UNITED STATES BANKRUPTCY COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In the Matter of:	:	
	:	
PIONEER ROOFING SYSTEMS, INC.,	:	**Chapter 11**
	:	
	:	**Case No. 15-13518-BFK**
Debtor.	:	
	:	

OBJECTION TO AMENDED DISCLOSURE STATEMENT

COMES NOW, Burke & Herbert Bank & Trust Company ("B&H"), by counsel, and files this objection to the Amended Disclosure Statement filed by the Debtor Pioneer Roofing Systems, Inc. herein. B&H states and avers that the Disclosure Statement filed by the Debtor herein does not contain "adequate information" as that term is defined pursuant to 11 U.S.C. 1125(a)(1), fails to provide proper classification of claims and interests, and fails to provide for proper treatment of claims and interests as required pursuant to the Bankruptcy Code. For the reasons stated hereinbelow, B&H objects to the Disclosure Statement and asks that this Court deny approval of same.

I. INTRODUCTION

The Debtor, Pioneer Roofing Systems, Inc. ("Debtor" or "Pioneer"), filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on or about October 8, 2015, and the Debtor has continued in possession of its property and affairs since that date as a Debtor in Possession. On or about February 14, 2017, the Debtor filed a proposed Amended Disclosure Statement ("Disclosure Statement") and Amended Plan of Reorganization ("Plan").

11 U.S.C. 1125 states that no solicitation of any proposed plan may be made until a disclosure statement containing "adequate information" is transmitted to each holder of a claim or interest in the debtor. 11 U.S.C. 1125(b). "Adequate information" is defined as 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, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. 11 U.S.C. 1125(a)(1) and Menard-Sanford v Mabey (In re A.H. Robbins Co.), 880 F.2d 694 (4th Cir. 1989).

The Disclosure Statement filed by the Debtor herein lacks adequate information as required pursuant to 11 U.S.C. 1125.

II. DEFICIENCIES IN DISCLOSURE

The Disclosure Statement is defective, in that, it contains incomplete, inadequate and potentially misleading information regarding the Debtor and its business operations, and additionally suffers from material omissions that a typical investor would require in making a reasonable determination regarding the Debtor's proposed Plan. The Disclosure Statement further fails to provide for proper classification of claims and interests herein.

a. Inadequate and incorrect description and/or classification of claims of B&H

The Disclosure Statement is inaccurate or incomplete with respect to its description and classification of claims asserted herein by B&H. In the first instance, the Disclosure Statement lumps all primary loans made by B&H to the Debtor into Class 5 as "B&H Bank Secured Claims." As noted in the Disclosure Statement, the Debtor is principal obligor with respect to

three separate loans made by B&H, which the Debtor identified in the Disclosure Statement as follows:

Loan #	**Total Claim**	**Security**
Loan 3925	$336,777.99[1]	S.A. 4/13/10. C&D
Loan 2001	$438,201.79	S.A. 4/13/10. C&D
Loan 3869	$ 24,896.52	S.A. 4/13/10. UCC
Total	**$799,876.30**[2]	

However, Pioneer is also obligated to B&H pursuant to a corporate guaranty of a loan #501203806 made originally to PRS Real Estate, LLC (Loan #3806). Loan #3806 has been scheduled by the Debtor as part of the Class 6 class of general unsecured claims. Yet, the corporate guaranty of Pioneer is fully secured by B&H's lien on corporate assets of the Debtor. Accordingly, the claims of B&H appear in the first instance to be improperly classified.

The B&H Bank Secured Claims as identified in the Disclosure Statement, as well as Pioneer's liability under Loan #3806, are admittedly secured, in part, by a lien upon all assets of the Debtor including all accounts receivable, furniture, fixtures, machinery & equipment, inventory and general intangibles. It is believed that the Debtor's assets standing alone are insufficient to fully secure payment of the B&H claims, and that a purported classification of B&H claims as fully secured claims is improper and/or inaccurate.

[1] Loan #3925 was reduced to judgment prior to the filing of this case by entry of a confessed judgment against Pioneer made on or about July 14, 2015.

[2] The amounts listed by the Debtor in the Disclosure Statement do not include attorneys' fees and other costs and charges applicable under the loan documents currently in excess of $60,000.00. The Disclosure Statement should be amended to properly define and quantify all B&H claims.

The Debtor's Disclosure Statement itself acknowledges at Section V that B&H "has a security interest in all of Pioneer's assets which exceeds the liquidation value of Pioneer's assets." (Disclosure Statement, pg. 6). It is impossible to determine from the plain language of the Disclosure Statement if B&H's claims are to be treated as fully or partially secured. Instead, the Disclosure Statement refers to additional collateral security provided by the Debtor's principals and affiliates in treating the B&H claims as presumptively secured. However, the additional collateral provided by the Debtor's principals Stephen Wann ("Wann") and Joan Martin ("Martin") is not property of the estate and is not capable of being used to determine the amount and extent of a secured claim.

11 U.S.C. 506 states in pertinent part that a claim secured by a lien upon property in which the estate has an interest "is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property." 11 U.S.C. 506(a). Wann and Martin admittedly provided additional collateral security in the form of indemnity deeds of trust against their personal residence and commercial real property located at 7211 C&D Telegraph Square, Lorton, Virginia. Yet, because Pioneer's estate holds no interest in the real property, it may not be used in valuing or classifying the B&H claims as secured.

Finally, Pioneer identifies the Class 5 B&H Bank Secured Claims as "unimpaired." This has important ramifications for B&H because such a determination would eliminate B&H's ability to vote on the Debtor's proposed Plan. 11 U.S.C. 1126 provides in pertinent part that an unimpaired class of claims is "conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is

not required." 11 U.S.C. 1126(f). "Impairment" is further defined at §1124 of the Bankruptcy Code as follows:

> Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--
> (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or
> (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default--
> (A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;
> (B) reinstates the maturity of such claim or interest as such maturity existed before such default;
> (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;
> (D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and
> (E**)** does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

11 U.S.C. 1124.

As noted above, Loan #3925 was reduced to judgment pre-petition and is due and payable in full. Additionally, Loans #2001 and 3869 have fully matured, were in default pre-petition, and are due and payable in full. The Debtor's Plan does not provide for payment in full of B&H's claims at confirmation, and the Debtor fails to meet the requirements of 11 U.S.C. 1124 for determination of unimpaired status. It is inconceivable that the Debtor would attempt to classify B&H's claims as unimpaired. The classification is incorrect and must be corrected.

In summary, the current classification of Loan #3806 fails to acknowledge that such claim is secured by the same collateral as the other B&H Bank Secured Claims as identified in the Disclosure Statement. Additionally, the Disclosure Statement fails entirely to estimate expected value of collateral in which the Debtor holds an interest for the purposes of bifurcating B&H's claims into secured and unsecured portions. Finally, the Disclosure Statement improperly identifies B&H's Class 5 claims as "unimpaired." The description and classification of B&H claims alone is therefore inadequate as contained in the proposed Disclosure Statement.

b. Inadequate or improper description of proposed Plan treatment

The Disclosure Statement fails to provide adequate information from which B&H can reasonably determine the nature and extent of proposed treatment of its claims under the Plan. For the purposes of simplicity, B&H will address the proposed claim treatment as currently set forth in the Disclosure Statement and without regard to the improper classification identified hereinabove.

i. B&H Bank Secured Claims

The three direct loans identified in the Disclosure Statement as the B&H Bank Secured Claims (Class 5) consist of Loans #3925, 2001 and 3869. It is impossible for B&H to determine how and when these claims will be paid under the Debtor's proposed Plan. Annual Plan projections conflict with the narrative language of the Plan, and the narrative description of Class 5 treatment is so evasive as to leave B&H without the ability to reasonably determine when and how much it will be paid.

The narrative description of Plan treatment provides in the first instance that the claims will be initially paid "pursuant to a Cash Collateral Order [Docket No. 29] entered by this Court

on October 30, 2015 at the rate of $10,000.00/month for Loan 2001, $3,000.00/month for Loan 3925 and $1,713.00/month for Loan 3869." While the narrative description appears to suggest that these payments are interim only until sale of real property owned by Wann and Martin, the remaining narrative description and the attached Reorganization Budget are either inconsistent, confusing, or both.

The Reorganization Budget attached as Exhibit A to each of the Disclosure Statement and Plan, provides for annual payments to B&H on account of Class 5 claims in the amount of $156,000.00 for the *entirety* of the five-year Plan repayment period. The payments are both deficient on their face *and* in conflict with the narrative description of an earlier payoff of Class 5 claims. The annualized payments currently required under the Cash Collateral Order utilized by the Debtor as a reference point for interim payments would amount to $176,556.00 per year. Accordingly, the $156,000.00 contained in the Reorganization Budget appears inadequate to continue interim payments to B&H assuming all other requirements for confirmation were met. More troubling is the fact that the Reorganization Budget contemplates the possibility of a full five years of such payments notwithstanding narrative language in the Plan to the contrary.

The Disclosure Statement and Plan each state with respect to Class 5 treatment that B&H will be paid additional amounts on its Class 5 claims "when Stephen R. Wann and Joan E. Martin sell their real property" located at i) 1263 Dartmouth Court, Alexandria, Virginia, and ii) 7211 C&D Telegraph Square, Lorton, Virginia. Hence, the Plan appears to contemplate a payment of B&H claims via sale of third party collateral. Yet, neither Wann nor Martin are made parties to the Disclosure Statement and Plan, have not committed to the completion of any sale(s) and have failed entirely to provide information pertaining to the timing, projected sales

value and/or expected recovery from such sales. Further, it is impossible for B&H to determine the timing and amounts of proposed payments. The Reorganization Budget states in a footnote that sale of the Dartmouth Court property "will occur in the first half of 2017" and that the sale of units C&D at Telegraph Square will occur "in 2017/2018." Yet, there is no information pertaining to any listing prices, marketing plans, any final deadline for sale or provisions for remedies of B&H in the event sales are not accomplished within a stated period. Because the Reorganization Budget appears to contemplate payment of some measure of monthly payments to B&H over the five-year life of the Plan, it is simply impossible for B&H to accurately discern the amount and timing of its payments under the Plan.

Finally, it is unclear if the proposed Plan as described in the Disclosure Statement is even capable of confirmation. The Plan currently described provides that upon sale of the Dartmouth Court property by Wann and Martin, payoff of a second deed of trust in the principal amount of app. $200,000.00 will be made, and that Wann and Martin will thereafter make payment of an additional $400,000.00 in sales proceeds to B&H. This is problematic because B&H holds both a second deed of trust against the Dartmouth Court property as well as judgment liens exceeding $800,000.00. The Plan has no provisions for any lien avoidance and there is no basis upon which Pioneer could effect a release of a lien against non-debtor property as a component of a proposed Chapter 11 plan. The apparent attempt to cause B&H to release liens against non-debtor property serving as collateral for its claims renders the Plan unconfirmable. Where the Court can determine that a plan described in a disclosure statement is not confirmable on its face, then it should decline approval of the proposed disclosure statement. In re Pecht, 57 B.R. 157 (Bktcy. E.D. Va. 1986).

ii. Loan #3806

Loan #3806 is a loan made to an affiliate of the Debtor known as PRS Real Estate, LLC ("PRS"). PRS owns real property located at 7211 E&F Telegraph Square, Lorton, Virginia. The property is adjacent to the C&D units owned by Wann and Martin. As noted above, Pioneer guarantied the loan and the guaranty is secured by the same security interests as those of the Class 5 loans described in the Disclosure Statement. Currently, Pioneer has identified Loan #3806 as a general unsecured claim and placed it in Class 6 under the Plan. As noted above, the classification is simply wrong and Loan #3806 should at least initially be scheduled as a Class 5 secured claim until Pioneer has undertaken a bifurcation analysis sufficient to further break down B&H's claims as secured and unsecured.

Even if Loan #3806 were to remain in Class 6, the Disclosure Statement offers conflicting information as to the amount and duration of any payments. The narrative description of Class 6 claims states that they will be paid five percent (5%) of their claims over the life of the Plan. However, a footnote to the last page of the Reorganization Budget states that the Debtor will continue to make payments of $1,714.00 monthly as to Loan #3806 until the loan is paid in full. B&H cannot determine if the $1,714.00 monthly is supplemental to any class 6 payments, cannot determine if the Debtor is seeking to modify its rights as against the original borrower, PRS, and simply requires additional information and clarification to properly understand the provision for payment of its claim represented by Loan #3806.

c. Failure of Disclosure Statement to disclose potential injunctive provisions.

The Disclosure Statement is further defective because it fails to identify and clarify provisions contained in the Plan for discharge and injunctions that appear to affect rights of

creditors (including B&H). Article VII, Section 7.02 of the Plan contains provisions for discharge and post-confirmation injunctions. As currently written, Sec. 7.02(b) provides that all holders of claims will be "enjoined from taking any actions to interfere with the implementation of the Plan and the transactions contemplated herein." While it is not clear if the Debtor intends this to be limiting as to B&H's rights, the language is arguably broad enough that it could prevent B&H from acting to foreclose or execute upon third party lien rights securing its several loans. As this Court knows, third party injunctions and releases are granted in a Chapter 11 plan "only in exceptional cases." In re Nat'l Heritage Found., Inc., 478 B.R. 216, 232 (Bankr. E.D. Va. 2012), aff'd sub nom. Nat'l Heritage Found. Inc. v. Behrmann, No. 1:12-CV-1329 AJT/JFA, 2013 WL 1390822 (E.D. Va. Apr. 3, 2013), aff'd sub nom. Nat'l Heritage Found., Inc. v. Highbourne Found., No. 13-1608, 2014 WL 2900933 (4th Cir. June 27, 2014), on reh'g, 760 F.3d 344 (4th Cir. 2014), and aff'd sub nom. Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344 (4th Cir. 2014).

More importantly, the existence of injunctive provisions of the Plan are not described in the Disclosure Statement. To the extent the Debtor does intend these provisions to apply to third parties, such an inclusion is mandatory to the Debtor's compliance with an adequate information standard applicable to disclosure statements. See, 11 U.S.C. 1125(b). The Disclosure Statement should be made to provide a *full* description of operative terms of the Plan to avoid any uncertainty or surprise.

d. Failure to provide for replacement liens.

This Court's orders entered with respect to the Debtor's continued use of cash collateral of B&H provided for replacement liens in the form of liens against the Debtor's vehicle

inventory for any diminution in value of collateral as valued at hearing before this Court on November 10, 2015. The order permitting use of cash collateral and providing for replacement liens was entered by this Court on November 24, 2015 (Dkt. #47). The Disclosure Statement fails to identify the granting of replacement liens and fails further to provide for a current value of collateral in order to determine and define rights of B&H as to replacement liens. Again, information is simply lacking to properly identify the rights and interests of B&H, and to define the consequences of those rights as to post-confirmation liens and payments.

e. Reorganization Budget is either wrong or misleading.

The Reorganization Budget attached to the Plan and Disclosure Statement contains numerous errors which render the Disclosure Statement confusing at best. As noted above, the Reorganization Budget contains an incorrect and insufficient annual payment amount for ongoing debt service of B&H Class 5 claims as identified in the Disclosure Statement. More importantly, the Reorganization Budget contains provisions for annual debt service of $156,000.00 per year to B&H for the full five-year term of the Plan notwithstanding that payoff of B&H claims is apparently anticipated by an earlier sale of non-debtor collateral.

To the extent that sale of Dartmouth Court and units C&D at Telegraph Square are closed in 2017, a full four years of projected B&H debt service at $156,000.00 per year is freed up to reallocate to other creditors. To the extent the budget evidences continued debt service, it is misleading to general creditors and fails to provide accurate information regarding the availability of cash flow to fund a proposed plan of reorganization.

III. ARGUMENT

11 U.S.C. § 1125 requires that the Court conduct a hearing, after notice, to determine if

the proposed Disclosure Statement contains adequate information. 11 U.S.C. § 1125(b). "Adequate information" is defined under Sec. 1125 to mean:

> …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, … that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan,…

11 U.S.C. § 1125(a)(1). Determination of "adequate information" is made on a case by case basis and is largely within the discretion of the bankruptcy court. See, e.g., Menard-Sanford v. Mabry (In re A.H. Robbins Co.), 880 F.2d 694 (4th Cir. 1989). In this case, information simply is not sufficient or adequate to permit a hypothetical investor to make an informed judgment about the plan. Amendment of the Disclosure Statement consistent with the issues addressed herein should be required.

IV. CONCLUSION

For the reasons stated hereinabove, B&H prays that this Court deny approval of the Disclosure Statement and that B&H have such other and further relief as this Court may deem just.

BURKE & HERBERT BANK & TRUST COMPANY
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was served via the *ecf* filing system upon counsel to the Debtor and the U.S. Trustee.

/s/ Kevin M. O'Donnell
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