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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In Re PACIFIC THOMAS CORPORATION, Debtor.	CASE NO. 12-46534 Chapter 11 Date: December 12, 2013 Time: 10:30 a.m. Place: Courtroom 215 United States Bankruptcy Court 1300 Clay Street Oakland, CA Judge: Hon. M. Elaine Hammond

OBJECTION OF BANK OF THE WEST TO THIRD AMENDED DISCLOSURE STATEMENT IN SUPPORT OF THIRD AMENDED PLAN OF REORGANIZATION DATED NOVEMBER 13, 2013

Bank of the West ("BOW") hereby objects to the Third Amended Disclosure Statement in Support of Third Amended Plan of Reorganization Dated November 13, 2013 ("Third Amended Disclosure Statement") proposed by the debtor, but not the debtor-in-possession Pacific Thomas Corporation ("Debtor"), and filed in the above-entitled bankruptcy case (the "Case").[1]

INTRODUCTION

Debtor has filed yet another disclosure statement and proposed plan of reorganization, which fails to address many of the issues raised by objecting creditors and the Court at the hearing on the Second Amended Disclosure Statement held on October 17, 2013, including, without limitation, the flaws raised and the confusion surrounding the structure of the proposed financing from Thorofare Capital ("Thorofare"), and the source of funding of payment of the estimated administrative expense claims.

The Thorofare proposed financing has been the subject of four proposed disclosure statements filed by Debtor since June 11, 2013. In that six month period since the filing of the initial disclosure statement by Debtor, Debtor has not gotten to the stage where loan documents were circulated, nor has Debtor been in a position to file a motion seeking an Order authorizing Debtor to obtain post-petition financing with respect to the proposed financing by Thorofare. In fact, the Third Amended Disclosure Statement and the November 4, 2013 letter from Thorofare attached as Exhibit F thereto ("November 4 Letter") state that loan documents would be circulated prior to Debtor filing the Third Amended Disclosure Statement and that a motion seeking an order authorizing post-petition financing would be filed. As of the date of this Objection, neither has occurred.

Thus, many of the same objections raised by BOW to the previously proposed disclosure statements are raised herein. As will be set forth below, the Third Amended Disclosure Statement lacks "adequate information" as required by 11 U.S.C. § 1125. More importantly, the Third Amended Plan of Reorganization filed by Debtor ("Third Amended Plan") is unconfirmable

[1] Capitalized terms not otherwise defined in this objection shall have the meanings ascribed to such terms in the Third Amended Disclosure Statement.

on its face as it does not provide adequate means for implementation, and is not feasible with respect to BOW's Class 2 claim. Based on the foregoing, and for the reasons set forth below, the Third Amended Disclosure Statement should not be approved.

FACTUAL BACKGROUND

A. BOW's Claim

Debtor executed that certain Business Loan Agreement dated December 18, 2008 in favor of BOW pursuant to which BOW agreed to make various extensions of credit to Debtor subject to the terms and conditions set forth therein ("Loan Agreement").

Debtor executed in favor of BOW a Promissory Note dated December 18, 2008 in the original principal amount of $3,500,000.00 (as modified, the "Note").

In order to secure repayment of all obligations owed by Debtor to the BOW pursuant to the Note and Loan Agreement, Debtor executed that certain Commercial Security Agreement dated December 18, 2008. BOW filed its UCC-1 Financing Statement with the California Secretary of State's Office on December 30, 2008 as Document No. 19571280002.

In order to further secure repayment of all obligations owed by Debtor to the BOW pursuant to the Note and the Loan Agreement, Debtor, as trustee, executed and delivered to BOW that certain Deed of Trust dated December 18, 2008 ("Deed of Trust") in favor of First Santa Clara Corporation, as trustee, for the benefit of BOW, as beneficiary, with respect to the Real Property (as that term is defined in the Deed of Trust), which includes the real property commonly known as 2615 East 12th Street, Oakland, California ("BOW Property"). The Deed of Trust was recorded on December 24, 2008 in the Official Records of the Alameda County Recorder's Office.

In order to further secure repayment of all obligations owed by Debtor to the BOW pursuant to the Note and the Loan Agreement, Debtor executed that certain Assignment of Rents dated December 18, 2008 ("Assignment of Rents") with respect to the BOW Property, which was recorded on December 24, 2008 in the Official Records of the Alameda County Recorder's Office.

Pursuant to the Assignment of Rents, Debtor granted BOW, inter alia, a continuing security interest in the Rents (as that term is defined in the Assignment of Rents) generated from the BOW Property.

BOW and Debtor also executed that certain ISDA Master Agreement dated as of November 17, 2008 (together with the Schedule thereto, the "Master Agreement") and that certain Interest Rate Protection Agreement dated December 18, 2008 ("Rate Protection Agreement", and together with the Master Agreement and the Security Agreement, the "Swap Documents").

The Note, Deed of Trust, Security Agreement and Assignment of Rents, and all other documents executed in connection therewith shall hereinafter be collectively referred to as the "Loan Documents".

Debtor filed its Voluntary Petition for relief under Chapter 11 of Bankruptcy Code commencing the Case on August 6, 2012.

BOW has filed a Proof of Claim based on its secured claim against Debtor pursuant to the Loan Documents in the amount of $3,237,845.57, plus additional interest, plus attorneys' fees and costs and other amounts due under the Loan Documents and Swap Documents, which continue to accrue until paid in full.

OBJECTIONS TO THIRD AMENDED DISCLOSURE STATEMENT

BOW objects to the Third Amended Disclosure Statement on the following grounds:

A. The Legal Standard: Adequate Information

Bankruptcy Code section 1125(b) provides as follows:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

Bankruptcy Code § 1125(b).

Bankruptcy Code section 1125(a)(1) defines "adequate information" as—

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan....

Bankruptcy Code § 1125(a)(1).

The determination of what constitutes "adequate information" is to be made on a case-by-case basis. Matter of Texas Extrusion Corp., 844 F.2d 1142, 1157 (5th Cir. 1988), cert. denied, 109 S. Ct. 311 (1988). Many courts have used the following non-exhaustive list of criteria as a guide for evaluating the adequacy of the information contained in a disclosure statement:

a. the circumstances that gave rise to the filing of the bankruptcy petition;

b. a complete description of the available assets and their value;

c. the anticipated future of the debtor;

d. the sources of the information provided in the disclosure statement;

e. a disclaimer, which typically indicates that no statements or information concerning the debtor or its assets or securities are authorized, other than those set forth in the disclosure statement;

f. the condition and performance of the debtor while in Chapter 11;

g. information regarding claims against the estate;

h. a liquidation analysis setting forth the estimated return that creditors would receive under Chapter 7;

i. the accounting and valuation methods used to produce the financial information in the disclosure statement;

j. information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor;

k. a summary of the plan of reorganization;

l. an estimate of all administrative expenses, including attorneys' fees and accountants' fees;

m. the collectability of any accounts receivable;

n. any financial information, valuations or pro forma projections that would be relevant to creditors' determinations of whether to accept or reject the plan;

o. information relevant to the risks being taken by the creditors and interest holders;

p. the actual or projected value that can be obtained from avoidable transfers;

q. the existence, likelihood and possible success of non-bankruptcy litigation;

r. the tax consequences of the plan; and

s. the relationship of the debtor with affiliates and insiders. (the foregoing, collectively, the "Guide Points").

See, e.g., Cardinal, supra, 121 B.R. at 765; Microwave Products, supra, 100 B.R. at 378; Scioto, supra, 88 B.R. at 170-71; In re Jeppson, 66 B.R. 269, 292 (Bankr. D. Utah 1986); In re Metrocraft Publishing Services, Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984).

In determining whether to approve a disclosure statement, a number of courts have also deemed it appropriate to consider, in addition to the contents of the statement, whether the plan being described by the disclosure statement is actually confirmable. See, e.g., Cardinal, supra, 121 B.R. at 764; Copy Crafters, supra, 92 B.R. at 980, In Re Monroe Well Service, Inc., 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987); In Re Pecth, 57 B.R. 137, 139 (Bankr. E.D. Pa. 1986); In Re McCall, 44 B.R. 242, 243 (Bankr. E.D. Pa. 1984); In Re Kehn Ranch, Inc., 41 B.R. 832, 833 (Bankr. D.S.D. 1984). These courts have reasoned that if a plan is not confirmable, approval of the disclosure statement and solicitation of acceptances is fruitless, unnecessarily costly, and a waste of judicial resources. BOW could not agree more. Of course, where the plan deficiencies are slight, it may be premature to address such deficiencies at the disclosure statement level, but where the deficiencies go to the heart of the plan, it is entirely appropriate to do so.

B. The Third Amended Disclosure Statement Lacks Adequate Information

The Third Amended Disclosure Statement lacks adequate information under the standards set forth above based on the following:

Guide Points b. and i. require a disclosure statement to provide a complete description of Debtor's assets and the value thereof and the valuation methods used to arrive at those values. The Third Amended Disclosure Statement guides the reader to Exhibit A thereto, which provides a breakdown of the value of the real property collateral and personal property collateral. With respect to the personal property collateral, while there is a reference to the "Schedules" and the "Debtor's books and records", it is unclear whether the values listed are "as is" market values or whether some other opinion of value was used to derive the value of the personal property collateral.

Guide Point d. requires that a disclosure statement identify the sources of

information provided therein. There is no disclosure of the sources of information contained in the Third Amended Disclosure Statement.

Guide Point f. requires a description of the condition and performance of the debtor while in Chapter 11. Other than setting forth certain events that have occurred in the bankruptcy case, including the appointment of Kyle Everett, the Chapter 11 Trustee ("Chapter 11 Trustee"), the Third Amended Disclosure Statement does not set forth Debtor's financial performance and actions of Debtor's management, including Randall Whitney, that led to the appointment of the Chapter 11 Trustee. These include the failure to pay post-petition real property taxes, unconsented to use of the secured creditors' cash collateral, failure to timely collect rent from Pacific Trading Ventures under the Master Lease, and failure to timely perform certain obligations pursuant to Orders entered by the Court. This information is critical to creditors in evaluating whether Debtor has the ability to perform under the Third Amended Plan, especially in light of the fact that **the same management** (i.e. Randall Whitney) is being proposed to manage the day to day business operations of the Debtor under the Third Amended Plan.

Guide Point j. requires a disclosure statement to provide information regarding the future management of Debtor. The Third Amended Disclosure Statement states that Debtor's business operations will be managed by an undisclosed Chief Executive Officer at an hourly rate for a total compensation estimated at $3,000.00 per month. It is crucial that creditors are informed of who the proposed Chief Executive Office of the Reorganized Debtor will be especially given the improper actions taken by the Debtor's management.

Guide Point p. requires an analysis of the actual or projected value that can be obtained from avoidable transfers. Section 2.05 of the Third Amended Disclosure Statement provides that Debtor has conducted "a diligent review of its general ledger and corporate books and records" and "believes there are no voidable preferential transfers, fraudulent conveyances, or other avoidance actions to pursue". While Section 2.05 also states that a draft copy of the Third Amended Disclosure Statement was provided to the Trustee's counsel and no issue was raised with respect to Section 2.05 of the Third Amended Disclosure Statement by the Trustee's counsel, does not mean that the Chapter 11 Trustee has conducted his analysis of fraudulent transfer claims at this

juncture. Considering the fact that the Chapter 11 Trustee was appointed and the circumstances surrounding his appointment and considering the possibility of potential insider transactions by Debtor, BOW does not trust the accuracy of Debtor's analysis and believes there should be input from the Chapter 11 Trustee on this issue.

In addition, the following issues also exist with respect to the Third Amended Disclosure Statement:

(a) As will be set forth in detail below with respect to the deficiencies in the Third Amended Plan, there is no disclosure of the identity of the insiders anticipated to fund the $600,000-$950,000 to pay administrative expenses, the amount of the investment for each insider, or their ability to fund, and there is no information provided as to the Hawaii property referenced (i.e. value, lienholders, listed for sale, etc.); and

(a) The Third Amended Disclosure Statement does not in any way address the issues raised by the Court and the objecting creditors regarding the structure of the proposed financing from Thorofare as set forth in the "Conditional Commitment Letter" dated September 3, 2013 attached as Exhibit F to the Third Amended Disclosure Statement.

These numerous deficiencies in the Third Amended Disclosure Statement render it lacking "adequate information" as required by Bankruptcy Code section 1125(b) and the Court should decline to approve it.

C. The Third Amended Plan Is Facially Defective

Here, the Third Amended Plan is facially defective in several particulars, including it does not provide adequate means for its implementation and does not demonstrate feasibility.

1. The Third Amended Plan Is Facially Defective Because It Does Not Provide Adequate Means for Its Implementation

11 U.S.C. § 1123(a)(5) provides that "a plan shall ... provide adequate means for the plan's implementation...." Bankruptcy Code § 1123(a)(5).[2] While Debtor contemplates obtaining

[2] BOW reserves the right to assert other deficiencies in the Second Amended Plan in connection with any hearing on confirmation thereof. The Third Amended Plan deficiencies identified herein are only exemplary.

$600,000-$950,000 from insiders to fund payment of the administrative expenses, there is no disclosure of the identity of these insiders, whether these insiders have the ability to fund, and no information is provided regarding the Hawaii property referenced in the Third Amended Disclosure Statement (i.e. title holder, liens encumbering the property, appraised value, etc.). Since insider investment is anticipated to be the source for payment the bulk of the administrative expenses, this information is critical to the analysis of Debtor's ability to fund the Third Amended Plan.

Moreover, the Third Amended Plan contains no provision for addressing what happens if Debtor is unable to obtain insider investor funds to pay administrative claims, or a refinancing to pay BOW's claim and other creditors' claims in full. Without these insider investment funds and the refinance, Debtor will not be able to make the payment of the administrative claims and payment of the BOW's Class 2 Claim on the Effective Date.

2. The Third Amended Plan Is Not Feasible

Debtor's Third Amended Plan cannot be confirmed because it is not feasible as required by 11 U.S.C. § 1129(a)(11). In order for a plan to be feasible, the Court must determine whether the plan is workable and has a "reasonable likelihood of success". In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992). The purpose of the feasibility test has been described as protection against "visionary" or "speculative" plans. In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985).

Debtor is relying on the rental income generated under the Master Lease and the leases of the non-safe storage tenants and/or a refinance loan from a third party, and insider investment funds to make the requisite payments under the Third Amended Plan. The proposed Third Amended Plan is not feasible for the following reasons.

First, the "Conditional Commitment Letter" attached as Exhibit F to the Third Amended Disclosure Statement is just that –a conditional commitment letter. While the November 4 Letter states that the "Conditional Commitment Letter" remains firm, it is unclear what that means. In addition, there is no evidence that loan documents have been circulated as stated in the November 4 Letter, nor has Debtor filed any post-petition financing motion as contemplated under the Third Amended Disclosure Statement.

As this Court is aware, Debtor has been seeking third party financing since well before the filing of the Case, and has continued these efforts over the first year of the Case **without success**. Debtor's inability to obtain a firm commitment of third party financing renders Debtor's ability to fund the proposed Third Amended Plan speculative at best.

Last, Debtor relies on obtaining in third party insider investment funds and funds from the refinance to fund payment of the administrative expenses set forth above, which BOW believes are grossly underestimated by Debtor. As iterated above, there is no information regarding these insider investors and their ability to fund the anticipated investment of $600,000-$950,000 under the Third Amended Plan, which also renders Debtor's ability to fund the proposed Third Amended Plan speculative at best.

Based on the foregoing, the Third Amended Plan is facially defective and cannot be confirmed.

CONCLUSION

The Third Amended Disclosure Statement does not contain "adequate information" as required by 11 U.S.C. § 1125(b). Further, the Third Amended Plan is facially defective. For the reasons set forth above, approval of the Third Amended Disclosure Statement should be denied.

DATED: November 27, 2013

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