

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re:

TARA RETAIL GROUP, LLC,

Case No. 1:17-bk-00057

Chapter 11

Debtor.

**OBJECTION OF
KMART CORPORATION TO DISCLOSURE STATEMENT**

Kmart Corporation (“**Kmart**”), by and through counsel, hereby submits its objection (this “**Objection**”) to the Disclosure Statement to Accompany Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Proposed by Tara Retail Group, LLC [Doc. 269] (the “**Disclosure Statement**”). In support of its Objection, Kmart states as follows:

1. The Disclosure Statement fails to contain adequate information with respect to (a) the Debtor’s financial status, (b) its liquidation analysis, and (c) the best interests of creditors test.

2. Section 1125 of Title 11 of the United States Code (the “**Bankruptcy Code**”) requires a debtor to provide adequate information in its disclosure statement to creditors. 11 U.S.C. § 1125(b) (2012).

3. The Bankruptcy Code defines adequate protection as “information of a kind, and in sufficient detail, . . . that would enable [the creditor] to make an informed judgment about the plan” 11 U.S.C. § 1125(a) (2012).

4. This Court previously has explained that adequate information is “information that is material, important and necessary for creditors . . . to properly evaluate a proposed plan and thus enable the creditors . . . to make a reasonably informed decision on the plan.” *In re William F. Gable Co.*, 10 B.R. 248, 249 (Bankr. N.D. W. Va. 1981).

Debtor's Financial Status

5. Adequate information necessarily includes information regarding how a debtor believes that its sources of funding will be sufficient to pay the claims as provided in the plan. *See id.* (requiring amended disclosure statement to estimate amount of accounts receivable that are collectible, estimated expenses incurred in collecting, and success or lack of success debtor has had in collecting accounts receivable).

6. Moreover, as noted by the United States Bankruptcy Court for the District of South Carolina, a debtor's failure to include any estimation of future income is fatal to the adequacy of the disclosure statement. *See In re Forest Grove, LLC*, 448 B.R. 729, 735-36 (Bankr. D.S.C. 2011) (noting that "statement of potential sources of revenue is speculative, at best" and inadequate).

7. The Disclosure Statement in this case contains no financial information regarding the Debtor or the Debtor's proposed sources of funding the plan of reorganization (the "**Plan**"). *See* [Doc. 269 at 11]. Instead, the Debtor makes conclusory statements that holders of allowed claims will receive 100% of their claims. [Doc. 269 at 11.]

8. The Debtor provides no information related to its financial condition, including actual and projected rental income, and projected recoveries in pending litigation, nor does the Debtor provide an explanation of why the Debtor believes its litigation claims are meritorious or an explanation of how the Debtor calculated projected recoveries.

9. The Debtor also provides no information about when any rental payments are expected to resume.

10. Without all of this information, Kmart cannot evaluate the Plan's feasibility or the Debtor's ability to reorganize at all, and the Disclosure Statement is patently inadequate.

11. Additionally, although it is more in the nature of an objection to confirmation of the Plan, Kmart notes that the Debtor proposes to assume its unexpired lease with Kmart, *see* [Doc. 269-1 at 24], but that it will not cure the defaults under the lease for as many as five years after confirmation, *see* [Doc. 269 at 10].

12. This proposed treatment is contrary to the terms of the Bankruptcy Code, as Section 365 requires the Debtor to cure its breach of its lease with Kmart at the time of assumption, or else provide adequate assurance that it will so promptly cure its breach. 11 U.S.C. § 365(a)(1)(A) (2012).

13. Accordingly, the Disclosure Statement also fails to provide sufficient information to permit Kmart to assess the Debtor's ability to cure its defaults promptly when the Debtor assumes the lease.

Liquidation Analysis

14. A proper liquidation analysis is a critical component of the adequate information that a disclosure statement must contain. *See, e.g., In re Diversified Investors Fund XVII*, 91 B.R. 559, 561 (Bankr. C.D. Cal. 1988) (noting that, "to provide adequate information, the disclosure statement must contain a liquidation analysis which compares the proposed plan of reorganization with a Chapter 7 liquidation").

15. The liquidation analysis must be more than a conclusory statement that one secured creditor would receive the entirety of the distributions, and instead must identify and value the assets subject to liquidation and describe how they are subject to creditors' liens. *See,*

e.g., In re Divine Ripe, L.L.C., 554 B.R. 395, 405-06 (Bankr. S.D. Tex. 2016) (finding disclosure statement inadequate where it was “completely devoid of any disclosures related to the [d]ebtor’s assets, aside from a minimal disclosure about the amount of the loan held by [one creditor],” and where liquidation analysis contained conclusory statement about nature and value of assets subject to liens); *In re Howell*, No. 09-91535, 2011 WL 1332176, at *1 (Bankr. N.D. Ga. Jan. 21, 2011) (slip copy) (noting that disclosure statement’s liquidation analysis was inadequate where it contained “an unsupported conclusion that [the] plan . . . would provide the maximum benefit to all classes of creditors”).

16. In this case, the Disclosure Statement contains a single conclusory statement that a chapter 7 liquidation “would provide no recovery to creditors other than Comm 2013.” [Doc. 269 at 23].

17. However, the Debtor provides no explanation or information to support that conclusion.

18. Indeed, given, as discussed above, that there is no information related to the Debtor’s financial condition, including actual and projected rental income, and projected recoveries in pending litigation, the Debtor has provided no support for its conclusion that no other creditors would receive *any* distribution in a chapter 7 liquidation.

Best Interests of Creditors Test

19. The Disclosure Statement does not adequately describe how the Plan satisfies the best interests of creditors test.

20. Individual creditors that do not vote in favor of a plan must receive in a chapter 11 reorganization at least as much as each would receive in a chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7)(A).

21. As discussed above, the Disclosure Statement does not provide any real financial projections, and the liquidation analysis is wholly conclusory and inadequate.

22. As a result, individual creditors cannot determine what they would actually receive, either under the Plan or pursuant to a liquidation under chapter 7.

23. Accordingly, the Disclosure Statement fails to contain adequate information to indicate that the Plan satisfies the best interests of creditors test.

24. For all these reasons, the Disclosure Statement fails to contain adequate information as required by the Bankruptcy Code.

WHEREFORE, Kmart respectfully requests that this Court enter an order sustaining this Objection to the Disclosure Statement, denying approval of the Disclosure Statement, requiring the Debtor to file and distribute an amended disclosure statement compliant with the Bankruptcy Code, and granting Kmart such other and further relief as is just and proper.

KMART CORPORATION

By Counsel

 /s/ Julia A. Chincheck
Julia A. Chincheck (WVSB #718)
Daniel J. Cohn (WVSB #11916)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100
Facsimile: (304) 343-3058
E-mail: jchincheck@bowlesrice.com
E-mail: dcohn@bowlesrice.com
Counsel for Kmart Corporation

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re:

TARA RETAIL GROUP, LLC,

Debtor.

Case No. 1:17-bk-00057
Chapter 11

CERTIFICATE OF SERVICE

I, Julia A. Chincheck, do hereby certify that I served the foregoing **Objection of Kmart Corporation to Disclosure Statement** upon all persons registered to receive electronic notices in this case by means of the Court's CM/ECF noticing system on July 17, 2017.

/s/ Julia A. Chincheck
Julia A. Chincheck (WVSB #718)