

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

December 4, 2013 at 3:00 p.m.

1.	<u>12-30992</u> -E-11	MACHELLE HOLLOWAY	APPROVAL OF DISCLOSURE
	RAS-13	Scott D. Schwartz	STATEMENT FILED BY DEBTOR
			11-1-13 [<u>244</u>]

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 all creditors, parties requesting special notice and Office of the United States Trustee on November 1, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to continue the hearing on the Motion to Approve Disclosure Statement to 3:00 p.m. on -----, 2014. 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:

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

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to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

For Cases filed in the Sacramento Division:

United States Attorney
(For [insert name of agency])
501 I Street, Suite 10-100
Sacramento, CA 95814

For Cases filed in the Modesto and Fresno Divisions:

United States Attorney
(For [insert name of agency])
2500 Tulare Street, Suite 4401
Fresno, CA 93721-1318

. . .

(c) Notice to the Internal Revenue Service. In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

- (1) United States Department of Justice
Civil Trial Section, Western Region
Box 683, Ben Franklin Station
Washington, D.C. 20044
- (2) United States Attorney as specified in LBR 2002-1(a)
above; and,
- (3) Internal Revenue Service at the addresses specified
on the roster of governmental agencies maintained by
the Clerk.

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

IRS
PO Box 7346
Philadelphia, PA 19101-7346

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

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

A motion is a contested matter. See Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

However, the Proof of Claim filed by the Internal Revenue Service, No. 9, is for the modest amount of \$3,587.51, all of which is asserted as a priority claim. The court waives the defect in service based on the plan having to provide for the statutory payment in full. The court also relies on counsel to properly serve the Internal Revenue Service with the plan confirmation documents.

Case filed: June 8, 2012

Background: Debtor-in-Possession works for Ghirardelli Chocolate Company as an analyst and manages real estate holdings. In January 2012, Debtors-in-Possession's spouse left and the values of the income from her rental property was insufficient to sustain her, due to the recession.

Creditor/Class	Treatment	
Class 1: Priority Claims IRS	Claim Amount	\$3,587.51
	Impairment	
	The claim of the IRS to the extent allowed as a priority claim under Section 507 of the Code.	
Class 2.1: Bank of America, N.A. First priority deed of trust 2120 Quaker Ride Court, Stockton, CA	Claim Amount	\$99,500.00
	Impairment	
	The claim of Bank of America N.A. secured by a first priority deed of trust affecting the property located at 2120 Quaker Ridge Court, Stockton, California to the extent allowed as a secured claim under Section 506 of the Code.	
Class 2.2: Chase Bank First priority deed of trust 2890 E Huntington Blvd #159, Fresno, CA	Claim Amount	\$118,731.00
	Impairment	
	The claim of Chase Bank secured by a first priority deed of trust affecting the property located at 2890 E Huntington Blvd #159, Fresno, California to the extent allowed as a secured claim under Section 506 of the Code.	
Class 2.3: Indy Mac/Onewest Bank First priority deed of trust 3750N and 3707N California Street, Stockton, CA	Claim Amount	\$119,000.00
	Impairment	

	The claim of Indy Mac/Onewest Bank secured by a first priority deed of trust affecting the property located at 3705N and 3707N California Street, Stockton, California to the extent allowed as a secured claim under Section 506 of the Code.	
Class 2.4: Seterus Inc. First priority deed of trust 3428 Ladd Tract Court, Stockton, CA	Claim Amount	\$90,500.00
	Impairment	
	The claim of Seterus Inc. secured by a first priority deed of trust affecting the property located at 3428 Ladd Tract Court, Stockton, California to the extent allowed as a secured claim under Section 506 of the Code.	
Class 2.5: Wells Fargo Bank, N.A. First priority deed of trust 4535, 4541, 4547 and 4553 Flint Avenue, Salida, CA	Claim Amount	\$204,000.00
	Impairment	
	The claim of Wells Fargo Bank N .A. secured by a first priority deed of trust affecting the property located at 4535,4541,4547 and 4553 Flint Avenue, Salida, California to the extent allowed as a secured claim under Section 506 of the Code.	
Class 2.6: Wells Fargo Bank, N.A. First priority deed of trust 3212 Ingalls Street, San Francisco, CA	Claim Amount	\$394,405.00
	Impairment	
	The claim of Wells Fargo Bank secured by a first priority deed of trust affecting the single family residence located at 3212 Ingalls Street, San Francisco, California the extent allowed as a secured claim under Section 506 of the Code.	
Class 2.7: Wells Fargo Bank, N.A. First priority deed of trust 520 Greenview Place, Manteca, CA	Claim Amount	\$392,606.00
	Impairment	
	The claim of Wells Fargo Bank secured by a first priority deed of trust affecting the property located at 520 Greenview Place, Manteca, California to the extent allowed as a secured claim under Section 506 of the Code. This is the Debtor's primary residence.	
Class 3: General Unsecured Claims	Claim Amount	\$565,847.00
	Impairment	

	All creditors in this class shall receive \$36,504 or approximately 6.45% of the total claims of \$565,847. The payments shall be made in 36 equal monthly installments of \$1014 (pro rata to the creditors). Payments shall begin after the effective date of this plan. Debtor reserves the right to object to any particular claim as to the amount or the validity. No interest will accrue on these claims. Any remaining balance at the end of the 36 payments shall be discharged. The Debtor shall pay the amount in the proof of claim, if filed, unless Debtor objects. If no proof of claim is filed, the Debtor shall pay the amount scheduled on their petition.	
Class 4: Equity interest holders	Claim Amount	
	Impairment	
	Equity interest holders are parties who held an ownership interest (i.e., equity interest) in the Debtor. With respect to an individual who is a Debtor, the Debtor is the equity interest holder. The holders in class 4 shall retain all property of the estate and make payments to creditors from the proceeds of such property. Property will re-vest in Debtor upon confirmation.	

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
- Y Source of information for D/S
- Y Disclaimer
- Y Present condition of Debtor in Chapter 11
- 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).

OPPOSITION

Federal National Mortgage Association

Federal National Mortgage Association, holder of a note and deed of trust in the real property commonly known as 3428 Ladd Tract Court, Stockton, California, objects on the basis that the Debtor-in-Possession does not specify who is responsible for paying taxes and insurance with respect to the subject real property. Additionally, Federal National Mortgage Association requests that Debtor specify whether it would constitute a material default under the plan if Debtor defaulted on either the taxes or insurance.

Wells Fargo Bank, N.A.

Wells Fargo Bank, N.A., fka Wells Fargo Bank Minnesota, N.A., as Trustee for the Certificateholders of Banc of America Alternative Loan Trust 2003-6, Mortgage Pass-Through Certificates, Series 2003-6, ("Creditor") holder of note and deed of trust in the real property commonly known as 2120 Quaker Ridge Court, Stockton, California objects to the statement on several grounds.

First, Creditor argues that Debtor does not provide specific information regarding monthly payments, such as the when the payments are to start or end. Creditor also states the payment appears low per the proposed treatment and \$99,500.00 paid over 252 months at 5.875% interest requires a monthly payment of \$688.12.

Second, Creditor argues that Debtor is proposing an interest rate to secured creditors that is below market. Creditor states that the proposed interest rate does not adequately compensate the creditor for the risk inherent in the Chapter 11 plan. However, this appears to be an objection for the confirmation of the plan, rather than if the disclosure statement provides adequate information. Creditor can reserve this argument for that time.

Third, Creditor states that the plan does not specify who is responsible for property taxes and hazard insurance payments. Further, the plan should provide a breach provision providing that if Debtors do not make such payments, it should be considered a default under the plan.

Fourth, Creditor argues that the breach provision in the plan is insufficient, as it does not provide what will constitute a "material default" post-confirmation.

Lastly, Creditor states that the disclosure statement fails to provide for treatment of post-petition advances made by Creditor. Creditor states it has advanced funds to maintain real property taxes and insurance for the subject property, which may show that the plan may be infeasible. Creditor states these expenses should be administrative expenses and would need to be paid in full in accordance with 11 U.S.C. § 1129(a)(9).

DISCUSSION

1. Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains

"adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

2. "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

3. Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A.C. Williams, supra.*

4. There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D.Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *In re Michelson*, 141 B.R. 715, 718-19 (Bankr. E.D.Cal. 1992).

5. The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

Here, the objecting creditors make valid objections. The Disclosure Statement fails to make several necessary disclosures. First, the court agrees that the statement should specify who is responsible for paying taxes and insurance with respect to the Debtor-in-Possession's real properties. Furthermore, Debtor-in-Possession should provide specific information regarding monthly payments, such as the when the payments are to start or end.

Additionally, the disclosure statement does not appear to address the treatment of Wells Fargo Bank, N.A.'s post-petition advances, which they claim an administrative expense.

Based on the service defect and the issues raised above, the court cannot approve the disclosure statement as filed.

Continued Hearing

The nature of the objections are such that the Debtor in Possession and Counsel should be able to address them through amendments to the Proposed Plan and Disclosure Statement. Rather than causing all of the parties to incur the expense of starting over, the court continues the hearing to **3:00 p.m. on -----, 2014. On or before December -----, 2013**, the Debtor in Possession shall file a Supplemental Pleading titled "Proposed Amendments to Chapter 11 Plan and Disclosure Statement." The Supplemental Pleading shall identify the specific provisions of the Plan and Disclosure Statement to be amended, and state the specific proposed amended language for each section of the respective pleadings.

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 Disclosure Statement filed by 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 hearing on the Motion is continued to **3:00 p.m. on -----, 2014. On or before December -----, 2013**, the Debtor in Possession shall file a Supplemental Pleading titled "Proposed Amendments to Chapter 11 Plan and Disclosure Statement." The Supplemental Pleading shall identify the specific provisions of the Plan and Disclosure Statement to be amended, and state the specific proposed amended language for each section of the respective pleadings.