & Baker Farms* (9th Cir. BAP 1994) 177 BR 648, 654-655; *In re Monarch Beach Venture, Ltd.* (CD CA 1993) 166 BR 428, 431-432; *In re Acequia, Inc.*, supra, 787 F2d at 1358]" March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Chapter 11, Plan Confirmation Procedure § 11:1892 (Rutter Group 2015).

### **DISCUSSION**

#### No Evidence

"The plan proponent must provide admissible evidence at the confirmation hearing proving that the plan is confirmable. [*In re Lenox* (9th Cir. 1990) 902 F2d 737, 739—court erred in confirming plan without hearing evidence that plan complied with § 1129; see also *In re Acequia, Inc.* (9th Cir. 1986) 787 F2d 1352, 1358-1359—court can consider evidence presented at prior evidentiary hearing in determining plan's confirmability]." March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Chapter 11, Plan Confirmation

Procedure § 11:1890 (Rutter Group 2015); see also, Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan § 6.0(3), filed July 23, 2015, ECF # 211 (requiring "a confirmation brief, supported by competent evidence, demonstrating that each of the elements of 11 U.S.C. § 1129(a) and, if applicable, 11 U.S.C. § 1129(b), have been satisfied.")

Here, the moving party has not offered any declaration or other competent evidence demonstrating that the elements of § 1129 have been met. The only purported supporting evidence offered by the plan proponents is the "Outline of Evidence," Exhibit A in Support of Memorandum of Points and Authorities, filed September 2, 2015, ECF # 246. But the evidence is not competent, nor does it address all of the elements of § 1129.

#### Insufficient Notice

"Plan confirmation requires a noticed hearing. [11 USC § 1128(a); FRBP 2002(b) & (d), 3020(b)(2); *In re Acequia, Inc.* (9th Cir. 1986) 787 F2d 1352, 1358; *In re Mid Pac. Airlines, Inc.* (BC D HI 1990) 110 BR 489, 490-491]. . . . Parties in interest must be given at least 28 days' notice (by mail) of (a) the time fixed for filing objections to plan confirmation; and (b) the confirmation hearing date. [See FRBP 2002(b) & (d), 3020(b)(2), 9034(i) (service on U.S. Trustee)]." March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Chapter 11, Plan Confirmation Procedure § 11:1866-1867 (Rutter Group 2015).

This court implemented the notice provisions by scheduling order. Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan §§ 1.0, 3.0, filed July 23, 2015, ECF # 211. That order required transmission of the plan, disclosure statement, order and ballots not later than July 29, 2015. *Id.* Such a date is precisely 28 days before the creditors' August 26, 2015, deadline to object to confirmation.

But the plan, disclosure statement, order and ballots were not mailed to creditors until August 1, 2015, which is only 25 days prior to the deadline to objection to confirmation. Certificate of Service, Filed August 1, 2015, ECF # 225.

#### Lack of Good Faith

Section 1129(a)(3) requires that the plan be proposed in good faith. In the absence of objection, the court may presume the existence of good faith. "Where no objections are filed to the plan, the court may properly find that the plan has been proposed in good faith and not by any means forbidden by law *without receiving evidence on those issues*. [FRBP 3020(b)(2); see also 11 USC § 1129(a)(3)] . . . . The Federal Rules of Evidence apply in all bankruptcy cases; and evidence supporting or contesting the plan thus must be submitted in *admissible* form—by declarations under penalty of perjury attached to the motion or plan confirmation memorandum, and/or live testimony. [See FRBP 9017; *In re Carolina Triangle Ltd. Partnership* (9th Cir. BAP 1994) 166 BR 411, 415—plan confirmed where contesting creditor failed to present admissible evidence to support its objection]." March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Chapter 11, Plan Confirmation Procedure § 11:1893-1894 (Rutter Group 2015).

The plan proposes quarterly payments of \$5,000 each for three years, which will pay general unsecured creditors a 3-5% dividend. Third Amended Joint Chapter 11 Plan of Reorganization § 4.4, filed July 1, 2015, ECF # 202. But as the U.S. Trustee notes the debtor's own financial projections (albeit unauthenticated) show that as of May 2016 (one year after plan confirmation) the debtor projects cash on hand of \$598,760. Exhibit A to Third Amended Joint Chapter 11 Plan of Reorganization, filed July 1, 2015, ECF # 201. Like the U.S. Trustee, the court is unable to reconcile large amounts of cash on hand, low distributions to unsecured creditors and good faith. The debtor in possession has not sustained its burden of proof on the question of good faith.

#### Payment of Priority Secured and Unsecured Taxes

Absent consent by the affected taxing authority, tax claims require particular treatment, including time limitations for payment, of tax claims.

"Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that . . . (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 this title, 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 this title, the holder of such claim will receive on account of such claim regular installment payments in cash--(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and (D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C)." 11 U.S.C. § 1129(a)(9)(B), (C), (D).

The plan provides, "On the Effective Date, except to the extent that a holder of an Allowed Priority Tax Claim agrees to different treatment, each holder of an Allowed Priority Tax Claim shall receive their Pro-Rata distribution of deferred quarterly cash payments of \$58,507.59 over a period not exceeding five (5) years, equal to the Allowed Amount of such claim. Holders of the Allowed Priority Tax Claims shall retain Liens on Collateral, if any, until their respective Allowed Priority Tax Claim is paid in full." Third Amended Joint Chapter 11 Plan of Reorganization § 2.2, filed July 1, 2015, ECF # 202. Though less than articulately expressed, this plan must be construed as calling for payments over five years from the effective date, not the order for relief, e.g. "On the Effective Date . . . each holder of an Allowed Priority Claim shall receive payments . . . over a period not to exceed five (5) years." As a consequence, to the

extent that the plan purports deal with priority or security tax claims covered by § 1129(a)(9)(B), affirmative consent of the affected creditor must be obtained.

The debtor has provided the affirmative consents of the Internal Revenue Service and the State Board of Equalization. Exhibit B in Support of Memorandum of Points and Authorities, filed September 2, 2015, ECF # 246. But no consent has been obtained for the following tax claims. Nor has objection been filed to any of the following claims. Such claims enjoy the presumption of validity. Fed. R. Bankr. P. 3001(f).

*Claim No. 7: Employment Development Department*

The Employment Development Department has filed a claim for \$16,141.85. Claim No. 7, filed May 16, 2014. Of that amount, the claim asserts priority under 11 U.S.C. § 507(a)(8) for \$3,750.42. As a consequence, those claims must be paid on later than five years from the order for relief, i.e., March 31, 2014. Because the plan does not so provide and because the consent of the impacted creditors has not been obtained, the plan cannot be confirmed.

*Claim No. 8: City of Fresno*

The City of Fresno has filed a claim for \$4,091.30. Claim No. 8, filed July 3, 2014. Of that amount, the claim asserts a priority under 11 U.S.C. § 507(a)(8) for 44,091.30. As a consequence, those claims must be paid on later than five years from the order for relief, i.e., March 31, 2014. Because the plan does not so provide and because the consent of the impacted creditors has not been obtained, the plan cannot be confirmed.

*Claim NO. 10: County of Fresno*

The County of Fresno has filed a secured claim for \$106,651.16. Claim No. 10, filed July 30, 2014. As a consequence, those claims must be paid on later than five years from the order for relief, i.e., March 31, 2014. Because the plan does not so provide and because the consent of the impacted creditors has not been obtained, the plan cannot be confirmed.

Conditions Precedent

The plan contains four conditions precedent to confirmation, including deposit into escrow of \$45,000 by the New Investors and deposit into escrow of \$15,000 by Scott Hiroshi. Third Amended Joint Chapter 11 Plan of Reorganization § 9.1, filed July 1, 2015, ECF # 202. But there is no evidence that these conditions have been satisfied.

For each of these reasons, confirmation will be denied. Additional grounds for denial may well exist. But having identified five such grounds precluding confirmation, the court finds it unnecessary to review or delineate further the grounds for denial of confirmation.

**CIVIL MINUTE ORDER**

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

Findings of fact and conclusions of law are stated in the civil

Ray Fisher Pharmacy, Inc.'s motion for confirmation of chapter 11 plan has been presented to the court. Having considered the motion and supporting documents,

7. 14-11595-A-11 RAY FISHER PHARMACY,  
PWC-7 INC.  
RAY FISHER PHARMACY, INC./MV  
ALAN KINDRED/Atty. for dbt.

No tentative ruling.