

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 16, 2014 at 1:30 p.m.

1. 14-28443-E-13 PERRY/LOUISE ALLEN MOTION TO EXTEND AUTOMATIC STAY
D. Randall Ensminger 8-28-14 [[19](#)]

Tentative Ruling: The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f) (2) (iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and parties requesting special notice on August 28, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

The Motion to Extend the Automatic Stay is denied without prejudice.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the

September 16, 2014 at 1:30 p.m.

Debtor's second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 13-27807) was **closed** with discharge on September 27, 2013. See Order, Bankr. E.D. Cal. No. 13-27807, Dckt. 18, September 23, 2014.

11 U.S.C. § 362(c)(3) states:

(c) Except as provided in subsections (d), (e), (f) and (h) of this section -

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was **dismissed**, other than a case refilled under a chapter other than chapter 7 after dismissal under section 707(b)

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

11 U.S.C. § 362(c)(3)(A) (emphasis added).

Here, the Debtor's previous bankruptcy was closed, after successful prosecution by Debtor, and not dismissed. Under the plain language of § 362(c)(3), the automatic stay terminates after 30 days only if the previous case was pending within one-year preceding the second case and the first case was dismissed. Here, while the first case was pending within one year prior to the instant case, the first case was closed with discharge, not dismissed, which removes the Debtor's case from the purview of § 362(c)(3)(A).

Because of the first case being closed with discharge, 11 U.S.C. § 362(c)(3)(A) is not applicable and the automatic stay is not limited to the 30 day cap. The motion is denied without prejudice.

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 Extend the Automatic Stay filed by Perry and Louise Allen, 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 without prejudice. The thirty-day limitation on the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(A) is not applicable in

September 16, 2014 at 1:30 p.m.

- Page 2 of 17 -

this case, with the prior case which was pending within one-year of the filing of this case (Bankr. E.D. Cal. 13-27807, having been closed on September 27, 2013, after Debtors granted their discharge, and not dismissed.

2. [12-28879-E-11](#) ANNETTE HORNSBY CONTINUED APPROVAL OF AMENDED
SK-51 Sunita Kapoor DISCLOSURE STATEMENT FILED BY
DEBTOR
4-15-14 [[236](#)]

No Tentative Ruling: 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.

Correct Notice NOT Provided. The Proof of Service states that the amended Plan, amended Disclosure Statement, and supporting pleadings were served on creditors and the Office of the United States Trustee on September 5, 2013. By the court's calculation, 11 days' notice was provided. Pursuant to the court's order continuing the hearing on the Motion to Approve the Disclosure Statement (Dckt. 252), Debtor was to file the proposed amended disclosure statement on or before September 2, 2014.

The Disclosure Statement and Plan of Reorganization was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

The court's decision is to xxxxxxxx the Motion to Approve the Disclosure Statement.

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 does not list any address for the Internal Revenue Service.

A motion is a contested matter. See Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was made on two of the required addresses but neglected to serve the Internal Revenue Service at the addresses specified on the roster of governmental agencies maintained by the Clerk. Dckt. 274. Therefore, service was inadequate.

Additionally, it appears that several of the creditors were served with the Disclosure Statement, including Capital One, City of Oakland, Credit One Bank, First Premier Bank, and Pro Solutions to a P.O. Box. See Proof of Service, Dckt. 274. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed

expeditiously.”).

Furthermore, the court ordered on June 5, 2014 that the hearing on the Motion to Approve the Disclosure Statement would be continued to September 16, 2014 at 1:30 p.m. and that the Debtor-in-Possession shall file the proposed amended disclosure statement on or before September 2, 2014. The Debtor-in-Possession filed the amended disclosure statement on September 5, 2014. Dckt. 272. FN. 1.

FN.1. The court notes that the Debtor-in-Possession originally filed an amended disclosure statement on September 4, 2014. Dckt. 266. After review of the two disclosure statements, the two disclosure statements and the two amended plans have slight differences. The court will only be reviewing the September 5, 2014, most recently filed plan and disclosure statement. Dckt. 270 & 272.

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: May 8, 2012

Background: Debtor-in-Possession receives income from her retirement, social security, the rental part of her home and one residential property. Debtor-in-Possession states the collapse of the real estate market in addition to difficulty negotiating with Wells Fargo Bank, N.A., which secures two of the three real properties owned by Debtor-in-Possession and that started foreclosure proceedings, caused the filing of the petition. Debtor-in-Possession has a pending State Court Action for a wrongful foreclosure against Deutsche Bank National Trust Company in relation to the real property known as 950 Harrison Street, Suite 207, San Francisco, California.

Summary of Plan:

Creditor/Class	Treatment	
Administrative Claims US Trustee and Attorney Fees	Claim Amount	
	Impairment	
	UST: \$650 estimated Attorney: \$5,100 estimated Under this plan, Administrative Expenses shall be paid in full on the effective date of the plan.	

<p>Class 1 Wells Fargo Bank, N.A.</p> <p>Secured by first deed of trust on 2319 Bennington Drive, Vallejo, CA</p>	<p>Claim Amount</p>	<p>\$462,000.00</p>
	<p>Impairment</p>	<p>Impaired</p>
<p>Under the proposed plan, the Debtor will retain this property secured by Class 1 claimant.</p> <p>Debtor-in-Possession has obtained a loan modification. The new principal value of the note will be \$467,807.28, \$5,807.28 of the new principal shall be deferred and treated as a non interest bearing principal forbearance. The new principal balance less the deferred principal balance is \$462,000.</p> <p>The new interest rate is 4.125%. Under the plan, Debtor shall pay Wells Fargo Bank a monthly principal and interest payment of \$1,965.95 plus an escrow payment for taxes and insurance of \$936.69, which may adjust periodically.</p> <p>The Debtor-in-Possession and Wells Fargo have entered into a stipulation allowing the Debtor-in-Possession to use Wells Fargo's cash collateral for debt service and to pay towards the monthly mortgage installment. The docket entry for the stipulation is Dckt. 250.</p> <p>Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete.</p> <p>In the event of a default, this claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor-in-Possession maintains all rights and protections of California Real Property and Foreclosure Law.</p>		

Class 2 Stan Shore Trust Secured by second deed of trust on 2319 Bennington Drive, Vallejo, CA	Claim Amount	\$125,000.00
	Impairment	Impaired
	Stan Shore Trust, Stan Shore Trustee claim is secured against the real property commonly known as 2319 Bennington Drive, Vallejo, California is determined to be a secured claim in the amount of \$14,063.00 and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. Principal and interest only payment of \$259.00 on the amount of \$14,063.00 will be made through the plan at the interest rate of 4% for 60 months.	
Class 3 Franchise Tax Board Secured by tax lien on 2319 Bennington Drive, Vallejo, CA	Claim Amount	\$6,642.49
	Impairment	Impaired
	A secured claim has been filed by the Franchise Tax Board in the amount of \$6,642.49. The Franchise Tax Board has agreed to debtor making a monthly payment of \$125.60 including 3% interest, starting ten days from the effective date of the plan. Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete. In the event of a default, this Claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor-in-Possession maintains all rights and protections of California Real Property and Foreclosure Law.	

<p>Class 4 Wells Fargo Bank, N.A.</p> <p>Secured by first deed of trust on 324 Moonraker Drive, Vallejo, CA</p>	Claim Amount	\$310,577.37
	Impairment	Impaired
	<p>The Moonraker Drive property has a value of \$212,000, pursuant to a stipulation [Doc# 163] with Wells Fargo Bank, N.A. Wells Fargo Bank N.A.'s first secured claim against this property is limited to \$212,000. The remaining portions of Wells Fargo Bank N.A.'s first secured claim and second secured claim are now unsecured and shall receive the treatment of other general unsecured claims as described below in class 7. Under the Plan, Debtor shall pay Wells Fargo Bank N.A. the full amount of its secured claim as follows: Monthly Payments of: \$1,057.61 for P & I and property taxes (\$456.67) for a total monthly payment of \$1,514.28.</p> <p>Calculated at 5.25% interest for a period of 40 years.</p> <p>Material default of either treatment includes missing a payment, as well as failure to maintain taxes and insurance post-confirmation. This default can be cured if, within 10 days of receiving notice of such default, Debtor-in-Possession makes the payment. Payments to begin on December 1st, 2013.</p> <p>Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete.</p>	
<p>Class 5 Wells Fargo Bank, N.A.</p> <p>Secured by second deed of trust on 324 Moonraker Drive, Vallejo</p>	Claim Amount	\$310,577.37
	Impairment	Impaired
	<p>Wells Fargo Bank, N.A. second Deed of Trust secured against the real property commonly known as 324 Moonraker Drive, Vallejo California 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. This property is encumbered by a senior lien securing claims which exceed the value of this property.</p>	
<p>Class 6 General Unsecured Claims</p>	Claim Amount	\$381,277.23 estimated
	Impairment	Impaired

	<p>Debtor-in-Possession shall make sixty (60) monthly payments to the general unsecured class. Each participating member of the unsecured class shall receive a pro rata share of these monthly payments in accordance with the ratio in the amount of their claim against the Debtor-in-Possession and the total overall amount of the general unsecured claims against the Debtor.</p> <p>Unsecured creditors will receive 5% of the excess income left over after payment of debtors administrative claims, priority tax claims and secured creditors. Thus, unsecured creditors will receive approximately \$97.61 per month, over 60 months, for a total of approximately \$5,856.60 Payments to begin on the 1st of the month following the effective date of Debtor's Plan.</p>	
Class 7 Equity Interests	Claim Amount	
	Impairment	Unimpaired
	<p>Debtor shall retain all property of the estate and any other property to which Debtor had a right to prior to filing Bankruptcy and to which Debtor's may obtain rights to receive in the future.</p> <p>Application to Absolute Priority Debtor-in-Possession submits that the absolute priority rule does not bar the viability of this Plan under the particular circumstances of the case. Debtor-in-Possession Filed Chapter 11 in the individual capacity. Debtor-in-Possession proposes to apply all of her disposable income for the five year duration of the plan to make payments to unsecured creditors. Therefore, the restrictions of the absolute priority rule should not limit this Plan.</p>	

A. C. WILLIAMS FACTORS PRESENT

Y Incidents that led to filing Chapter 11

Y Description of available assets and their value

Y Anticipated future of the Debtor

N 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

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).

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).

OPPOSITION

Stan Shore Creditor Objection - May 7, 2014

Stan Shore, in pro per, filed an objection to the amended disclosure statement. Mr. Shore states that he has set aside \$97,000.00 loaned to the Debtor for his son's college education. Mr. Shore states he proposes a plan that will waive all previously unpaid interest and unpaid late fees, postpone future payments of principal and interest and reduce future interest. Mr. Shore states the "above proposed plan" eliminates any

and all financial hardship related to this loan and allows the Debtor to stay in her home without monthly interest payments. Mr. Shore states that this is a fair resolution and asks the court to approve the Creditor's plan and allow Creditor's loan terms.

Wells Fargo Bank, N.A. Opposition - May 19, 2014

Wells Fargo Bank, N.A. ("Creditor"), which holds a claim secured by a first deed of trust against the Debtor's residence, 2319 Bennington Drive, Vallejo, California, opposes Debtor's Second Amended Disclosure Statement filed on April 15, 2014 (Dckt. 236). Dckt. 246. Creditor states that the disclosure statement and plan contain the incorrect monthly principal and interest payment about, as stated the in loan modification between the parties. Creditor states the amount is \$1,966.95, not \$1,965.95.

Creditor also argues that Debtor alleges that the Bennington Property generates monthly rental income of \$1,500. Creditor states it is unclear from the Debtor's monthly operating reports ("MOR") on file in this case if the rental income has been/is being segregated.

Further, Creditor states this case was commenced in May 2012 and Debtor has not obtained a court order allowing Debtor to use Creditor's cash collateral. No motion to use Creditor's cash collateral has been filed. Creditor has not consented to Debtor's use of its cash collateral. If Debtor has been collecting rental income of \$1,500.00 per month since the inception of this case through and including (at least) April 2014, the total rental income should be \$34,500.00. Creditor states that Debtor needs to account for Wells Fargo's cash collateral.

However, Creditor does not direct the court to any motions it has filed to protect its interests or other steps if it was not "consenting" to the known use of cash collateral by the Debtor in Possession. The asserted "non-consented to" use of cash collateral for the past two years is not a basis for denying approval of a disclosure statement.

United States Trustee's Objection - September 9, 2014

The United States Trustee ("UST") opposes approval of the Debtor-in-Possession's Disclosure Statement filed September 4, 2014. FN.2. The UST argues that the disclosure statement provides that unsecured creditors will receive approximately \$97.61 per month. However, the chart and the narrative, as well as the plan say that payments to unsecured creditors will be \$27.67 per month. However, this objection is now moot because it appears that the UST's opposition was based on the September 4, 2014 disclosure statement and not the September 5, 2014 amended disclosure statement.

FN.2. While the UST is objecting under the September 4, 2014 amended disclosure, the same deficiencies and errors are present in the September 5, 2014 amended disclosure, except for the chart narrative objection made by the UST. Additionally, the UST filed an amended opposition on September 11, 2014 (Dckt. 283) which only added the docket control number to the opposition. There was no substantive changes to the UST's objection between the two oppositions.

Additionally, the UST objects to the disclosure statement as it does not comply with 11 U.S.C. § 1129(a)(15)(B). The disclosure statement and the plan say that the Debtor-in-Possession will apply "all of her disposable income for the five year duration of the plan" to make payments to the unsecured creditors. Dckt. 266, 267. By contrast, the chart in the disclosure statement shows that Debtor-in-Possession is going to keep \$603.26 per month of the funds left after payment of all personal expenses and plan payments (\$10,606.23 per month total income minus \$10,002.97 total expenses). Dckt. 267. Both the disclosure statement and the plan state that unsecured creditors will receive 5% of the excess income left over after payment of other creditors and the Debtor-in-Possession's expenses. This means that the Debtor-in-Possession will retain most of her disposable income.

The UST also objects on the grounds that the plan fails to reflect creditor Stan Shore's § 1111(b) election. The UST understands this to mean that Shore has elected to have his entire claim treated as a secured claim and that he is waiving his unsecured claim. However, the disclosure statement and the plan include him among the class of general unsecured claims.

The UST also objects to the approval of the disclosure statement because it fails to address the potential applicability of the absolute priority rule. The UST alleges that the disclosure statement mixes the provisions in 11 U.S.C. §§ 1129(a)(15)(B) and 1129(b)(2)(B), which are independent provisions. Additionally, because not every judge accepts the inapplicability of the absolute priority rule in individual cases, the disclosure statement should address what the plan will provide should the rule be found applicable.

Stan Shore Creditor Objection - September 10, 2014

Stan Shore, now represented by counsel, filed an objection to the amended disclosure statement. Dckt. 277. Mr. Shore states that under the amended disclosure statement, Mr. Shore's secured claim is limited to \$14,063.00 of his total estimated claim based on the fact that the Debtor-in-Possession values the Bennington Property at \$476,063.00 and the senior loan is estimated at \$462,000.00. Debtor-in-Possession proposes that the remainder of Mr. Shore's claim be treated as unsecured and the interest rate to be reduced to 4%. Mr. Shore argues that either of these acts qualifies as an impermissible modification of a claim secured by the debtor's principal residence under 11 U.S.C. § 1123(b)(5).

Additionally, Mr. Shore argues that the amended disclosure statement cannot be approved because it fails to provide sufficient information to creditors as to how Mr. Shore's loan will be treated. Mr. Shore also states that on July 28, 2014, Mr. Shore made an election to have his claim be treated and allowed as fully secured under 11 U.S.C. § 1111(b). However, Mr. Shore argues that Debtor-in-Possession proposes to treat Mr. Shore as only partially secured and the rest as general unsecured which Mr. Shore argues is impermissible under bankruptcy law.

Mr. Shore objects also on the grounds that Debtor-in-Possession's amended disclosure statement is deficient as it fails to address the arrears on Mr. Shore's loan. Mr. Shore states that Debtor-in-Possession has made no payments on the loan since the filing of the bankruptcy. Mr. Shore states that there is a total of \$27,317.38 in arrears that the Debtor-in-Possession fails to address.

Lastly, Mr. Shore objects stating that under the current plan and amended disclosure statement, the Debtor-in-Possession proposes to make monthly payments to the senior lender of the Bennington Property in the amount of \$1,966.95 plus an escrow for taxes of \$1,006.19 and insurance on \$120.00. According to Mr. Shore, the Debtor-in-Possession proposes to pay, in total, \$3,093.14 to the senior lienholder for the Bennington Property. However, pursuant to the loan modification agreement reached between the parties, the total amount owed is \$2,903.64 and Debtor-in-Possession provides no information as to why the monthly loan payments have increased or what the extra payment will go towards. Mr. Shore argues additionally that Debtor-in-Possession proposes to make payments of \$1,683 to the senior lienholder on her rental property but the parties agreed to payments of \$1,514.28 and Debtor-in-Possession has not explained why there is an extra amount being paid. Finally, Mr. Shore notes that the Debtor-in-Possession lists payment of landscaping and repairs twice. Under her monthly expenses, Debtor-in-Possession notes payments of \$881.86 per month for "Landscaping and Repairs." Later, Mr. Shore argues, under living expenses, the Debtor-in-Possession adds an additional \$180.00 for "Home Maintenance & Landscaping." Mr. Shore is unclear why these costs are spread out over two separate sections and the basis for the amounts.

ANALYSIS

There are severe service issues that must be addressed by the Debtor-in-Possession.

In addition to the service issues, Creditor has raised a an issue regarding the cash collateral of Wells Fargo Bank, N.A. While a review of the docket reveals that the court has not approved the use of the cash collateral of Wells Fargo Bank, N.A., the court notes that it has been two years since the filing of this case. Creditor's argument that Debtor-in-Possession was using its cash collateral, it did nothing, and now it disapproves of the earlier disclosure statement is not persuasive. Creditor chose not to act over the past two years in this case and therefore the court considers it tacitly authorized the use of its cash collateral.

As for Mr. Shore's original proposal, it appears he is attempting to state alternative plan terms, not an objection to the proposed Disclosure Statement. First, under the terms of the current proposed plan, the Stan Shore Trust, secured by a second Deed of Trust against the real property commonly known as 2319 Bennington Drive Vallejo California 94591 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. Order, Dckt. 150. Mr. Shore objects to the proposed plan which would pay him \$0.00 on his secured claim and an approximate 0.15% dividend on the general unsecured claim. However, the objection to the proposed plan treatment is not necessarily an objection to the disclosure

statement.

Mr. Shore's second set of objections filed on September 10, 2014 also appears that he is attempting to state alternative plan terms. Mr. Shore does point out that there are discrepancies which brings into question the veracity and feasibility of this Chapter 11 case, with some numbers being inflated or potentially double counted. However, as with Mr. Shore's original objections, the crux of Mr. Shore's objection is his proposed plan treatment and not necessarily an objection to the disclosure statement.

Both the UST and Mr. Shore argue that the amended disclosure statement does not properly reflect Mr. Shore's 11 U.S.C. § 1111(b) election. Neither the plan nor the amended disclosure statement reflect Mr. Shore's election and continues to show Mr. Shore having both secured and unsecured claim.

The court also notes that the Debtor in Possession has been prosecuting state court litigation against the persons who assert they purchased real property commonly known as 950 Harrison Street, Unit 207, San Francisco, California. The Debtor listed this property on Schedule A, asserting that the foreclosure thereon was wrongful and that she owned the property. Dckt. 24 at 1. On Schedule D the Debtor listed Deutsche Bank AG as a creditor having a claim secured by the Harrison Street Property. Dckt. 27 at 2.

At the April 16, 2014 Status Conference it was reported by the Purchasers that they prevailed on a summary judgment in the State Court Action and obtained a determination that they were the owners of the property. Counsel for the Debtor in Possession reported that the Debtor in Possession had engaged counsel to prosecute an appeal of that summary judgment granted for the Purchasers.

The Disclosure Statement does not include information of the State Court litigation, the asserted interests of the estate in the Harrison Street Property, the prosecution of an appeal, the funding of counsel and the appeal, and provision for the Harrison Street Property if it is determined that the estate has an interest in that Property. The Disclosure Statement, in the "Events Leading Up to Chapter 11 Filing" section states,

"The Debtor in Possession has a possible contingent claim in a condominium at 950 Harrison St., Ste 207, San Francisco, California, 94107 for \$525,000 in 2000. The Debtor-in-Possession has been prosecuting State Court litigation in San Francisco Superior Court Case #CGC12-520585 against the persons who assert they purchased the Harrison Street property. The purchasers prevailed on a Summary Judgment in the State Court action and obtained a determination that they were the owners of the property. Counsel, Wallace C. Doolittle, agreed to a flat fee of \$10,000 to file the appeal, all briefing and attendance at oral argument. The \$10,000 was paid by Debtor-in-Possession's relatives with an understanding that they will not be reimbursed. If Debtor-in-Possession can establish this contingent claim, then she will notify the Court and Creditors within 30 days and will

amend the plan.”

Dckt. 270, Disclosure Statement, pg. 7-8:19-28; 1-3. While the amended disclosure statement provides more information, no information is provided as to the nature of the claim, only a statement that it is a contingent claim (without identifying any contingencies to the claim maturing into a ripe, actionable claim or the grounds of the appeal) which dates back to 2000.

The Debtor in Possession has not obtained authorization to employ counsel to prosecute an appeal. Such counsel is not entitled to compensation for the services he or she is providing the Debtor in Possession. 11 U.S.C. §§ 327, 329, 330, and 331.

The Disclosure Statement includes a proposed budget, which includes detailed information for the Debtor’s projected monthly post-confirmation expenses. These expenses stated in the Disclosure Statement and stated in the most recent Monthly Operating Report are broken down as follows:

Expense	Disclosure Statement (Dckt. 270)	July 2014 Monthly Operating Report (Dckt. 264)
Bennington Dr. PITI, HOD, Repairs, Maintenance, Principal and Interest Payment to Stan Shore	(\$4,234.00)	
Moonraker Dr. PITI, Repair, Maintenance	(\$2,720.43)	
Real Property Rent/Lease		(\$4,030.00)
Living Expenses	(\$2,775.00)	
General Monthly Expenses		(\$5,652.00)
	(\$9,729.43)	(\$9,682.00)

The July 2014 Monthly Operating Report lists the Debtor in Possession having \$160,783.00 in general monthly expenses (excluding a Rent/Lease expense, which the court interprets to be the monthly mortgage payments) for the period June 2012 through July 2014 (a 27 month period). This averages \$5,954.93 in non-Rent/Lease/mortgage payments per month. Because this court requires plan proponents to provide evidence to establish future income and expense projections are credible, often times the monthly operating reports are provided as part of that evidence.

The Debtor in Possession has not provided any breakdown on the

Monthly Operating Report of what constitutes "General Monthly Expenses." No expenses are listed for payment of any rental property related expenses. This raises an issue which the Debtor in Possession will have to address for the confirmation hearing.

Using the Debtor in Possession's budget stated in the Disclosure Statement, she has income of \$10,606.23 a month and Living Expenses of (\$2,775.00) a month, which generates \$7,831.00 of monthly net monies to fund a plan. As the court reads the Plan, the following payments are required for Administrative Expenses, Priority Claims, and Secured claims.

	Monthly Average For 60 Month Plan
U.S. Trustee Fees of \$650.00 FN.1.	\$10.83
Counsel for Debtor in Possession, \$5,100.00 Administrative Claim FN.1.	\$85.00
Franchise Tax Board Priority Claim	\$125.60
Wells Fargo Bank, N.A. Secured Claim, Bennington Dr.	\$3,093.14
Wells Fargo Bank, N.A. Secured Claim, Moonraker Dr.	\$1,514.28
California Franchise Tax Board Secured Claim	\$125.60
Stan Shore Secured Claim, Bennington Dr.	\$259.00
Average Monthly Total Plan Payments for Administrative Expenses, Priority Claims, and Secured Claims Stated by Debtor in Possession	\$5,213.45

 FN.1. The court does not expect the Administrative Expenses for the U.S. Trustee and Counsel for Debtor in Possession to be amortized over 60 months, but to be paid as required by the Bankruptcy Code. The above model is used just to determine the average monthly projected disposable income which the Debtor in Possession states that she is generating under the Chapter 11 Plan.

With \$7,831.23 of monthly net income to fund a plan, it appears that there is \$2,617.78 a month to fund payment to creditors holding general unsecured claims. Over 60 months this totals \$157,066.80. The Disclosure Statement identifies there being only \$97.61 a month being deposited for distribution to creditors holding general unsecured claims - which totals \$5,856.60. The Disclosure Statement does not identify how the additional

\$151,210.20 of monies is distributed during the 60 month term of the proposed Plan. The Debtor-in-Possession has not explained, justified, or amended any of the plans or disclosure statements to account for this substantial and significant differences in monies that are to be distributed.

Considering the fact that the plan and amended disclosure statement as it is currently presented to the court does not apply all of Debtor-in-Possession's disposable income to the plan, the absolute priority rule appears not to be applicable here. In fact, the Debtor-in-Possession admits to the fact that not all of the disposable income will be paid into the plan: "Unsecured creditors will receive 5% of the excess income left over after payment of debtors administrative claims, priority tax claims and secured creditors." Dckt. 270, pg. 16-17; 28, 1-4.

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 Approve Amended Disclosure Statement filed by Annette Hornsby, the Debtor in Possession 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 xxxx and the Amended Disclosure Statement is xxxx.