

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

IN RE:

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**THE DAVID WINSTON EARLY CABELL
FAMILY LIMITED PARTNERSHIP, LTD.,¹

DEBTOR.**

**Case No. 16-10569
(Chapter 11)**

**WELLS FARGO BANK, NATIONAL ASSOCIATION'S OBJECTION TO FIRST
AMENDED DISCLOSURE STATEMENT (DATED: AUGUST 24, 2017)
[This instrument relates to Docket No. 59]**

TO THE HONORABLE BILL PARKER, UNITED STATES BANKRUPTCY JUDGE:

Wells Fargo Bank, National Association ("Wells Fargo") files this *Objection* (the "Objection") to the *First Amended Disclosure Statement (Dated: August 24, 2017)* [Docket No. 59] (the "Disclosure Statement"), and respectfully states as follows:

I. OVERVIEW OF OBJECTION²

1. This Court should deny approval of the Disclosure Statement because: (i) the Disclosure Statement fails to describe how Wells Fargo's Swap Claim (Proof of Claim No. 4) will be treated under the Plan; (ii) the Disclosure Statement fails to describe how Wells Fargo's Deficiency Claim will be treated under the Plan; (iii) the Disclosure Statement provides no evidence to substantiate the assertion that the Financial Assets were increasing in value as of the

¹ EIN: xx-xxx3120

² Certain undefined capitalized terms appearing in the Overview of Objection are defined later in this Objection. Additionally, all references herein to the "Bankruptcy Code" shall mean Title 11 of the U.S. Code. All other undefined, capitalized terms appearing in this Objection shall have the meaning(s) ascribed to such terms as set forth in this Court's *Agreed Final Order Approving Use of Cash Collateral and Granting Partial Adequate Protection* [Docket No. 37] (the "Cash Collateral Order") and the Conditional Approval Objection. Wells Fargo also hereby incorporates all arguments, assertions, and statements set forth in Wells Fargo's: (i) *Motion for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)* [Docket No. 51] (the "Stay Relief Motion"); (ii) *Objection to Motion by the David Winston Early Cabell Family Limited Partnership, Ltd. to Extend Chapter 11 Case Resolution Deadline* [Docket No. 50] (the "Extension Objection"); and, (iii) *Objection to the Debtor's Emergency Motion for Order (1) Conditionally Approving Amended Disclosure Statement; (2) Fixing Record Date for Voting; (3) Approving Plan Solicitation Package and Voting Procedures; (4) Setting Deadlines to Vote on Plan and Object to Plan and Disclosure Statement; and (5) Setting Hearing on Final Approval of Disclosure Statement and Plan Confirmation* [Docket No. 66] (the "Conditional Approval Objection").

time of the Debtor's pre-petition Event of Default; (iv) the Disclosure Statement must be amended to reflect that the Debtor's sole tenant with respect to the Real Property vacated prior to the Petition Date, the Debtor had no replacement tenant, the Debtor has not generated any revenues during 2017, and the Debtor currently has no operations; (v) the Disclosure Statement uses inflammatory language to describe Wells Fargo's filing its Stay Relief Motion and Extension Objection and Wells Fargo's actions in connection with the pre-petition Event of Default; the Debtor has no basis to characterize Wells Fargo's intent behind taking such actions, instead, the Debtor may merely note that such actions were taken, if at all; and, (vi) the Disclosure Statement should reflect that the original Disclosure Statement [Docket No. 52] was filed on August 4, 2017 and the Debtor took no action to prosecute the same until August 24, 2017, when it filed the Conditional Approval Motion and sought emergency relief.

2. Without providing this information the Plan fails to provide adequate information as required by Section 1125 of the Bankruptcy Code and/or provides misleading information that may skew voters' impressions of the Debtor's conduct and operations. As such, this Court should deny approval of the Disclosure Statement until these deficiencies are remedied.

II. OBJECTION

3. The Disclosure Statement should not be approved because it fails to provide adequate information. Section 1125(b) of the Bankruptcy Code requires that a disclosure statement contain adequate information. "Adequate Information" is defined as "information of a kind, and in sufficient detail . . . [so as to enable] a hypothetical investor of the relevant class to make an informed judgment about the plan."³ The Disclosure Statement should be denied

³ 11 U.S.C. § 1125(a); *see also In re Fullmer*, No. 09-50086-RLJ-11, 2009 WL 2778303, at *2-3 (Bankr. N.D. Tex. Sept. 1, 2009) (stating that "[a]dequate information is generally defined as information of a kind, and in sufficient detail, given the nature and history of the debtor and the condition of the debtor's financial records that will enable the debtor's creditors and investors to make an informed judgment about the plan," and denying approval of the disclosure statement); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R. 567, 567-69 (Bankr. N.D. Ga. 1984) (listing **WELLS FARGO'S OBJECTION TO DEBTOR'S FIRST AMENDED DISCLOSURE STATEMENT** **PAGE 2 OF 6**)

because it fails to provide adequate information and/or provides misleading information insofar as:

- (i) The Disclosure Statement fails to describe the Plan's proposed treatment of Wells Fargo's Swap Claim, filed as Claim No. 4 in the Claims Registry of this Bankruptcy Case (the "Swap Claim"), and to which no objection has been filed. The Swap Claim is secured by the same Collateral which secures the Note Claims, but to the extent that the Note Claims are undersecured, the Swap Claim is completely unsecured and should be classified as a General Unsecured Claim for purposes of the Debtor's Plan pursuant to Rule 3018(d) of the Federal Rules of Bankruptcy Procedure ("FRBP" or the "Bankruptcy Rules").
- (ii) the Disclosure Statement fails to recognize or describe how Wells Fargo's Deficiency Claim will be treated under the Plan.⁴ On June 6, 2017, Wells Fargo conducted the Approved Foreclosure Sale and was the ultimate purchaser of the Real Property via a credit bid of approximately \$2,106,000.00 (the "Credit Bid"). The Approved Foreclosure Sale and the amount of Wells Fargo's Credit Bid have not been contested. After the Approved Foreclosure Sale, and as of approximately June 21, 2017, the remaining amount of the Wells Fargo Indebtedness totaled no less than approximately \$3,377,981.79, which amount remains subject to adjustment to account for post-petition interest, fees, costs, and charges, including attorneys' fees and costs that continue to accrue (the "Deficiency Claim"). The Deficiency Claim remains secured up to the value of the Financial Assets, which value was only approximately \$2,431,292.00 as of August 3, 2017.⁵
- (iii) the Disclosure Statement provides no evidence to substantiate the assertion that the Financial Assets were increasing in value as of the time of the Debtor's pre-petition Event of Default or that the Financial

numerous factors courts may consider to determine whether the disclosure statement provides adequate information and denying approval of the disclosure statement).

⁴ Pursuant to the Loan Documents, Wells Fargo holds valid, perfected, first-priority secured claims against the Debtor in connection with the pre-petition financial accommodations extended to the Debtor (the "Pre-Petition Claims"). The Pre-Petition Claims are secured by, among other things, and without limitation, the Financial Assets and certain of the Debtor's personal property and all proceeds therefrom, including, but not limited to, the Revenues, cash and cash collateral, and the Property as set forth more specifically in the Loan Documents (collectively, the "Collateral"). The Pre-Petition Claims serve as the subject of Wells Fargo's proofs of claim, filed at Claims Register Nos. 2–4, in the total combined amount of \$5,252,647.96, subject to adjustment to account for post-petition interest, fees, costs, and charges, including attorneys' fees and costs that continue to accrue (together with the Pre-Petition Claim, collectively, the "Wells Fargo Indebtedness"). This Court has also granted Wells Fargo valid Post-Petition Liens (as defined in the Cash Collateral Order) on the Post-Petition Collateral (as defined in the Cash Collateral Order) pursuant to the Cash Collateral Order.

⁵ See Disclosure Statement, art. 4.1.

Assets continue to "significantly" increase in value so as to provide a windfall to Wells Fargo or even satisfy the Deficiency Claim;⁶

- (iv) the Debtor has not generated any revenues during 2017 and currently conducts no operations. Additionally, the Debtor's sole tenant with respect to the Real Property vacated prior to the Petition Date and the Debtor never obtained a replacement tenant. This information bears directly on the feasibility of the Plan and must be considered when reviewing the Plan in its totality in order for creditors to make an informed decision on the Plan;
- (v) articles 2(D) and (E) use inflammatory language to describe and negatively color, prior to any final adjudication of such facts and matters in the Bankruptcy Case and Adversary Proceeding currently pending before this Court, Wells Fargo's filing its Stay Relief Motion and Extension Objection and Wells Fargo's calling the pre-petition Default under the Loan Documents. Descriptions of Wells Fargo's conduct, to the extent relevant, should be limited to the undisputed facts sans any unsubstantiated embellishments;⁷ and,
- (vi) the Disclosure Statement should reflect that the original Disclosure Statement [Docket No. 52] was filed on August 4, 2017 and the Debtor took no action to prosecute the same until August 24, 2017, when it filed the Conditional Approval Motion and sought emergency relief. This information is necessary to elucidate the Debtor's self-inflicted delays, manufactured emergencies, and failure to adhere to the Case Resolution Deadline due to no party's fault but its own.

III. RESERVATION OF RIGHTS

4. Wells Fargo reserves all rights with respect to the Disclosure Statement and Plan, and all other pending pleadings in this Bankruptcy Case and the Adversary Proceeding, and as against the Debtor or any other party under the Loan Documents, the Bankruptcy Code, and applicable law, including, but not limited to, the right to amend or supplement this Objection as allowable under applicable law, the Local Bankruptcy Rules, and the orders of this Court, and to assert further claims, counterclaims, and/or defenses or affirmative defenses as the evidence may allow, or that may be determined through pre-trial discovery, including the right to enforce the

⁶ See Disclosure Statement, art. 2(B).

⁷ See, e.g., Disclosure Statement, art. 2(D) ("In light of Wells Fargo's *inconsistent* positions . . .") (emphasis added); Disclosure Statement, art. 2(E) ("In an attempt to sidestep the Adversary Proceeding . . .").

arbitration provisions in the Loan Documents and/or move this Court to order the parties to arbitrate per the terms of the Loan Documents.

IV. PRAYER

Wells Fargo respectfully requests that this Court: (i) sustain this Objection; (ii) deny approval of the Disclosure Statement; (iii) enforce the terms of the Case Resolution Order and dismiss this Bankruptcy Case with prejudice to re-filing for a period of no less than 180 days; and, (iv) grant Wells Fargo such other and further relief to which it may be justly entitled, both at law and in equity.

DATED: September 18, 2017

Respectfully submitted,

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**ATTORNEYS FOR WELLS FARGO BANK,
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Certificate of Service

I hereby certify that on September 19, 2017, a true and correct copy of the foregoing document will be served via first class, U.S. mail to the parties listed below. Additionally, on September 18, 2017, a true and correct copy of the foregoing document was electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District.

/s/ Sean B. Davis

One of Counsel

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