

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re
Jeffrey J. Andrews,
Debtor

Chapter 11
Case No. 16-10449-BAH

Hearing: 11/9/2016 at 2:00 p.m.

**OBJECTION OF UNITED STATES TRUSTEE TO ADEQUACY OF DEBTOR'S
DISCLOSURE STATEMENT DATED SEPTEMBER 29, 2016**

To the Honorable J. Michael Deasy, United States Bankruptcy Judge:

Pursuant to 28 U.S.C. § 586(a)(3)(B), 11 U.S.C. § 1125, and Fed. R. Bankr. P. 3017, William K. Harrington, United States Trustee, submits this Objection to Adequacy of Disclosure Statement with Respect to Debtor's Plan of Reorganization Dated September 29, 2016. In furtherance of his Objection, the United States Trustee respectfully submits as follows:

1. ***Absolute Priority Rule.*** The Disclosure Statement fails to address the application and requirements of the "absolute priority rule" set forth in 11 U.S.C. § 1129(b)(2)(B). Under 11 U.S.C. § 1129(b)(2)(B), before the Debtor retains any property interest, the claims of unsecured creditors must be paid in full. *In re Trikeen Tileworks, Inc.*, 2011 BNH 008, 8-9. *See also In re Walsh*, 447 B.R. 45, 47-49 (Bankr. D. Mass. 2011)(absolute priority rule continued to apply in individual chapter 11 case to prevent debtor from retaining any prepetition property included in estate unless allowed unsecured claims were paid in full); and *In re Lee Min Ho Chen*, 482 B.R. 473, 484-485 (Bankr. D. Puerto Rico 2012)(individual chapter 11 plan did not comply with absolute priority rule where it provided for debtor to retain interest in prepetition assets while paying general unsecured claims a dividend of less than .05%). The rule is implicated in the present case, because the Debtor will retain prepetition assets (his interests in Beebe River, LLC

and Custom Crushing, LLC), but unsecured creditors will receive a dividend of 10% over 20 months, but this dividend won't even commence for 60 months. *See also Zachary v. California Bank & Trust*, 811 F.3d 1191 (9th Cir. 2016)(absolute priority rule applies in an individual chapter 11 case); *In re Maharaj*, (*Maharaj v. Stubbs*) 681 F.3d 558 (4th Cir. 2012)(absolute priority rule applies in individual chapter 11 case); *In re Liveley*, 717 F.3d 406 (5th Cir. 2013)(absolute priority rule covers only individual debtor's postpetition earnings and postpetition acquired property); *Ice House America, LLC v. Cardin*, 751 F.3d 734 (6th Cir. 2014)(absolute priority rule continues to apply to prepetition property of individual debtor in chapter 11 case).

While Courts have allowed equity holders to retain property in exchange for contributions of added capital under what is referred to as the "new value corollary" to the absolute priority rule, the following five requirements must be met:

The junior claim holder must offer value that is: (1) new, (2) substantial, (3) money or money's worth, (4) necessary for a successful reorganization and (5) reasonably equivalent to the value or interest received.

In re Trikeen Tileworks, Inc., 2011 BNH 008, 8-9 (citing *In re Bonner Mall P'ship*, 2 F.3d 899, 906 (9th Cir. 1993)). The Disclosure Statement fails to address how the Debtor proposes to satisfy the requirements cited in *Trikeen*. Neither sweat equity, nor the promise to pay future income to make plan payments constitutes "new value" for purposes of the exception to absolute priority rule. *See, e.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988)(promise of future labor does not constitute new value); *In re Lee Min Ho Chen*, 482 B.R. at 485 (post-petition wages do not constitute "new value" for the purposes of the exception to the absolute priority rule; new value must come from a source other than the debtor); *In re Eitemiller*, 149 B.R. 626 (Bankr. D. Idaho 1993)(promise to use future earnings to

make plan payments did not constitute new value); *In re Hendrix*, 131 B.R. 751 (Bankr. M.D. Fla. 1991)(promise to pay future income does not constitute new value). Only money contributed as of the effective date of the plan, and not a promised future stream of payments, will satisfy the requirements of the new value exception. *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 654–56 (9th Cir. 1997).

2. ***Liquidation Analysis - Beebe River Park; Sale Post-Petition?*** The Debtor's Disclosure Statement concedes Beebe River Park, LLC owns one parcel of real estate with \$300,000 of equity. Yet the Debtor "believes that the combined sale proceeds from all sales of individual lots would not generate funds in excess of the Community Guarantee Savings Bank mortgage to benefit the estate." The Debtor needs to advise creditors when this parcel of real estate was appraised, if at all, and the value. The Debtor should also disclose the number of lots Beebe River owns and the rental income and expenses of the limited liability company. (At the § 341 meeting, the Debtor testified that there were 10 lots, and that the rental income received covered the Community Guarantee Savings Bank mortgage. The Debtor acknowledged there were "idle" lots available for rent.)

It may be helpful for the Debtor to include in his Disclosure Statement the information it provided in its first B26¹ form:

¹ Under Rule 2015.3 of the Federal Rule of Bankruptcy Procedure, a chapter 11 debtor or trustee shall file periodic reports of the value, operations, and profitability of any non-public entity in which the estate has a controlling interest. On May 6, 2016, the Debtor provided the United States Trustee with his first such report ("B26 Form) for the quarter ending March 31, 2016. A Debtor is to file subsequent reports no less frequently than every six months until the effective date or until the case is dismissed or converted. The Debtor's next periodic report is due at this time. *See* Fed. R. Bankr. P. 2015.3(b).

Beebe River Business Park, LLC does not have a balance sheet.

Cash In: February, 2016	\$5,240.00
Out Flow: February, 2016	
Mortgage payment	\$2,400.04
Property taxes	\$2,793.38
Net Cash Flow:	\$46.58

Neither the Disclosure Statement nor Plan addresses what would happen post confirmation with any surplus proceeds from the sale of Beebe River Property. Will unsecured creditors be assured of any dividend from surplus proceeds?

The Debtor should also be required to advise creditors whether the Debtor has retained a broker to sell or list for rental any of the lots in the Beebe River property. If the Debtor has not retained a broker to sell or rent the lots, why not, given the Debtor's financial situation? When asked this question at the § 341 meeting, the Debtor testified that he wanted to retain the Beebe River property because at his age, 58, he wasn't sure how long he would be able to operate the crushing equipment.

3. ***Operations of Custom Crushing, LLC.*** The Debtor's Disclosure Statement provides very little information to creditors about the income and expenses of Custom Crushing, LLC, the Debtor's primary source of income. According to the Debtor's initial B26 form, this entity was operating at a break-even point at best:

Twelve-Month Cash FlowFiscal Year
Begins: Jan-16Custom Crushing Co, LLC
Meredith, NH

	Beginning	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16	Aug-16	Sep-16	Oct-16	Nov-16	Dec-16	Monthly Average	Overview
Cash Summary															
Cash on Hand (beginning of month)	(81)	(81)	(3)	592	0	0	0	0	0	0	0	0	0	42	
Cash Available (on hand + receipts, before cash out)	0	2,019	10,023	7,535	0	0	0	0	0	0	0	0	0	1,631	
Cash Position (end of month)	(81)	(3)	592	2,165	0	0	0	0	0	0	0	0	0	230	
Cash Receipts															
Sales	0	2,100	4,526	6,943	0	0								2,714	
Collections from CR accounts	0	0	0	0	0	0								0	
Loan/equipment sales	0	0	5,500	0	0	0								1,100	
Total Cash Receipts	0	2,100	10,026	6,943	0	0	0	0	0	0	0	0	0	3,794	
Cash Paid Out															
Purchases (specify)	0	0	0	0	0	0								0	
Gross wages (exact withdrawal)			2,507	2,473	0	0								1,245	
Bank fees	160	192	64											139	
Auto/ truck expenses	150	670	1,607											809	
Supplies (office & oper.)	49	16	139	0	0									41	
Repairs & maintenance	408	104	520	0	0									206	
Advertising	0	0	0	0	0									0	
Rent	0	5,240	0	0	0									1,048	
travel/ food/toils	49	258												153	
Gas/ diesel fuel	203	172	129											168	
Insurance	424		208											316	
Utilities/cell phone	457	272	230			0	0							192	
Other (specify)	123	0	0	0	0	0								25	
Loan principal payment	0	0	0	0	0	0								0	
Capital purchase (specify)	0	0	0	0	0	0								0	
Other startup costs	0	0	0	0	0	0								0	
Reserve and/or Escrow	0	0	0	0	0	0								0	
Owners' Withdrawal	0	0	0	0	0	70								14	
Total Cash Paid Out	2,022	9,480	6,970	0	0	0	0	0	0	0	0	0	0	1,629	

The United States Trustee requests that the Debtor provide creditors with information about the current income and expenses of Custom Crushing, LLC so they are in a better position to evaluate the Disclosure Statement and Plan.

4. ***Extension of Exclusivity.*** The Debtor filed a motion for an extension of exclusivity, which was granted through September 27, 2016, but as the Debtor's Plan and Disclosure Statement were filed on September 29, 2016, other creditors could file a Plan and Disclosure Statement if interested. The United States Trustee asks that the Debtor delete the reference to the extension of exclusivity on page 10, or supplement the language to make clear that the Debtor chose not to file his Plan and Disclosure Statement within the exclusive period.

WHEREFORE, the United States Trustee respectfully requests that the Court deny approval of the Debtor's Disclosure Statement until these issues are resolved, and for such other and further relief as is just.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Geraldine Karonis
Geraldine Karonis
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Dated: November 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, I caused to be served a copy of the foregoing Objection by CM/ECF upon:

Eleanor Dahar, Esq.
Richard Mulligan, Esq.
Joshua Ryan- Polczinski, Esq.

/s/ Geraldine Karonis
Geraldine Karonis

Dated: November 7, 2016