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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re: GRAND CANYON RANCH, LLC, Debtor.	Case No.: BK-S-15-14145-BTB Chapter 11 Date: November 8, 2017 Time: 1:30 p.m.

OPPOSITION TO APPROVAL OF FANN CONTRACTING, INC'S DISCLOSURE STATEMENT TO ACCOMPANY CREDITOR'S FIRST AMENDED PLAN OF LIQUIDATION

Brian Shapiro, in his capacity as the Chapter 11 trustee ("Trustee") of the bankruptcy estate of Grand Canyon Ranch, LLC ("Debtor"), submits his opposition ("Opposition") to Fann Contracting, Inc.'s ("Fann") disclosure statement ("Disclosure Statement") [ECF No. 531] to accompany its first amended plan of liquidation ("First Amended Plan") [ECF No. 532]. The Trustee opposes the Disclosure Statement on the basis that it fails to contain adequate information regarding the effect of the *Order Approving Settlement Arising Out of Settlement Conference Pursuant to 11 U.S.C. §§ 105(a) and 363 and Bankruptcy Rule 9019* (the "Settlement Order")[1]

[1] All capitalized, undefined terms shall have the meanings ascribed to them in the Settlement Order. All references to "Chapter" and "Section" hereinafter are to title 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"); all references to a "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure; and all references to a "Local Rule" are to the Local Rules of Bankruptcy Practice for the U.S. District Court for the District of Nevada. The above-captioned Chapter 11 Case shall be referred to as the "Chapter 11 Case."

[ECF No. 537], and the First Amended Plan is otherwise patently non-confirmable for effectively giving Fann priority over both senior and similarly situated creditors.

This Opposition is made and based upon the memorandum of points and authorities set forth below, the papers and pleadings on file with this Court, judicial notice of which is respectfully requested, and any argument of counsel entertained by the Court at the time of the hearing for the Disclosure Statement.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

The Disclosure Statement cannot be approved. First, the Disclosure Statement does not present the requisite adequate information mandated by Section 1125. It entirely ignores the Settlement Order—even though the Court had already made its oral ruling on the Second 9019 Motion (as defined below)—and the effectuated Settlement Transaction (as defined below), which has already been consummated. Not only does the Disclosure Statement contain language questioning the nature and structure of the Settlement Transaction in direct contravention of the Settlement Order, but it wholly misrepresents projected distributions given its refusal to acknowledge the Settlement Order and Settlement Transaction. Additionally, while the Disclosure Statement asserts that Liberty Mutual and Gallagher Basset will each pay $100,000 into the estate to settle the Fann Litigation, there is no substantive discussion of this proposed settlement.

Second, the First Amended Plan is patently nonconfirmable. Remarkably, Fann, as a general unsecured creditor, has proposed its own class of one, Class 3A, separate and apart from all other general unsecured creditors in Class 3B. Fann has proposed that Fann's solo Class 3A receives a guaranteed distribution of $500,000, which is expressly guaranteed at the expense of the similarly situated general unsecured creditors in Class 3B. Further, the language of the First Amended Plan and Disclosure Statement provides that Fann receive a "pro rata distribution of all funds received by the Estate," see Disclosure Statement at 20, which effectively attempts to guarantee Fann's distribution at the expense of senior creditors as well, including the

administrative claims class. The First Amended Plan cannot ignore provisions of the Bankruptcy Code and provide a single general unsecured creditor a guaranteed distribution at the expense of all similarly situated or senior creditors, which distribution could not even be implemented. Additionally, the First Amended Plan cannot ignore or attempt an end run around effectuated orders of this Court, including the Employment Order (as defined below) and Settlement Order. Therefore, the Disclosure Statement cannot be approved not only because it fails to provide adequate information, but additionally because the First Amended Plan is patently nonconfirmable.

II.
PERTINENT FACTS

1. On March 17, 2017, this Court entered its *Order Approving Employment of Garman Turner Gordon LLP as Attorneys for Chapter 11 Trustee Pursuant to 11 U.S.C. § 327(a) and Compensation Pursuant to 11 U.S.C. § 328(a)* (the "Employment Order") [ECF No. 167], approving the employment of GTG as the Trustee's attorney on a contingent basis pursuant to the Retention Agreement (as defined in the Employment Application).

2. On August 26, 2017, this Court made an oral ruling approving the Trustee's *Motion for Order Approving Settlement Arising Out of Settlement Conference Pursuant to U.S.C. §§ 105(a) and 363 and Bankruptcy Rule 9019* (the "Second 9019 Motion") [ECF No. 383] over Fann's objections. In particular, contrary to the Second 9019 Motion, Fann had sought the Court to treat portions of the transaction under the proposed settlement as occurring outside of the Estate such that property received in exchanged would not be subject to GTG's contingency fee. See, e.g., ECF Nos. 429 and 483.

3. On September 13, 2017, Fann filed the First Amended Plan and Disclosure Statement. Among other things, the First Amended Plan and Disclosure Statement (1) maintained that the Court's August 26, 2017 ruling was ambiguous and could be interpreted as ruling in Fann's favor on the Second 9019 Motion, see Disclosure Statement at 6 and 13, (2) provided that the transaction would still occur as Fann had proposed in its objections (verses in accordance with the terms of the actual Settlement that was ultimately approved by the Court), see id., (3) estimated

that the Trustee and GTG's fees would be paid based on Fann's proposed transaction, not the approved Settlement transaction (the "Settlement Transaction"), see id. at 17, and (4) provided that Fann would be placed into its own Class 3A separate from the other general unsecured creditors, classified in Class 3B, in which Fann would receive a guaranteed $500,000 distribution that would be paid from the Class 3B creditor's pro rata share. See id. at 20-21.

4. On September 18, 2017, this Court entered the Settlement Order. Among other things, the Settlement Order expressly provided without ambiguity that (1) the Estate would receive a $1.75 million payment ("Settlement Amount") from Mared, (2) the real property known as the Frontier is property of the Estate, (3) the Frontier would be transferred to Mared in its entirety in a single transaction, and (4) the Canyon Rock Parties would receive a $900,000 allowed secured claim from the proceeds of the Settlement Amount. See ECF No. 537 at 2-3.

5. Since the entry of the Settlement Order, Fann has not modified its First Amended Plan nor the Disclosure Statement to reflect the Settlement Order and therefore, the Disclosure Statement is laden with inaccurate information that precludes its approval.

III.
LEGAL ARGUMENT

A. Legal Standard.

To approve a disclosure statement, the court must determine that it contains "adequate information." See In re Arnold, 471 B.R. 578, 584 (Bankr. C.D. Cal. 2012). Adequate information is defined by Section 1125 as follows:

> 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, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other

> parties in interest, and the cost of providing additional information....

Courts have held that where a disclosure statement disregards the outcome of decided matters, such as failure to include claims that have survived claim objections, the disclosure statement lacks adequate information. See In re Arnold, 471 B.R at 586.

Additionally, "where a plan is on its face nonconfirmable, as a matter of law, it is appropriate for the court to deny approval of the disclosure statement describing the nonconfirmable plan." In re Silberkraus, 253 B.R. 890, 899 (Bankr.C.D.Cal.2000). As such, where a plan contradicts provisions of the Bankruptcy Code necessary for confirmation, including Sections 503, 507, 1123, or 1129, or otherwise violates court orders such that a plan cannot be approved on its face, its accompanying disclosure statement is deemed nonconfirmable.

B. The Disclosure Statement Does Not Contain Adequate Information.

The Disclosure Statement entirely disregards the entry of the Settlement Order. Among other things, (1) it calculates the Trustee and GTG's fees based on a transaction where the Estate received $850,000 through a transfer of a portion of the Frontier between third parties, not the $1.75 million actually received by the Estate, and (2) it presumes that the distribution available to unsecured creditors is based on Fann's proposed transaction and not the actual Settlement Transaction. In accordance with In re Arnold, the Disclosure Statement does not contain adequate information alone for failing to include the details of the Settlement Order, a now-final order (the material details of which were known to Fann at the time of filing the Disclosure Statement).

Creditors attempting to evaluate the First Amended Plan cannot be presented with facially false information through the Disclosure Statement. The estimated distributions detailed in the Disclosure Statement cannot happen as presented. In contravention of Section 1123(a)(5), there is simply no adequate means for the First Amended Plan's implementation given the entry of the Settlement Order and the subsequent closing of the Settlement Transaction. The law, therefore, is clear that the Disclosure Statement cannot be approved for failing to address the entry of the Settlement Order, and for misrepresenting the material terms of the Court's oral ruling on the Second 9019 Motion (which were subsequently put in writing in the Settlement Order).

Additionally, there is inadequate discussion of the proposed settlement payment of $200,000. The Disclosure Statement fails to explain the basis for the proposed $200,000 settlement payment, particularly why or how such settlement would be fair, and why or how Fann's claim should be allowed in full despite the Estate's claims against Fann. There is no analysis, such as required under Bankruptcy Rule 9019, explaining why the settlement is prudent and should be approved. While claims may be settled through a plan, Fann must still provide information used to evaluate a settlement for creditors to determine whether they would choose to vote in favor of a plan that effectuated such a settlement. The Disclosure Statement is again inadequate for failing to provide this information.

C. <u>The First Amended Plan Is Patently Nonconfirmable.</u>

Remarkably, through its Class 3A, Fann attempts to provide itself with a guaranteed $500,000 distribution that is not available to other general unsecured creditors. In fact, the First Amended Plan provides that the Class 3B distribution to all other general unsecured creditors would be reduced in order to ensure Fann's guaranteed $500,000 distribution. Again, to be absolutely clear, *Fann's First Amended Plan separates Fann into its own general unsecured class apart from all the other general unsecured creditors and provides itself with a guaranteed distribution at the expense of the other general unsecured creditors and, apparently, even priority and administrative claims.*

It is challenging to even detail how many Bankruptcy Code provisions this scheme violates. Among the options, this classification scheme is directly contrary to Section 1123(a)(4), which requires that a plan provide the same treatment for each claim or interest of a particular class. Likewise, where a non-accepting class faces cramdown (and it is certain that Class 3B would vote against the disparate treatment proposed under the First Amended Plan), Section 1123(b)(1) requires that such plan not discriminate unfairly. The First Amended Plan, however, would provide for materially different percentage recoveries between Class 3A and 3B, although the classes are comprised of otherwise indistinguishable general unsecured claims.

. . .

Further, while Section 1123(a)(5) requires adequate means for the plan's implementation, once the improper disparate treatment of claims is corrected. The First Amended Plan's implementation presumes that the Settlement Order was never entered, and instead Fann's preferred transaction was consummated. Additionally, while the First Amended Plan is flatly contrary to the requirements for cramdown found in Section 1129(b), Fann's creation of its own Class 3A as the would-be only accepting impaired class under Section 1129(a)(10) (as the only other voting class, Class 3B would undoubtedly vote to reject its discriminatory treatment) is impermissible gerrymandering.

By guaranteeing Fann a "pro rata distribution of all funds received by the Estate in an amount no less than $500,000," see Disclosure Statement at 20, the First Amended Plan creates a conflict with the full distribution of administrative priority claims, including those of the Trustee and GTG. Pursuant to Sections 503, 507, and Section 1129(b)(2)(B), the Trustee and GTG must receive full payment before unsecured creditors receive a distribution. While GTG intends to voluntarily reduce its contingent fee by $50,000 in order to provide for an additional distribution to creditors, the First Amended Plan is nevertheless patently nonconfirmable pursuant to the Bankruptcy Code. Additionally, while the Disclosure Statement states that Fann believes "GTG may seek larger compensation" (n.2 at 17) than the amount unilaterally proposed by Fann, the Disclosure Statement is nonetheless misleading and the First Amended Plan nonconfirmable because Fann's proposed compensation violates the Employment Order.

Fann cannot disregard and attempt to unwind effectuated orders of this Court through the operation of the First Amended Plan. Not only must the Disclosure Statement address the Settlement Order as a matter of providing adequate information, but the First Amended Plan must follow all applicable Bankruptcy Code provisions and orders of this Court. As such, the Disclosure Statement should not be approved because the First Amended Plan appears to disregard or attempt to alter the terms of the Trustee's and GTG's compensation under the Bankruptcy Code in addition to orders of this Court such as the Settlement Order.

IV.
CONCLUSION

Based on the foregoing, the Trustee respectfully requests that the Court deny approval of the Disclosure Statement and grant such other and further relief as the Court deems just and proper.

DATED this the 25th day of October, 2017.

GARMAN TURNER GORDON LLP

By: _____

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