

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re

362 Route 108 Realty Trust
Debtor

Chapter 11
Case No. 16-11405-BAH

Hearing: 3/22/2017 at 2:00 p.m.

**OBJECTION OF UNITED STATES TRUSTEE
TO ADEQUACY OF DEBTOR'S DISCLOSURE STATEMENT**

To the Honorable Bruce A. Harwood, Chief United States Bankruptcy Judge:

Pursuant to 11 U.S.C. § 1125, William K. Harrington, United States Trustee respectfully submits this Objection to the adequacy to the Debtor's Disclosure Statement. In support thereof, the United States Trustee submits:

General Background

1. On October 3, 2016, ("**Petition Date**"), the entity known as 362 Route 108 Realty Trust filed a voluntary chapter 11 skeleton petition with the Court. In the skeleton filing, the entity reported it was a "realty trust." On October 6, 2016, 362 Route 108 Realty Trust filed a "Trustee's Certificate of Formation, Incumbency and Resolutions." *See* Court Docket No. 7. The certificate recited that G. Brandt Atkins is the sole trustee of the trust as well as the sole shareholder of the trust.

2. According to the declaration of trust, 362 Route 108 Realty Trust was formed on June 10, 1998 and was organized under the laws of the State of New Hampshire. *See* Court Docket No. 7, page 8.

3. On October 14, 2016, 362 Route 108 Realty Trust filed the remaining schedules and statement of financial affairs. *See* Court Docket No. 14. The Trust reported no equity security holders. *Id.* at page 24.

4. According to the schedules filed, 362 Route 108 Realty Trust owns a 1.5 acre parcel of land at 362 Route 108, Somersworth, New Hampshire. The property was valued as “unknown.” *See* Court Docket No. 14, Schedule A. The real property is subject to four mortgages, including:

- a) Eastern Bank, first mortgage, \$385,000
- b) Janet Laatsch, mortgage \$73,000
- c) NH Real Estate Management & Brokerage, Inc., mortgage, \$45,000
- d) Sarnia Properties, second mortgage, \$95,000

Total liens \$598,000

See Court Docket No. 14, Schedule D.

5. The Debtor’s primary asset, its real estate at 362 Route 108, Somersworth, New Hampshire, is currently unoccupied, and has been so for approximately 14 months, since its long standing tenant, Empire Beauty School, vacated the premises.

6. The Debtor has ten (10) unsecured creditors, with most claims under \$2000. The largest unsecured claim is that of Empire Beauty School, the Debtor’s former tenant, who asserts a claim of \$350,000, which the Debtor disputes. *See* Schedules E/F, Court Docket No. 14.

Specific Objections to the Adequacy of Debtor’s Disclosure Statement

7. *Mr. Atkins – Real Estate Broker?* The Debtor states that Mr. Atkins is a “highly qualified, experience [sic] real estate broker with an enormous incentive to make the Plan work.” *See* Disclosure Statement, Court Docket No. 65 at pp. 26-27. Public records on file with the New Hampshire Office of Professional Licensure & Certification indicate Mr. Atkins’ real estate broker’s license was “permanently revoked” by a decision dated April 19, 2016.

8. *Post petition taxes.* The Debtor’s Disclosure Statement describes the Class 1

creditor as the “Local Government Lien Class.” The class “includes all pre-petition claims held or asserted by the Local Government for unpaid real property taxes...” Court Docket No. 64 at p. 5. A review of the claim filed by the City of Somersworth indicates that \$7,557.22 is due for the second half of the tax for 2016 with a billing date of October 27, 2016, which would appear to be post petition.

Assuming the taxes are a post-petition obligation, the United States Trustee requests that the Debtor indicate whether it has the agreement of the Town to pay post petition taxes over a 48 month period. The United States Trustee also requests that the Debtor indicate how post petition taxes accruing after October of 2016 will be paid in the absence of a tenant. The projections indicate that beginning in January of 2018, the Debtor will start receiving “R.E. Taxes (income)” in the amount of \$1237.17 per month. The United States Trustee requests that the Debtor clarify the projection reference to “R.E. Taxes (income).”

9. *Eastern Bank Loan.* On information and belief, the first mortgage held by Eastern Bank matured by its own terms more than five years before the filing. According to Eastern Bank’s proof of claim, the unpaid principal balance of \$400,423.15 was due on September 25, 2011. *See* Claim 6-1, part 5. Eastern Bank now asserts that the principal balance due is \$360,337.64. Its claim also includes interest due of \$20,284.69, late charges of \$1,102.33, and \$20,164.21 for legal fees and costs going back to October 30, 2014. *Id.*, Claim 6-1, part 2. The Debtor’s Disclosure Statement assumes that the Debtor may modify the terms of a matured loan, and that Eastern Bank agrees to this treatment. Has Eastern Bank agreed to this treatment?

10. *Projections.* The Debtor’s Disclosure Statement acknowledges that the Debtor has no current income at this time. The Debtor projects rental income of \$3,375 per month beginning in July of 2017, which rent is projected to increase to a total of \$5,075 per month

beginning October, 2017. *See* Court Docket 65-1, Exhibit B. There are no prospective tenants identified in the Disclosure Statement or Plan, or any information whatsoever that would allow a creditor to determine how or why the income projections are reasonable.

11. *Treatment of Unsecured Creditors.* The treatment for unsecured creditors is not sufficiently clear. The Debtor states the unsecured creditors are to receive a dividend of the *lesser* of 10% of the proofs of claim filed (\$355,777.96, which assumes the claim asserted by Empire is allowed in full) or the total amount of allowed claims in the class, \$4,593.21, payable over 5 years. Elsewhere the Debtor states that the dividends “could be as high as \$35,577.” Disclosure Statement, Court Docket No. 65 at p. 12. The Projections annexed to the Disclosure Statement assume dividends of no more than \$4,593.21 payable over five years.

Based on the projections provided by the Debtor, the Debtor would have insufficient funds to pay dividends as high as \$35,577. If the shortfall is to be paid by Mr. Atkins as the Disclosure Statement indicates, *see* Disclosure Statement, Article IX.A., p. 14, there is nothing in the Disclosure Statement that evidences Mr. Atkins has the financial wherewithal to make the payments.

In the Disclosure Statement, the Debtor provides an example of how a creditor would be paid under the plan: Raiche & Company, a creditor with a claim of \$500, would receive an 11% dividend if the allowed general unsecured claims come in at \$4,593. *See* Court Docket No. 65 at p. 12. The United States Trustee believes the Debtor’s analysis is flawed for three reasons: 1) the Debtor says repeatedly that if the allowed unsecured creditors come in at \$4593, they would be paid in full (yet in the illustration, the projected dividend is just 11%); 2) the Plan allows the Plan Agent to take 10% as a fee for serving in that capacity and the calculations do not account for the 10% agent fee; and 3) the dividend to the creditors is paid over 60 months.

Whether Raiche & Company is to receive a dividend of \$499, or \$55 (11% of \$500), the dividends are still payable over a maximum of 60 months. Language found in the Plan would suggest that in no event would Raiche & Company ever receive a dividend:

“[n]otwithstanding anything to the contrary in this Plan, no cash payment of less than \$50.00 will be made to any entity holding an Allowed Claim. No consideration will be provided in lieu of the de minimis distributions that are not made in this Section.”

Plan, Court Docket No. 64, Article XIII.D. at p. 24. Because many of the unsecured creditors hold small claims, and the dividends are payable over 60 months, they may never see a dividend due to this particular Plan provision.

12. *Debtor’s Counsel’s Role as Unsecured Creditors’ Class Agent.* As Debtor’s counsel holding an administrative claim, Attorney Gannon will receive a “4th priority mortgage” to secure the payment of his legal fees for this case. *See* Plan, Court Docket No. 64, Article VII.B.3. at p.12. The Plan also proposes to have Attorney Gannon serve as the initial Creditors’ Agent for the class of general unsecured creditors, which will also receive a “4th priority mortgage” as security for the payment of the unsecured creditors’ dividend.¹ Plan, Article VIII.A.4, at p. 14.

The United States Trustee calls upon Attorney Gannon to explain how he would be able to serve in all of these roles given the potential if not actual irreconcilable conflicts.

13. *Equity Interests.* According to the Executive Summary in the Disclosure Statement, equity interests are permitted to vote, yet the Debtor will propose that they retain their existing interests. *See* Court Docket No. 65 at page 3. On the other hand, the Plan states that

¹ According to the Disclosure Statement, Debtor’s counsel will be paid over 60 months with interest at the rate of 6%. The mortgage and security agreement will cover the “Milton Premises and Somersworth Premises” which will be junior only to the liens held by TD Bank and Optima Bank. Disclosure Statement, Section VB, Class 6, at p. 11. The United States Trustee is unaware of the property known as the Milton Premises, or the relationship of TD Bank and Optima Bank to this case.

the equity interests held by Mr. Atkins shall be cancelled without the payment of any dividend.

Plan, Court Docket No. 64, at p. 14.²

“If the Equity Holders shall not be permitted to retain their Equity Interests in the Debtor, the Debtor shall issue new beneficial interests in the Trust to Mr. Atkins and Ms. Atkins or their nominees in consideration of the new value provided by them.”

Id. at p. 14.

While the Disclosure Statement indicates that Mr. Atkins and NHRE are to *commit* themselves to lending the Debtor the money to pay the dividends, the amount of contribution or the amount of “new value” is not specifically identified.

The Plan fails to address how the Debtor can demonstrate that the proposed Plan is “fair and equitable” under the absolute priority rule set forth in 11 U.S.C. § 1129(b)(2)(B). 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 Trikeenan Tileworks, Inc., 2011 BNH 008, 8-9 (citing *In re Bonner Mall P’ship*, 2 F.3d 899, 906 (9th Cir. 1993)). It is unclear that the Debtor has or will be able to satisfy the requirements cited in *Trikeenan*. 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 Eitemiller*, 149 B.R.

² The treatment of the class 8 equity holders does not disclose the equity interests of Ms. Shirley Atkins, issued to her on information and belief after the filing.

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).

14. *Claim Against Empire Beauty School*. The Debtor discloses one asset that is unencumbered and available for unsecured creditors in a hypothetical liquidation scenario: its claim against its former tenant, Empire Beauty School, valued from \$35,000 to \$100,000. *See* Court Docket No. 65-1, Exhibit C, Unencumbered Property and Estimated Liquidation Value. The United States Trustee has received information that the claim may now be held by MMG Insurance Company. The Debtor's Disclosure Statement makes no mention of MMG Insurance Company's assertion of its subrogation rights.

WHEREFORE, the United States Trustee requests that the Court issue an Order denying approval of the Debtor's Disclosure Statement, and enter an Order converting this case to chapter 7, or dismissing the case, and for such other and further relief as is just.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Geraldine Karonis
Geraldine Karonis
Assistant U.S. Trustee
1000 Elm Street, Suite 605
Manchester, NH 03101
(603) 666-7908 Bnh 01853

Dated: March 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2017, I caused to be served a copy of the foregoing Objection to Adequacy of the Disclosure Statement by ECF/CM to:

William Gannon, Esq.
Jillian E. Colby, Esq.
Daniel R. Hartley, Esq.

/s/ Geraldine Karonis
Geraldine Karonis

Dated: March 15, 2017