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E-filed on: October 25, 2017

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re: 06-019 VACAVILLE III BUSINESS TRUST, Debtor.	Case No. BK-S-16-12929-ABL Chapter 11 **OBJECTION TO AMENDED DEBTOR'S DISCLOSURE STATEMENT** Date of Hearing: November 8, 2017 Time of Hearing: 1:30 PM Place: Courtroom No. 1, Third Floor Foley Federal Building 300 Las Vegas Blvd., S. Las Vegas, NV 89101 Judge: Hon. August B. Landis

TANK Holdings, LLC, one of the tenants-in-common ("TIC Interest Holder" or alternatively, "TANK Holdings") in the Property (defined below) and a prospective purchaser of the Property, by and through its counsel Richard F. Holley, Esq. and Ogonna M. Brown, Esq., of the law firm Holley Driggs Walch Fine Wray Puzey & Thompson, and Robbin Itkin of the law firm of Liner LLP, hereby files its objection to the Amended Debtor's Disclosure Statement filed by 06-019 Vacaville III Business Trust (the "Debtor") on October 11, 2017 [ECF No. 103]. This

Amended Disclosure Statement amends the Debtor's prior Disclosure Statement filed on June 27, 2017 [ECF No. 54].

This Objection is supported by the Declaration of Ogonna M. Brown, one of the attorneys for TANK Holdings ("Brown Decl."), filed concurrently herewith pursuant to LR 9014(c)(2), and the Declaration of Thomas F. Angstadt ("Angstadt Declaration"), the Manager of TANK Holdings, previously filed with this Court on August 25, 2017 as ECF No. 77, and incorporated by reference herein. This Objection is further supported by the papers and pleadings on file herein, the following Memorandum of Points and Authorities, together with such other and further evidence and argument as may be presented and considered by this Court at any hearing on the Amended Disclosure Statement.

Dated this 25th day of October, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Debtor has had approximately two (2) months to amend its Disclosure Statement [ECF No. 54], since the hearing before this Court on August 30, 2017. Notwithstanding the fact that nearly two (2) months have passed, giving Debtor ample time to address the objections to the Disclosure Statement raised by TANK Holdings in its Objection to Debtor's Disclosure Statement [ECF No. 76] and by the Court during the last hearing, the Debtor has done virtually nothing to remedy the ongoing deficiencies in its initial Disclosure Statement. TANK Holdings reiterates that Debtor has allegedly been attempting, albeit unsuccessfully, to sell 130 acres of real property located in Solano County, California, APN 0109-270-100 ("Property") since 2011.

Debtor's only quasi-substantive changes to the Amended Disclosure Statement are (i) the inclusion of the key terms of the Revised Letter of Intent from TANK Holdings, which to date has not been signed by the Debtor, (ii) information regarding the U.S. Trustee's conditional dismissal order, (iii) the liquidation analysis exhibit, which is contradictory, misleading and confusing, and (iv) information regarding Mesa's management fees in the amount of $90,356.62 claim. Debtor has failed to meaningfully address any of the prior objections raised in connection to the initial Disclosure Statement regarding its failure to serve the TIC Holders, the basis for the value of the Property, information regarding Debtor's historical marketing efforts to sell the Property since 2011, the means for effectuating the Plan in terms of specifics regarding the marketing of the Property, the overly broad and inconsistent marketing period of 3-5 years, a deficient liquidation analysis, and the Debtor's failure to disclose information regarding the sale requirements relating to under 11 U.S.C. § 363(f) and (h) and NRS § 645B.340

Since the last hearing on the approval of the Disclosure Statement, Debtor has admitted that it has obtained post-petition lending without court authorization paid by un-named "investors" to cover $23,043.34 in costs to pay Mesa for its "management" services [ECF No. 103, pp. 16-17, n.2]. Debtor fails to identify who specifically paid the Debtor these funds and when said funds were paid. To add insult to injury, the Debtor provides contradictory

information regarding the source of these unauthorized post-petition loans, when it identifies Mesa as the entity that has advanced funds to meet the Debtor's management expenses.

Enough is enough. It is clear that the Debtor is not serious about reorganizing its affairs by selling the Property. Consequently, the Court should *sua sponte* convert the case to a case under Chapter 7.

II. STATEMENT OF RELEVANT FACTS

FIRST BANKRUPTCY CASE

1. This is not the first bankruptcy case filed by the Debtor. The similarities between the First Bankruptcy Case (defined below) and this bankruptcy case are striking. The First Bankruptcy was filed on May 1, 2013, as a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court, District of Nevada, Case No. BK-S-13-13810-LED ("First Bankruptcy Case").[1]

2. In Debtor's Schedule A filed in May of 2013, Debtor listed as its primary asset its interest in the Property with an asserted value of $1,819,200 as of the Petition Date. The Property was encumbered by a tax lien in the amount of $710,402.89 in favor of the Solano County Treasurer [ECF No. 1, p. 9, p. 13].

3. Mesa Asset Management ("Mesa") was identified as the Debtor's manager [ECF No. 1].

4. The only other asset of the Debtor as of the Petition Date in May 2013, was nominal cash of $42.88 in its bank account [ECF No. 1, p. 10].[2]

[1] TANK Holdings respectfully requests that this Court take judicial notice of the Debtor's First Bankruptcy Case, and the related Petition, Schedules, Statements of Financial Affairs, and other documents filed in the First Bankruptcy case and the Debtor's Second Bankruptcy Case (defined below), and the related Petition, Schedules, Statements of Financial Affairs, and other documents filed in the Second Bankruptcy Case pursuant to Fed. R. Evid. 201, as made applicable by Fed. R. Bankr. P. 9017. The information contained in these documents, signed under penalty of perjury by Debtor's representative, are admissions of Debtor pursuant to Fed. R. Evid. 801(d).

[2] In the First Bankruptcy Case, Debtor identified the then-following pending bankruptcy cases that share common management: (i) Debtor 05-023 Carmencita Business Trust Nevada, Case No. BK-S-13-11150-BAM, filed on February 15, 2013 (dismissed by debtor to allow sale of property); (ii) Debtor 05-023 Redding Business Trust Nevada, Case No. BK-S-13-11151-BAM, filed on February 15, 2013; and (iii) Debtor 6-009 Ranco Coachella Business Trust Nevada, Case No. BK-S-13-13423-BTB (dismissed by OUST for 2½ years of inactivity, no MORs for 6 months, no plan/disclosure statement filed). *See* ECF No. 1, p. 4, Form 1 Voluntary Petition.

5. In the First Bankruptcy Case, the Debtor filed a series of Status Reports[3] with the Bankruptcy Court. In the last two (2) Status Reports, Debtor represented that "[a]ll owners of the Property, including Debtor, plan to market and sell the property to satisfy property taxes owed to the Solano County Treasurer – Tax Collector." [ECF Nos. 82, 86].

6. On November 24, 2015, the Office of the United States Trustee filed a Motion pursuant to 11 U.S.C. 1112(b) and Federal Rules of Bankruptcy Procedure 1017(f) and 9014, to dismiss Chapter 11 case ("Motion to Dismiss") [ECF No. 72]. The Motion to Dismiss was brought on the basis that the Debtor's case was pending before the Bankruptcy Court for more than 2½ years with no disclosure statement, plan or sale motion ever filed, despite Debtor's repeated representations to the Court that it would do so in seven (7) status reports filed in the case, dating as far back as January 2014 [ECF Nos. 38, 44, 51, 56, 62, 67, 70].

7. On December 10, 2015, Debtor objected to the Motion to Dismiss on the basis that dismissal would result in a tax sale that would significantly reduce the amount for which the Property could be sold and would not be in the best interests of the non-tax creditors or the investors. Debtor also argued that it filed for bankruptcy to market the Property with the goal of maximizing the recovery from the sale of the Property to pay creditors [ECF No. 84].

8. On January 6, 2016, the Bankruptcy Court entered an Order Dismissing Case [ECF No. 87].

SECOND BANKRUPTCY CASE

9. On May 27, 2016 (the "Petition Date"), Debtor filed this second voluntary Chapter 11 voluntary bankruptcy petition for relief before the United States Bankruptcy Court, District of Nevada, currently pending as Case No. BK-S-16-12929-ABL ("Second Bankruptcy Case") [ECF No. 1].

10. Debtor's sole asset is still its interest in the Property [ECF No. 1, p. 2, Item 55].

11. The only creditors reflected in the Debtor's mailing matrix in connection with the Bankruptcy Petition was the Office of the Debtor, Solano County, Debtor's counsel, and Mesa.

[3] Debtor filed Status Report on October 2, 2013, January 28, 2014, April 29, 2014, October 20, 2014, January 9, 2015, April 9, 2015, June 30, 2015, October 9, 2015, December 7, 2015, and January 4, 2016 [ECF Nos. 30, 38, 44, 51, 56, 62, 67, 70, 82, and 86].

No tenancy in common interest holders are identified or included in the mailing matrix [ECF No. 1, p. 27].

12. Debtor's Schedules reflect that it continues to hold a 60.64% ownership interest in the Property [ECF No. 1, p. 2, Item 55].

13. Debtor's Schedule A lists the value of the Debtor's interest in the Property at $1,819,200 as of the Petition Date, with a net book value of $2,973,000. The Property continues to be encumbered by a tax lien in favor of the Solano County Treasurer in the amount of $993,366.61 [ECF No. 1, p. 2, Item 55, pp. 9-13].

14. As of the Petition Date, Debtor scheduled only $7.54 in its bank account [ECF No. 1, pp. 9-12].

15. Debtor filed a series of Status Reports with the Bankruptcy Court on July 19, 2016, August 22, 2016, October 5, 2016, December 2, 2016, February 17, 2017, April 13, 2017, and June 5, 2017, each nearly identical to the other and nearly identical to the Status Reports filed in the First Bankruptcy Case. In each of the Status Reports, the Debtor states that "[a]ll owners of the Property, including Debtor, plan to market and sell the property to satisfy property taxes owed to the Solano County Treasurer – Tax Collector" [ECF Nos. 16, 23, 29, 36, 40, 44, and 47].

16. As of the Petition Date, the Debtor's cash balance was $1.00, and as of April 30, 2017, Debtor's cash balance remains the same at $1.00. *See* Monthly Operating Report for month ended April 30, 2017 [ECF No. 91].

OFFICE OF UST'S DISMISSAL MOTION

17. On June 23, 2017, the Office of the United States Trustee filed a Motion Pursuant to 11 U.S.C. 1112(b) and Federal Rules of Bankruptcy Procedure 1017(f) and 9014, to Convert or Dismiss Chapter 11 Case ("Motion to Dismiss"). The Motion was based on the Debtor's failure to file Monthly Operating Reports for the months of March 2017 through May 2017 [ECF No. 49].

18. On June 27, 2017, Debtor filed a Disclosure Statement ("Disclosure Statement") [ECF No. 54] and proposed Plan of Reorganization ("Plan") [ECF No. 55].

19. On July 12, 2017, the Debtor filed its Opposition to Motion to Convert or Dismiss Chapter 11 Case ("Opposition to Motion to Dismiss"), stating that the missing MORs were filed with the Court [ECF No. 61].

20. In its Opposition to the Motion to Dismiss, Debtor represented to the Court that a potential buyer was interested in purchasing the Property for $2.4 million, which amount exceeds the Debtor's tax liability [ECF No. 61, p. 4, ll. 20-24]. The prospective purchaser is Tank Holdings.

21. The Debtor attached a copy of TANK Holdings' Letter of Intent dated July 5, 2017, to purchase the Property for $2.4 million, as **Exhibit F** to the Opposition to Motion to Dismiss [ECF No. 61].

22. In its Opposition to Motion to Dismiss, Debtor represented to the Court that the "potential sale would satisfy the proposed liquidating plan that has been filed by the Debtor and is pending approval and confirmation" and that "there is a reasonable likelihood that the plan would be confirmed within a reasonable period of time pursuant to 11 U.S.C. 1112(b)(2)(A)." [ECF No. 61, p. 4, ll. 25-26, p. 5, ll. 1-2].

23. On August 10, 2017, the Bankruptcy Court entered a Conditional Order of Dismissal, providing that Debtor must confirm a plan by November 30, 2017, subject to an order extending the deadline, file timely Monthly Operating Reports, and timely pay the U.S. Trustee fees, absent which the U.S. Trustee could file an ex parte motion and lodge an order for immediate dismissal without further notice of hearing before the Bankruptcy Court [ECF No. 63].

24. On September 8, 2017, TANK Holdings filed a Motion to Amend or Alter Conditional Order of Dismissal ("Motion to Amend Order"), seeking an order from the Court to convert the Chapter 11 Bankruptcy Case to a case under Chapter 7 in the event the Debtor failed to confirm the Plan of Reorganization by the November 30, 2017 deadline previously imposed by the Court ("Deadline") [ECF No. 86].

25. On October 4, 2017, the Bankruptcy Court granted TANK Holdings' Motion to Amend Order, allowing for the conversion of the case instead of dismissal in the even the Debtor missed the Deadline. *See* Order Granting Motion Dismissal [ECF No. 99].

REVISED LETTER OF INTENT

26. As set forth in greater detail in the Angstadt Declaration, TANK Holdings has attempted to make inquiries to purchase the Property since 2013, but Debtor was unresponsive.

27. In October of 2016, TANK Holdings' California bankruptcy attorney made a number of calls to Debtor's counsel regarding the purchase of the Property, but Attorney Tim Thomas never returned any of the calls.

28. TANK Holdings submitted to Debtor a Letter of Intent dated July 5, 2017 ("LOI") [ECF No. 61, Exhibit F].

29. The Debtor did not respond to TANK Holdings' LOI for over a month.

30. TANK Holdings retained local bankruptcy counsel in August 2017. Local counsel also repeatedly attempted to engage Debtor's counsel in a dialogue regarding comments to the LOI. The Debtor did not respond to these overtures until August 11, 2017 After TANK Holdings made repeated requests for comments to the LOI submitted over a month prior, on or around August 16, 2017, Debtor finally submitted comments to the LOI [ECF No. 77]. In other words, it took over one (1) month for the Debtor to respond and provide comment to the LOI.

31. TANK Holdings immediately adjusted the LOI in response to Debtor's comments, and submitted a revised Letter of Intent to the Debtor on August 19, 2017 ("Revised LOI"). A true and correct copy of the Revised LOI is attached to the Angstadt Decl. as **Exhibit "3"** [ECF No. 77].

32. As set forth in the Revised LOI, TANK Holdings agreed to reduce the break-up fee from $125,000 to $75,000, and to reduce the minimum initial overbid increment from $250,000 to $100,000, which will cover the break-up fee of $75,000 and leave an amount to cover Debtor's costs related to the sale process [ECF No. 77].

33. TANK Holdings also agreed to reduce the subsequent bidding increments from $50,000 to $20,000 [ECF No. 77].

34. In connection with the initial LOI, Debtor requested assurances regarding Debtor's financial wherewithal to fund the sale, which TANK Holdings submitted to the Debtor on or around August 16, 2017 [ECF No. 77].

35. TANK Holdings also agreed in the Revised LOI to provide the Debtor with an earnest money deposit of $50,000 in escrow with First American Title Company within three (3) business days after the Debtor executes a Purchase and Sale Agreement ("PSA") [ECF No. 77].

36. On October 10, 2017, Debtor belatedly submitted revisions to the LOI to TANK Holdings, and after a series of revisions, on October 20, 2017, TANK Holdings submitted a finalized Revised LOI for Debtor's signature. A true and correct copy of the Second Revised LOI is attached to the Brown Decl. as **Exhibit "1"**.

37. Notwithstanding repeated efforts from TANK Holdings, to date, Debtor has not signed the Second Revised LOI. *See* Brown Decl.

38. Based upon information received from Debtor's counsel as recently as October 20, 2017, the Debtor has not circulated the Second Revised Letter of Intent to the TIC Holders for approval. *See* Brown Decl.

TANK HOLDINGS: TIC INTEREST HOLDER AND PROPOSED BUYER OF PROPERTY

39. TANK Holdings is also one of the tenants-in-common and an interest holder in the Property, as set forth in the Tenancy in Common Interest Purchase Agreement dated May 31, 2017 ("TIC Agreement").

40. On May 31, 2017, TANK Holdings entered into the TIC Agreement with Robert Lacroix and Mary Lacroix, not individually but solely in their respective capacities as Trustees of the Robert & Mary Lacroix Trust dated 3/24/03 (the "Lacroix Trust"), to purchase its tenancy in common interest of 20,000 undivided units as a tenant in common ("TIC Interest") in the Property. A true and correct copy of the TIC Agreement is attached to the Angstadt Declaration as **Exhibit "1"**.

41. TANK Holdings performed under the TIC Agreement, and on July 7, 2017, a Grant Deed was recorded with the Solano County Recorder's Office, evidencing the transfer of

the TIC Interest from the Lacroix Trust to TANK Holdings. A true and correct of the Grant Deed is attached to the Angstadt Declaration as **Exhibit "2"**.

42. On August 16, 2017, TANK Holdings filed a Notice of Transfer of Interest with the Bankruptcy Court [ECF No. 70]. TANK Holdings is an interested party in the bankruptcy case.

DEBTOR'S PLAN AND DISCLOSURE STATEMENT

43. According to Debtor's Disclosure Statement, the Debtor is a holding company for several parties who acquired an interest in one real estate parcel that served as collateral to secure an investment the investors foreclosed upon in 2011 after the borrower defaulted in 2007 [ECF No. 54, p. 12, ll. 15-17].

44. The Debtor was formed in 2010, but has no business operations beyond holding the Property. The Debtor has no current employees and no other ongoing liabilities [ECF No. 54, p. 13, ll. 11-12].

45. Mesa was retained as trustee of the Debtor to manage the liquidation of the real property [ECF No. 54, p. 13, ll. 2-3]. Mesa charges approximately $750.00 a month/$9,000.00 a year for its managements services [ECF No. 54, p. 13, ll. 20-22]. The Debtor has never produced a copy of the management agreement with Mesa, nor detailed what management services it allegedly performs.

46. Debtor states in the Disclosure Statement that the "Debtor currently is pursuing marketing of the Property to solicit offers to purchase the Property." [ECF No. 54, p. 13, ll. 16-17]. However, the Debtor does not provide any information in its Amended Disclosure Statement regarding alleged marketing efforts.

47. Mesa is allegedly owed $34,000 in management fees [ECF No. 54, p. 15, n. 2].

48. Debtor values the Property at $3,000,000, based "upon comparable sales and marketing of the surrounding communities and properties," resulting in a $1,833,300 value of the Debtor's interest in the Property [ECF No. 54, p. 13, ll. 23-26]. However, the Debtor does not provide any information to support the alleged valuation.

49. Debtor discloses that the Solano County's tax claim has increased to $1,086,080.54 since the Petition Date [ECF No. 54, p. 13, ll. 26-27]. This is an increase of $92,713.93. Debtor's Plan proposes to market the Property for sale for three (3) years after Plan confirmation ("Deadline"), on the condition that failure to sell the Property and pay the property taxes by the Deadline would result in an event of default. [ECF No. 55, p. 6, §3.1].

DEBTOR'S AMENDED DISCLOSURE STATEMENT

50. On October 11, 2017, nearly four (4) months after filing its initial Disclosure Statement, Debtor filed its Amended Disclosure Statement [ECF No. 103].

51. It is important to note that the Debtor did not make a single change to the Plan of Reorganization previously filed with this Court [ECF No. 55]. *See* Plan, **Exhibit 1** to Amended Disclosure Statement [ECF No. 103, pp. 35-48].

52. The Notice of Hearing for the Amended Disclosure Statement identifies the TIC Holders, but the mailings are sent only care of Mesa, the manager [ECF No. 96]. In other words, the Debtor still has not notified the actual TIC Holders of the bankruptcy filing, the hearing regarding the Amended Disclosure Statement, or notified them regarding the proposed Plan of Reorganization.

53. The Amended Disclosure Statement is still completely silent regarding historical marketing and sale efforts in terms of whether the Property was listed, with whom the property was listed, for how much the property was listed, how many interested buyers conducted due diligence regarding the property and any other details regarding the Debtor's sale efforts, leaving the prior objections to the Disclosure Statement unanswered. Debtor's blanket statement that it "attempted to market the Property for sale through the bankruptcy case" is new language, but provides no meaningful information regarding past marketing and sale efforts [ECF No. 103, p. 13, ll. 15-16, p. 14, ll. 1-5].

54. Debtor includes new information about the letter of intent it received from TANK Holdings, but Debtor fails to disclose that it has not signed the letter of intent [ECF No. 103, p. 14, ll. 7-26].

55. The Amended Disclosure Statement identifies the updated amount owed to Mesa, Debtor's management company, in the amount of $90,356.62 [ECF No. 103, p. 18, l. 9; p. 20, l. 8].

56. Debtor also includes new information regarding the Conditional Dismissal Order [ECF No. 103, p. 17, ll. 11-16]. The Amended Disclosure Statement has no other additional information and makes virtually no effort to address the objections of TANK Holdings to the initial Disclosure Statement.

III. LEGAL ARGUMENT

A. Standard for Objection to Debtor's Amended Disclosure Statement

Section 1125(b) of the Bankruptcy Code requires that, before acceptances of a proposed plan may be solicited, the plan proponent must transmit to all holders of claims and interests "a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." *See* 11 U.S.C. § 1125(b). Section 1125(a) of the Bankruptcy Code defines "adequate information" 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 of 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…

See 11 U.S.C. § 1125(a)(1).

Section 1125 requires a disclosure statement to provide "adequate information." 11 U.S.C. § 1125(a)(1). This means that the disclosure statement contain sufficient information such that a hypothetical reasonable investor may make an informed judgment when voting on the plan. *See* 11 U.S.C. § 1125(a)(1). "The purpose of a disclosure statement is to give all creditors a source of information which allows them to make an informed choice regarding the approval or rejection of a plan." *In re Cal. Fid., Inc.*, 198 B.R. 567, 571 (B.A.P. 9th Cir. 1996). At an "irreducible minimum," a disclosure statement must provide information about the plan and how its provisions will be effected. *See 2010-1 CRE Venture, LLC v. VDG Chicken, LLC (In re VDG*

Chicken, LLC), 2011 WL 3299089, at *4 (B.A.P. 9th Cir. April 11, 2011). In making such a determination, courts have considered relevant factors such as: (1) a description of the available assets and their value; (2) the scheduled claims; (3) the estimated return to creditors under a Chapter 7 liquidation; (4) the collectability of accounts receivable; (5) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (6) litigation likely to arise in a non-bankruptcy context; (7) tax attributes of the debtor; and (8) the relationship of the debtor with affiliates. *See In re Pac. Shores Dev., Inc.*, 2011 WL 778205, at *4 (Bankr. S.D. Cal. Fe. 25, 2011) (citing *In re Reilly*, 71 B.R. 132, 134 (Bankr. D. Mont. 1987)); *In re Neutgens*, 87 B.R. 128, 129 (Bankr. D. Mont. 1987); *In re Diversified Investors Fund XVII*, 91 B.R. 559, 561 (Bankr. C.D. Cal. 1988). If a disclosure statement does not provide sufficient factual support for its position, it should not be approved. *See*, *e.g.*, *In re Egan*, 33 B.R. 672, 675-76 (Bankr. N.D. Ill. 1983).

A disclosure statement cannot be approved unless it provides "adequate information" for a party in interest to make an informed judgment as to whether to accept or reject a proposed plan. 11 U.S.C. § 1125(a). Although the Bankruptcy Code is silent as to what exactly constitutes "adequate information," the courts have developed specific guidelines for the kinds of information to be contained in a disclosure statement. *See In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 171 (Bankr. S.D. Ohio 1988), and cases cited therein. A disclosure statement must contain certain categories of information, including, but not limited to, the following:

> 1. The circumstances that gave rise to the filing of the bankruptcy petition.
>
> 2. A complete description of the available assets and their value.
>
> 3. The anticipated future of the debtor.
>
> 4. The source of the information provided in the disclosure statement.
>
> 5. A disclaimer, which typically indicates that no statements of information concerning the debtor or its assets or securities are authorized, other than those set forth in the disclosure statement.
>
> 6. The condition and performance of the debtor while in chapter 11.

7. Information regarding claims against the estate.

8. A liquidation analysis setting forth the estimated return that creditors would receive under chapter 7.

9. The accounting and valuation methods used to produce the financial information in the disclosure statement.

10. 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.

11. A summary of the plan of reorganization.

12. An estimate of all administrative expenses, including attorneys' fees and accountants' fees.

13. The collectability of any accounts receivable.

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

15. Information relevant to the risks being taken by the creditors and interest holders.

16. The actual or projected value that can be obtained from avoidable transfers.

17. The existence, likelihood and possible success of non-bankruptcy litigation.

18. The tax consequences of the plan.

19. The relationship of the debtor and its affiliates.

In re Metrocraft Publishing Services, Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984). *See also In re Cardinal Congregate I*, 121 B.R. 760, 765 (Bankr. D. Ohio 1990); *In re Dakota Rail, Inc.*, 104 B.R. 138 (Bankr. D. Minn. 1989); *In re Jeppson*, 66 B.R. 269 (Bankr. D. Utah 1986).

Section 7.1 of the United States Trustee Guidelines issued by the Office of the United States Trustee offers further guidance for the adequacy of information in disclosure statements, setting forth the type of information that should be included in a disclosure statement. *See* Guidelines, Region 17, § 7.1.

B. The Amended Disclosure Statement Contains Inadequate Information under 11 U.S.C. § 1125 to Allow Creditors and Interested Parties including the TIC Interest Holders to Make an Informed Judgment About the Plan

The Amended Disclosure Statement still suffers from the same substantial inadequacies that plagued the initial Disclosure Statement, in that it fails to provide adequate information to allow creditors and TIC Interest Holders to meaningfully evaluate whether to support or oppose the proposed Plan of Reorganization. The Amended Disclosure Statement is inadequate under Section 1125, and does not meet the basic U.S. Trustee Guidelines, as set forth below.

1. Debtor's Amended Disclosure Statement Does Not Provide a Review of the Scheduled Assets and Their Value.

The U.S. Trustee Guideline 7.1(g) states:

> The statement should provide a review of the scheduled assets and their values, an estimate of the current value of all debtor's assets and the basis for such estimated values, (e.g. cost or appraisals), and an explanation of any deviation from the scheduled values.

See Guidelines, Region 17, § 7.1(g).

The Amended Disclosure Statement as revised remains full of gaps, contradictions and inadequacies, and simply does not meet the "adequate information" requirement of Section 1125 of the Bankruptcy Code. Debtor values the Property at $3,000,000, and bases the value "upon comparable sales and marketing of the surrounding communities and properties," resulting in a $1,833,300 value by the Debtor of its interest in the Property.[4] [ECF No. 103, p. 15, ll. 11-14]. However, there is no objective basis for Debtor's opinion of value of the Property and therefore of the Debtor's interest in the Property. The Debtor fails to identify anywhere in the Amended Disclosure Statement any concrete verifiable details regarding the value of the Property, including copies or descriptions of alleged comparable sales or listings in the area. This is a critical omission as the Debtor's interest in the Property is the sole asset that is intended to fund the Plan.

[4] Notably, there is no change in this information from the initial Disclosure Statement, and Debtor has done nothing to remedy this deficiency. [ECF No. 54, p. 13, ll. 23-26].

Debtor has failed to amend its Disclosure Statement to provide this basic and essential information. For these reasons and the additional reasons set forth below, the Court should deny approval of the Amended Disclosure Statement and Plan.

2. The Amended Disclosure Statement Provides Deficient Means of Effectuating the Plan.

The U.S. Trustee Guideline 7.1(j) states:

> The statement should include how the goals of the plan are to be accomplished, e.g., infusion of cash by an investor, sale of real or personal property, continued business operations, or issuance of stock. If an investor is to provide funds, financial information about the investor should be included.

See Guidelines, Region 17, § 7.1(j).

The Amended Disclosure Statement remains devoid of specifics regarding the marketing of the Property, other than the statement that the "Debtor's intent is to market the Property for sale in order to satisfy the taxes and return funds to the original investors." *See* Amended Disclosure Statement, p. 13, ll. 25-27 [ECF No. 103].[5] Ironically, Debtor has repeatedly made this representation to the Bankruptcy Court for over four (4) years now, including representations made in the First Bankruptcy Case. The Debtor has allegedly been "marketing" the Property since 2011[6]; and yet the Debtor's Amended Disclosure Statement provides no historical information regarding how the Property has been marketed for sale since Mesa was appointed as the Trustee to liquidate the Property after the investors foreclosed on the Property in 2011.

Glaringly absent from the Amended Disclosure Statement is any information regarding prior listings or advertisement of the Property; any information regarding interested party responses, or information regarding prior offers to purchase the Property, if any, since 2011. Mesa's sole function is and has been to market and sell the Property; therefore, the Amended

[5] The same deficiency existed in the initial Disclosure Statement and this lack of information remains unchecked in the Amended Disclosure Statement. *See* Disclosure Statement, p. 13, ll. 16-17 [ECF No. 54].

[6] Status Report filed October 2, 2013, January 28, 2014, April 29, 2014, October 20, 2014, January 9, 2015, April 9, 2015, June 30, 2015, October 9, 2015, December 7, 2015, and January 4, 2016 [ECF Nos. 30, 38, 44, 51, 56, 62, 67, 70, 82, and 86] (First Bankruptcy); Status Reports filed July 19, 2016, August 22, 2016, October 5, 2016, December 2, 2016, February 17, 2017, April 13, 2017, June 5, 2017 [ECF Nos. 16, 23, 29, 36, 40, 44, 47] (Second Bankruptcy).

Disclosure Statement should describe Mesa's historical sale efforts. The Debtor also fails to provide a copy or details regarding the management agreement with Mesa, the services it performs or commissions or fees it will receive when and if the Property is sold. The Debtor simply states that it receives an annual fee of $9,000 for "managing" the Property [ECF No. 103, p. 15, ll. 9-11]. This objection was previously raised by TANK Holdings, yet the Amended Disclosure Statement remains identical to the initial Disclosure Statement on this issue.[7]

The Debtor also fails to provide in the Amended Disclosure Statement any information regarding its current marketing and sale efforts. With the exception of the offer from TANK Holdings, which was obtained through no efforts on Debtor's part, the Amended Disclosure Statement remains devoid of any information regarding Debtor's current marketing efforts and what Debtor is doing to maximize the estate. This is information that the Debtor is required to include in the Amended Disclosure Statement. The Debtor makes representations to the Court that "[i]n an effort to complete a sale, the investor owners **are willing to accept a loss** on their original investment in the secured loan." *See* Amended Disclosure Statement (emphasis added) [ECF No. 103, p. 15, ll. 15-19]. However, based upon information received from Debtor's counsel as recently as October 20, 2017, the Debtor has not circulated the Second Revised Letter of Intent to the TIC Holders, and more importantly, the Debtor has not even signed the Second Revised Letter of Intent. *See* Brown Decl.

The Amended Disclosure Statement is likewise devoid of any meaningful information about how the Property will be marketed in the event the TIC Holders do not approve the Second Revised Letter of Intent. Debtor's Amended Disclosure Statement provides that the Debtor, through Mesa, should have five (5) years to sell the Property and pay the property taxes, and that failure to do so will result in a default allowing Solano County to foreclose to enforce its tax lien. *See* Amended Disclosure Statement [ECF No. 103, p. 19, ll. 11-14].[8] This timeline is in direct contradiction with the Debtor's anticipated timeline for the sale of the Property set forth in the

[7] See Disclosure Statement [ECF No. 54, p. 13, ll. 20-22].

[8] This same defect was contained in the initial Disclosure Statement [ECF No. 54, p. 17, ll. 15-22], and notwithstanding TANK Holdings' initial objection, the Debtor has taken no steps to remedy the inconsistent and contradictory information in the Amended Disclosure Statement.

Plan, in which the Debtor proposes to sell the Property within in three (3) years after Plan confirmation. Only if the sale does not close by 2020 does the Debtor's Plan fall into default, resulting in foreclosure by Solano County to enforce its tax lien, which is currently in excess of $1 million and continues to grow. *See* Plan, p. 6, ll. 7-11 [ECF No. 103, p. 41 of 51].

Debtor's proposed timing of the sale of the Property is by far the most important component for creditors to consider in order to make an informed judgment about the Plan. In light of this inconsistent information, this Court simply cannot approve the Amended Disclosure Statement. The Debtor also fails to state why this additional time is necessary, given the fact that the Debtor has been allegedly marketing the Property for the past six (6) years.

3. Debtor's Liquidation Analysis is Deficient.

The U.S. Trustee Guideline 7.1(l) states that "[t]he statement should describe the difference between treatment of creditors under the plan and treatment under a Chapter 7 liquidation.…" *See* Guidelines, Region 17, § 7.1(l). Further, pursuant to 11 U.S.C. 1129(a)(7)(ii), the plan must show that the creditors will receive not less than what they would in a Chapter 7 liquidation. Debtor states that liquidation will result in smaller distributions to creditors because "impaired classes would recover only the net present value of the estate property after sale by the taxing authority…."[9] *See* Amended Disclosure Statement, p. 32, ll. 3-4 [ECF No. 103]. This statement misses the point. The issue is whether creditors and parties in interest would do better in a chapter 7 liquidation. The answer to this question may very well be yes, given the continuous and significant increases in the tax liability and apparent inactivity on the sale's front.

Even though the Debtor acknowledges in its Amended Disclosure Statement that the "Plan provides for an extended time for sale, even if the approved sale under § 363 fails to be completed, resulting in the payment of equal or greater amounts than the present liquidation value to each of these classes," *see* Amended Disclosure Statement, p. 32, ll. 9-12 [ECF No. 103], the Debtor provides no detailed information or supporting documentation to support its contention. Without any basis or supporting information, the Debtor simply makes the

[9] Debtor made this same statement in the initial Disclosure Statement, at p. 30, ll. 14-15 [ECF No. 54].

conclusory statement that "[i]f the Debtor were to liquidate the Property today without the TANK offer, the sale would most likely be for less than the amount of the Class 1 claim and generate no income for the general unsecured creditors." *See* Amended Disclosure Statement, p. 32, ll. 13-16 [ECF No. 103]. This statement makes no sense, particularly in light of the fact that TANK Holdings offered to purchase the Property for $2.4 million is subject to an auction process and overbidding. The Amended Disclosure Statement also makes no sense in light of the fact that the Debtor has failed to execute a letter of intent with TANK Holdings.

Ironically, the information that can be gleaned from the Debtor's Schedules and Statements in this bankruptcy case as well as the First Bankruptcy (the filing and dismissal of which the Debtor fails to disclose), leads to the contrary conclusion that immediate liquidation would yield more for unsecured creditors than a prolonged sale process. Specifically, when the Debtor filed the First Bankruptcy, it owed Solano County $710,402.89 in real property taxes. [ECF No. 1, p. 9, p. 13]. Since then, the real property taxes have increased to $1,086,080.54 [ECF No. 103, p. 18, ll. 8-9], resulting in an additional tax obligation of $375,677.65 since the filing of the First Bankruptcy case. The Amended Disclosure Statement fails to update the tax obligation as of October 11, 2017, and uses stale figures going back to June 27, 2017, used in the initial Disclosure Statement.[10] The Debtor does not tell us what the amount of the tax debt was when it foreclosed on the Property in 2011. It is likely that the outstanding tax debt in 2011 was significantly less than the current outstanding obligation. While the tax debt continues to increase at an alarming rate (nearly $100,000 since the Petition Date, and approximately $400,000 since the Debtor filed its First Bankruptcy Case), there is no objective evidence that the value of the Property is increasing at the same or greater rate.

Debtor also fails to inform creditors that the management fee charged by Mesa likewise continues to be charged every year that the Property is not sold, resulting in an additional debt to the detriment of TIC interest holders. As of the Petition Date, Mesa was allegedly owed $34,000 in management fees [ECF No. 54, p. 15, n. 2]. In the Amended Disclosure Statement, Debtor

[10] The initial Disclosure Statement filed four (4) months ago in June 2017 identifies the amount of delinquent real property taxes of $1,086,080.54 [ECF No. 54, p. 13, l. 27]. This is the same figure identified in the Amended Disclosure Statement filed on October 11, 2017.

updates the Mesa management fee in the shocking amount of $90,356.62. Debtor's manager has positioned itself as a "creditor", even though the benefit to the estate from Mesa's "services" are highly suspect, given that Mesa has placed the Debtor into bankruptcy twice since 2011 with no success or actual benefit to the estate, while the real property taxes and management fees continue to accrue. The back taxes incurred pre-petition continue to accrue interest, penalties and late fees. Debtor concedes that it generates no income because the Debtor "has no business operations beyond the holding the Property," and "no current employees and no other ongoing liabilities." *See* Amended Disclosure Statement, p. 13, ll. 2-3, ll. 6-7 [ECF No. 103].

Equally troubling as it relates to Mesa's is that under Mesa's "management", Debtor has obtained unauthorized post-petition lending that has been paid by un-named "investors" to cover $23,043.34 in costs to pay Mesa, and states that "[b]oth amounts carry interest" [ECF No. 103, pp. 16-17, n. 2]. However, Debtor provides no information regarding whether or not the Debtor sought bankruptcy court approval for this post-petition lending, the terms of the repayment, and who specifically paid the Debtor these funds and when in order to pay Mesa for its "services", which to date have not benefitted the estate [ECF No. 103, pp. 16-17, n. 2]. This information regarding "investors" paying Debtor to fund Mesa's management fees is inconsistent with other new information in the Amended Disclosure Statement, which provides that "Mesa has advanced funds to meet these expenses to be reimbursed as part of its general unsecured claim." *See* Amended Disclosure Statement, p. 26, ll. 10-11 [ECF No. 103].

Debtor provides new cursory information in the Amended Disclosure Statement relating to the liquidation analysis, but fails to explain why a "Chapter 7 Trustee would have little interest in continuing to market the Property and would likely allow a tax sale to proceed against the Property" in the event TANK's offer is not approved or completed [ECF No. 103, p. 32, ll. 5-9]. Debtor adds a liquidation chart as an exhibit to the Amended Disclosure Statement, which inexplicably describes Liens to include general unsecured creditors, identifies total net equity to include $13,919.46 in the tax sale scenario, which is nonsensical, and identifies $33,632.32 to include money paid to TIC holders, which is likewise confusing [ECF No. 103, p. 51].

Debtor's liquidation analysis is confusing, misleading, wholly unsupported by any information, and entirely inconsistent with the information filed with the Bankruptcy Court in the First Bankruptcy Case and the Second Bankruptcy Case. Debtor must remedy the defects in the Amended Disclosure Statement as it relates to the liquidation analysis. It certainly appears that creditors and parties in interest will be best served by an expeditious sale instead of allowing Debtor to sell the Property over the next three (3) or five (5) years, which will do nothing but further reduce and eat away at the equity in the Property that should be paid to creditors and the investors.

4. Debtor's Amended Disclosure Statement Violates Section 1129(a)(1) and (2), As Interest Holders Received No Notice of Amended Disclosure Statement.

Pursuant to Section 1129(a)(1) and (2), a plan cannot be confirmed if the plan fails to comply with 11 U.S.C. § 1129(a)(1) and (2), which require the plan and the debtor to comply with the applicable provisions of Title 11. As a preliminary matter, Section 1125(c) provides that the "disclosure statement shall be transmitted to each holder of a claim or interest of a particular class." A review of the certificate of service for the Amended Disclosure Statement and proposed Plan reveals that the Debtor failed to serve TIC Interest Holders. It is alarming that Debtor's deficiencies regarding service of the Disclosure Statement and Plan remain unremedied for the Amended Disclosure Statement, in that the Notice of Hearing for the Amended Disclosure Statement simply "serves" the TIC Holders care of Mesa, the manager, without sending the actual notice to the respective addresses for the TIC Holders [ECF No. 96]. Debtor simply added the names of the TIC holders to the certificate of service without actually mailing the Amended Disclosure Statement to any of them. The only TIC Holders to receive actual service of the Amended Disclosure Statement are the Jack Sunseri Trust at a California address and TANK Holdings, through its Nevada bankruptcy counsel [ECF No. 96, p. 4].

This is not the first time the lack of service issue has been raised, as this deficiency was a problem in the service of the initial Disclosures Statement [ECF No. 57, p. 4 of 4] (listing only Office of the US Trustee, the Debtor, Solano County, Bankruptcy Court, Mesa). Based upon Debtor's continuous failure to properly serve the TIC Holders, it remains unclear whether the

Debtor ever noticed its filing of bankruptcy to the TIC Interest Holders. A review of the mailing matrix reveals that none of the TIC Interest Holders were included by the Debtor [ECF No. 1, p. 27] (listing only the Debtor, Solano County, Debtor's counsel, and Mesa).

Service of the Amended Disclosure Statement to the TIC Interest Holders is imperative, as they have a vested interest in (i) a Plan that proposes to market and sell the Property for up to five (5) years, (ii) the charge of over $90,000 in management fees for "services" that do not appear to benefit the estate, and (iii) the outcome of the sale versus liquidation through a Chapter 7 Trustee, all of which requires the TIC Holders to be properly noticed to ensure their participation. Debtor's Amended Disclosure Statement cannot be approved and the Plan cannot be confirmed under 1129(a)(1) and (2), without the requisite service of the Bankruptcy, Plan and Amended Disclosure Statement to the TIC Interest Holders.

5. Amended Disclosure Statement Fails to Provide Meaningful Information Regarding TIC Voting Requirements Under Sections 363(f) and (h)

The Amended Disclosure Statement is defective because it still makes no meaningful reference to the statutory requirements that dictate the rights of the TIC Interest Holders as it relates to the sale of the Property. Specifically, the Amended Disclosure Statement should contain an analysis of the sale components that must be met under 11 U.S.C. § 363(f) and 11 U.S.C. § 363(h). The Amended Disclosure Statement should contain meaningful information regarding whether the Debtor is able to satisfy the applicable non-bankruptcy law as required under 11 U.S.C. § 363(f)(1), which in this instance is NRS § 645B.340, and governs the sale of Property held by multiple holders of beneficial interest in a loan. Chapter 645B of the Nevada Revised Statutes provides that holders of a majority of the outstanding principal balance may act on behalf of all holders to sell the Property in which they have a TIC Interest, and sets forth in relevant part as follows:

> 1. Except as otherwise provided by law or by agreement between the parties and regardless of the date the interests were created, if the beneficial interest in a loan or the ownership interest in the real property previously securing the loan belongs to more than one person, the holders of the beneficial interest in a loan whose interests **represent 51 percent or more of the outstanding principal balance of the loan or the holders of 51 percent or**

> **more of the ownership interest in the real property**, as indicated on a trustee's deed upon sale recorded pursuant to subsection 10 of NRS 107.080, a deed recorded pursuant to subsection 5 of NRS 40.430 or a deed in lieu of foreclosure, and any subsequent deed selling, transferring or assigning an ownership interest, may act on behalf of all the holders of the beneficial interests or ownership interests of record on matters which require the action of the holders of the beneficial interests in the loan or the ownership interests in the real property,

See NEV. REV. STAT. § 645B.340(1) (emphasis added). The Debtor simply makes a blanket statement without any explanation that the "sale is subject to the approval of 51% of the investors in the original loan under Nevada law." [ECF No. 103, p. 14, ll. 25-26]. As a debtor in possession, the Debtor is obligated to meaningfully explain this vital component of the Plan.

Notwithstanding TANK Holdings' prior objection raised on this point, Debtor again fails to include in the Amended Disclosure Statement a feasibility analysis to address whether partition of the Property is impracticable for purposes of 11 U.S.C. § 363(h)(1), the costs associated with partition, the difficulty or ease of dividing the Property equitably as a result of the nature of the Property, and the limited or ease of access to the Property, and the legal ramifications of the Solano County's tax lien attached to the entirety of the Property. Debtor also fails to include in the feasibility analysis any information in the Amended Disclosure Statement regarding the requirements of 11 U.S.C. § 363(h)(2), and if the sale of the bankruptcy estate's undivided interest in the Property would realize significantly less than the sale of all co-owners' interest in the Property, and if partial ownership in the Property along with other co-owners makes the Property difficult to sell or use. Debtor's feasibility analysis likewise makes no mention of the requirements under 11 U.S.C. § 363(h)(3).

The Debtor must at least discuss these provisions and explain whether it can satisfy the conditions precedent to the sale of the Property subject to the interests of the TIC Interest Holders. If the TIC Interest Holders consent to the Debtor selling the Property, the Debtor must provide proof of such consent. Absent this additional information, the Debtor's Amended Disclosure Statement cannot be approved by the Court.

IV. CONCLUSION

Based on the foregoing, TANK Holdings respectfully requests that the Court enter an order denying approval of Amended Debtor's Disclosure Statement.

Dated this 25th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Holley Driggs Walch Fine Wray Puzey & Thompson, and that on the 25th day of October, 2017, I caused to be served a true and correct copy of OBJECTION TO AMENDED DEBTOR'S DISCLOSURE STATEMENT in the following manner:

☒ (ELECTRONIC SERVICE) Under Administrative Order 02-1 (Rev. 8-31-04) of the United States Bankruptcy Court for the District of Nevada, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

☐ (UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to the parties listed on the attached service list, at their last known mailing addresses, on the date above written.

☐ (OVERNIGHT COURIER) By depositing a true and correct copy of the above-referenced document for overnight delivery via Federal Express, at a collection facility maintained for such purpose, addressed to the parties on the attached service list, at their last known delivery address, on the date above written.

☐ (FACSIMILE) That I served a true and correct copy of the above-referenced document via facsimile, to the facsimile numbers indicated, to those persons listed on the attached service list, on the date above written.

An employee of Holley Driggs Walch
Fine Wray Puzey & Thompson

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FINE•WRAY•PUZEY•THOMPSON