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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	**Case No. 14-35043**
SAMUEL E. WYLY, et al.,	**Chapter 11**
	Jointly Administered
Debtors.	

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OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO DEBTOR'S PROPOSED PLAN AND DISCLOSURE STATEMENT

The Securities and Exchange Commission ("SEC"), objects to the Second Amended Chapter 11 Plan (ECF 1517) ("Plan") and Disclosure Statement (ECF 1470) ("Disclosure Statement") filed by Caroline D. Wyly ("Debtor" or "Dee Wyly") because, among other things, there is absolutely no assurance that the Plan can or will be funded. Its funding is entirely dependent on funds that currently reside in Isle of Man ("IOM") trusts. Counsel for the relevant trustees, has asserted in connection with virtually identical trusts that were settled by Sam Wyly,

that they will not release assets from the offshore trusts absent a global settlement. 11 U.S.C. §§ 1125, 1129(a), 524(e). The specter of a similar stunt in connection with the IOM trusts settled by the Debtor's late husband, Charles Wyly, means that the SEC cannot support Dee Wyly's Plan until the relevant funds have been repatriated and are subject to this Court's jurisdiction. In support of its objection, the SEC respectfully states as follows:

INTRODUCTION

The SEC objects to approval of the Disclosure Statement because it describes a plan that is not feasible and cannot be confirmed without repatriated funds. Moreover, the Plan includes several provisions that run afoul of the Bankruptcy Code, including priority payments, classification, injunctive provisions and retention of property of the estate. While the Debtor's Plan purports to pay creditors' in full, it cannot be confirmed without funding from the IOM trusts. At present, there is no indication that the IOM trustees will repatriate the necessary funds.

The SEC is aware that some of these issues may constitute objections to confirmation of the Plan. To avoid the potential waste of time and resources involved in distribution and solicitation with respect to an unconfirmable plan, it is appropriate to raise these objections to the Plan at the disclosure stage of the case. A court may disapprove a disclosure statement if the plan, on its face, does not meet the confirmation standards of Chapter 11. *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154 (3rd Cir. 2012); *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999). As discussed more fully herein, the Plan is facially unconfirmable and therefore the Debtor cannot meet the requirements of Section 1125 with respect to any disclosure statement submitted in connection with the Plan.

DISCUSSION

I. The Plan is not Feasible because it is Contingent on Funding that the IOM Trustees have Refused to Repatriate.

Section 1129(a)(11) requires that the Plan is workable and has a reasonable likelihood of success. *Fin. Sec. Assurance Inc v. T-H New Orleans Ltd., P'ship (In re T-H New Orleans Ltd P'ship)*, 116 F.3d 790, 801 (5th Cir. 1997); *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 715,744-45 (Bankr. M.D. La. 1999); *In re M & S Assoc., Ltd.*, 138 B.R. 845, 848-49 (Bankr. N.D. Tex. 1992); *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989). This requirement includes a showing that there will be sufficient assets to fund the plan as proposed.

While the Debtor's Plan optimistically provides for the full satisfaction of creditors' claims, it is wholly dependent on funding from the offshore trusts.[1] To date, the IOM trustees have refused to voluntarily repatriate any funds from the offshore trusts. Indeed, in the Sam Wyly bankruptcy, the same trustees have made clear that they will not repatriate funds, even upon the request of the Wyly beneficiaries, unless there is a global settlement. Letter from Michael Mann, August 1, 2016, ECF 1478. Without funds from the offshore trusts, the Debtor's nonexempt assets are wholly insufficient to satisfy even a fraction of the unsecured claims in this case. The Debtor has not provided any assurance that IOM trust assets will be available to fund the Plan. Accordingly, the Plan is facially unconfirmable and no further resources should be expended in soliciting the Plan.

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[1] Article 6.1(a) of the Plan provides that five business days before confirmation of the Plan, the IOM trustees will transfer title to assets in various investment or security accounts totaling a value of $139,150,000 or such other amounts as are necessary to fund the Plan. Ultimately, this is too little, too late. By then, the parties and the Court will have wasted valuable resources and time on an unconfirmable Plan.

II. The Debtor should not be Permitted to Retain Millions of Dollars of Estate Assets.

The Plan provides that Dee Wyly will retain certain properties and assets in accordance with Section 1115 of the Bankruptcy Code. Plan, Article 1.74. These assets and properties are significant and include her homestead and all personal property and furnishings located therein, all causes of action except those against Security Capital, all vehicles and personal property listed on her Schedules, a defined benefit plan, the Great Western Annuity, social security payments, rights and interests in the Charles Wyly Probate Estate, and an "Administrative Reserve" of $1,250,000. Many of these assets are not exempt property and should rightly be included in the estate for distribution to creditors. Moreover, they may not qualify as property that may be retained by a debtor pursuant to Section 1115 of the Bankruptcy Code. The Fifth Circuit has held that only property and income acquired post-petition is included in Section 1115. The absolute priority rule applies to pre-petition property of the estate in individual Chapter 11 cases. *In re Lively*, 717 F.3d 406, 409 (5th Cir. 2013). Given the debate as to what property constitutes property of the estate in these cases, Dee Wyly should not retain such assets.

III. The SEC should not be Enjoined under the Plan.

Article 13.2 of the Plan contains a broad plan injunction that is tantamount to a discharge. The SEC alerted the Debtor that this provision would run afoul of Section 523(a)(19) that prohibits the discharge of debts related to securities violations. In response, the Debtor limited the provisions by including the following provision:

> (c) Notwithstanding the foregoing, (a) and (b) shall not apply to the SEC nor shall there be any discharge of the Debtor by the SEC until such time as the Allowed Claim of the SEC is paid in full as provided for in Section 4.2; provided, however, that upon posting a surety bond or depositing into the Liquidating Trust the amount provided for in Section 4.2, the SEC shall be temporarily enjoined from taking any action against the Debtor or the Retained Assets to collect the SEC's Claim without further order of the Bankruptcy Court.

This provision opens a whole new can of worms. The SEC should not be bound by plan injunctions or prohibited from pursuing all of its legal rights, including defending the Second Circuit appeal.

IV. The Debtor Failed to Justify Payment of Other Unsecured Creditors Ahead of the SEC.

The Plan provides for the satisfaction of other unsecured claims prior to the payment of the SEC and IRS.[2] The SEC's claim is a general unsecured claim. Thus, it should be classified with and paid at the same time as other unsecured claims.[3] Generally, substantially similar claims are placed in the same class pursuant to Section 1122 of the Bankruptcy Code. The Debtor must demonstrate a business or economic reason for the separate classification of substantially similar claims. *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278-9 (5th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S. Ct. 72, 121 L. Ed. 2d 37 (1992). *See also, In re Save Our Springs (S.O.S) Alliance, Inc*., 388 B.R. 202, 233 (Bankr. W.D. Tex. 2008), *aff'd*, 2009 U.S. Dist. LEXIS 121177 (W.D. Tex. Sept. 29, 2009), *aff'd sub. nom, Save our Springs Alliance, Inc. v. SWI (II)-COS, L.L.C.*, 632 F.3d 168 (5th Cir.); 7 Collier on Bankruptcy § 1122.03[4][a], at 1122-11 (16th ed. 2016). The

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[2] Some of the unsecured claims are questionable at best and should not be paid through the Plan. For example, the Plan provides for payment to Charles Wyly, III for his contributions to the Debtor's control account. It is unclear whether his contributions, which were made post-petition and without approval from the Court, were a gift or a loan. Transcript, November 25, 2014, pp. 7-8.

[3] It appears to the SEC that the reason that the Debtor may be proposing classification is to secure an accepting class under Section 1129(a)(10). The Fifth Circuit could not have been clearer: "thou shall not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278-9 (5th Cir. 1991), cert. denied, 506 U.S. 821, 113 S. Ct. 72, 121 L. Ed. 2d 37 (1992). The Debtor should not be allowed to classify the similar claims of the SEC, IRS and other unsecured creditors to gerrymander an accepting class.

Debtor has provided no justification for separate classification of the SEC's claim or payment to other unsecured creditors ahead of the SEC and IRS.[4] If the Debtor seeks a cram down, the Plan cannot meet the requirements of Section 1129(b)(1) that it not discriminate unfairly and is fair and equitable.[5]

V. The Disclosure Statement is Deficient.

The SEC also objects that the Disclosure Statement is defective as presently filed and cannot be approved. Section 1125(b) of the Bankruptcy Code requires the Disclosure Statement to contain "adequate information" in order to be approved and capable of being used to solicit votes for any plan of reorganization. The Debtor's Disclosure Statement does not contain sufficient "adequate information" under Sections 1125(a)(1) and (b) and should be rejected. Among other things, the Disclosure Statement does not include the Liquidating Trust Agreement or an adequate liquidation analysis. The SEC is reluctant to spend additional time and resources in objecting to disclosure because it believes that the Plan is facially unconfirmable.

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[4] The SEC anticipates that the Debtor will argue that these issues are not relevant since the Plan provides that unsecured claims will be fully satisfied. Given the real uncertainty in funding, the SEC doubts that it will be paid in full.

[5] The SEC is not clear as to whether the Debtor intends to seek cram down. While the Disclosure Statement references cram down, Debtor's counsel has indicated that the Debtor will not seek such relief and the Plan contains no cram down provisions.

CONCLUSION

WHEREFORE, for the reasons stated above, the SEC respectfully requests that the Court enter an order denying approval of the Disclosure Statement.

Dated: August 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 25, 2016, a copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/ Angela D. Dodd
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