

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

TERRANCE D. BLUMER, Ind. &
d/b/a B & D Farms and f/d/b/a
Terr-Sue Farms and Terr-Lo
Farms,

CASE NO. 86-01305

Debtor

Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court as the result of written objections to the Disclosure Statement of Terrance D. Blumer, Ind. & d/b/a B&D Farms and f/d/b/a Terr-Sue Farms and Terr-Lo Farms ("Debtor"), and subsequent oral objections to an Amended Disclosure Statement.

The matter last appeared on the Court's motion calendar at Syracuse, New York on September 13, 1988 and was submitted for decision as of that date.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of the parties and the subject matter pursuant to 28 U.S.C.A. §§1334 and 157 (West Supp. 1988). This is a core proceeding, 28 U.S.C.A. §157(b)(1), (b)(2)(A), (L) and (O), and the following constitutes findings of fact and conclusions of law rendered in accordance with Bankruptcy Rules ("Bankr.R.") 3016, 3017, 7052 and 9014.

FACTS

The Debtor, a dairy farmer in Jordan, New York, filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 & Supp. 1988) ("Code"), on November 13, 1986.

At the time of the filing of his petition, the Debtor was

represented by the law firm of Wineburg, Weinstein, Scollan & Cannucciari, Esqs. of Auburn, New York, specifically, Michael A. Wineburg, Esq. ("Wineburg"), a member of that firm.

The case progressed rather slowly through 1987, as the Debtor entered into several stipulated orders with secured creditors regarding the continued use of collateral. In September, 1987, the Debtor received approval from the Court to sell a portion of his real property and apply the net proceeds paid to the holder of the first mortgage. As 1987 came to a close, other secured creditors filed motions to vacate the automatic stay imposed by Code §362, while lessor creditors sought to compel the Debtor to assume or reject equipment leases.

In early February of 1988, Wheeler Agway, Inc. ("Wheeler"), a secured creditor, moved for an order dismissing the Chapter 11 case pursuant to Code §1112(b). After a substantial adjournment of the motion, an Order was entered on April 7, 1988 directing that the Debtor either file a plan and disclosure statement by May 10, 1988 or face dismissal of the case without further order of the Court.

Unfortunately, Wineburg, the Debtor's attorney, passed away in April 1988. On May 12, 1988, a consent to change of attorneys, dated April 29, 1988, was filed with the Court whereby the Debtor sought to retain Pelland & Shockey, Esqs. as his new attorneys.

On May 10, 1988, Pelland & Shockey, Esqs. obtained an Order To Show Cause directing Wheeler, the United States Trustee ("UST") and all creditors to show cause before the Court on May 17, 1988 why the Debtor's time to file a plan and disclosure statement

should not be extended for a period of thirty (30) days. On May 17, 1988, the Debtor's counsel and the attorneys for Wheeler appeared before the Court and consented to an order extending to June 3, 1988 the Debtor's time to file the plan and disclosure statement.

On June 3, 1988, the Debtor filed his Plan of Reorganization ("Plan") and Disclosure Statement ("DS") and a hearing on the latter was scheduled for August 2, 1988. Prior to the date of the hearing, written objections to the DS were filed by Wheeler, AgriStor Leasing ("AgriStor"), the Farmers Home Administration ("FmHA") and Marine Midland Bank, N.A. ("MMB").

The objections of the various creditors are summarized as follows:

Wheeler - a) failure to describe the Debtor's business since the petition date to include any unpaid post-petition liabilities; b) failure to describe the means with which the Debtor will fund its Plan other than reference to periodic land sales; c) lack of financial information, particularly financial projections which would permit the creditor to make an "informed judgment"; d) lack of a detailed liquidation analysis; e) omission of estimated administrative expenses; f) misstatement of the Debtor's liabilities; g) failure to detail any preferences or voidable transfers.

AgriStor - Objections very similar to those raised by Wheeler.

FmHA - a) lack of adequate information to make informed judgment on the Plan; b) lack of projections of income and expenses; c) failure to identify secured creditors holding liens, the priority

of liens and the amount owed to these creditors.

MMB - a) lack of adequate information to make informed judgment on Plan; b) lack of information regarding administrative expenses; c) failure to explain how the Plan will be funded; d) no liquidation analysis; e) complete lack of financial information and alleged failure of the Debtor to file operating reports throughout the case; f) lack of any financial projections; g) no information regarding post-petition operations; h) lack of information regarding: sources of future income, disputed claims, accounts receivable, wages and salaries to employees, including the Debtor himself, family expenses, other withdrawals and payments to insiders; i) no information as to the number and dollar amount of claims in each class; j) DS is simply a superficial outline of the Debtor's operations and expenses.

At the hearing on the DS held on August 2, 1988, the Debtor and the objecting creditors agreed to an adjournment until August 16, 1988 to discuss the possibility of the Debtor filing an amended DS. The hearing was thereafter adjourned to September 6, 1988 and finally to September 13, 1988. On September 6, 1988 the Debtor filed his First Amended Disclosure Statement ("Amended DS") and First Amended Plan of Reorganization ("Amended Plan").

At the hearing conducted on September 13, 1988, the Debtor's counsel appeared, as did the attorneys representing Wheeler, FmHA, MMB and the Maxon Trust. It should be noted that the UST also appeared at several of these hearings and joined in the written objections already on file, submitting none of its own.

At the September 13, 1988 hearing, it appeared that AgriStor had

withdrawn its objections. However, Wheeler contended that following review of the Amended DS, it was still not clear how the now Amended Plan was to be funded, there was still no detailed liquidation analysis, no financial projections, no estimate of administrative liabilities, and finally a continued misstatement of liabilities by the Debtor. After reviewing operating reports the Debtor had apparently filed simultaneously with the Amended DS (and according, to the Debtor, which were timely prepared but not filed with the Court by his prior attorney), FmHa's attorney observed that the reports reflected a net loss during 1987 and since the operating reports were only current through May of 1988, it was too early to forecast a profit or loss for the current year. FmHA's attorney also referred to the continuing lack of financial projections and information as to the amount or priority of competing liens, the Amended Plan's silence on the treatment of the time, amount, terms or interest rate of the secured claims, and the absence of current real estate appraisals of the real property, other than values listed in schedules filed by the Debtor two years ago. The attorneys for MMB and the Maxon Trust concurred with the Wheeler and FmHA objections to the Amended DS.

Upon inquiry from the Court as to the retention of an accountant to prepare financial projections, the Debtor's counsel pointed to a lack of funds to compensate an accountant. The Debtor's counsel further claimed that if the Debtor were to furnish projections, they would be "pure conjecture." He suggested that the creditors prepare their own projections by using the Debtor's now filed operating reports covering the period November 1986 through May

1988.

Concerning a liquidation analysis, the Debtor's counsel referenced the schedules filed with the Chapter 11 petition, in spite of the exhortation by one or more of the creditors that those values, now some two years old, may no longer be accurate.

DISCUSSION

An examination of the Debtor's Amended DS leads to the following conclusions.

The Amended DS provides creditors with adequate information with respect to:

a) a history of the Debtor, a description of his business, and a recitation of the events precipitating the Chapter 11 filing;

b) a disclaimer;

c) a description of the Debtor's post-petition financial condition, at least through May 1988 when read together with the operating reports now on file with the Court;

d) a description of the wages and salaries being paid out and the recipients, with the presumption that these individuals constitute the future management of the Debtor's farm;

e) the existence of uncollected accounts receivable and the absence of any pre-petition preferences or fraudulent transfers;

f) the requirements of Code §§1124 and 1126;

g) a schedule of claims excerpted from Schedules A-1, A-2 and A-3 filed with the petition.

Conversely, the Court concludes that the Amended DS either does

not contain adequate information, or the information contained is not presented in a form and sequence that can be understood by creditors, as to the following:

a) a description of the Debtor's assets and a current estimate of their value;

b) a statement of the anticipated future operations of the Debtor;

c) a liquidation analysis based upon current appraised values and current amounts due to various creditors;

???d) a summary of the contents of the Amended Plan nor is a copy of the Amended Plan attached to the Amended DS and is indicated therein;???

e) the means for executing the Amended Plan, although there is vague reference to reduction of real property taxes and secured debt through various land sales;

f) an estimate of administrative expenses to include taxes and professional fees;

g) up-to-date financial data and projections of future income and expenses.

Code §1125 provides that a disclosure statement must contain "adequate information" and it further defines "adequate information" as that which "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."

For elucidation of these statutory requirements, the Eighth Circuit turned to the legislative history of Code § 1125:

Precisely what constitutes adequate information in any

particular instance will develop on a case by case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the costs of preparation of the statements, the need for relative speed in solicitation and confirmation, and, of course, the need for investor protection. ... In reorganization cases, there is frequently great uncertainty. Therefore, the need for flexibility is greatest.

Prudential Ins. Co. v. Monnier (In re Monnier Bros.), 755 F.2d 1336, 1342 (8th Cir. 1985) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 409, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6365). See also Kirk v. Texaco, Inc., 82 B.R. 678, 682 (S.D.N.Y. 1988); First American Bank of New York v. Century Glove, Inc., 81 B.R. 274, 278 (D.Del. 1988).

The Court must also keep in mind that although the creditors are entitled to adequate information, as opposed to pure speculation, since the purpose of the disclosure statement is to enable creditors to evaluate the plan, the Chapter 11 should not become mired in an extended dispute over the adequacy of the statement so as to turn the hearing on approval of the disclosure statement into a confirmation hearing. See In re Monroe Well Service, Inc., 80 B.R. 324, 333 (Bankr. E.D.Pa. 1987).

The Court's analysis of the instanted Amended DS is likewise sharpened by the so-called "nineteen factors" to be examined in evaluating a disclosure statement. See, e.g., In re Metrocraft Publishing Services, Inc., 39 B.R. 567, 568 (Bankr. N.D.Ga. 1984); In re Scioto Valley Mortgage Co., 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988). However, the Court believes that it must also consider the size and complexity of the case, the type of plan being proposed, the kind of claims or interests being

impaired and the access by these impaired holders to relevant information from other sources. See In re Monroe Well Service, Inc., supra, 80 B.R. at 330. In this vein, it is interesting to note that the objectants are generally substantially secured creditors of the Debtor, whose major concern is the treatment of their secured claim and whose leverage on the ultimate confirmability and success of the plan is far greater than the fully unsecured creditor who truly needs adequate information to assess the viability of the plan.

The Court also believes that it is of some significance that had the instant petition been filed some thirty days later, it presumably would have been filed pursuant to Chapter 12 of the Code, and the need for approval of a disclosure statement would not even exist. In fact, it is the avoidance of just such debilitating litigation as is presently before the Court that Congress sought to avoid in enacting Chapter 12.¹

Despite the foregoing, the Court believes that the objecting creditors are clearly correct in their opposition to the Amended DS on the basis of an inadequate liquidation analysis and the lack of any competent projections as to future income and expenses. Moreover, the insufficiency of the latter is significant not only as to the adequacy of information provided in the disclosure statements but also absolutely essential to a

¹ This presumption may not be entirely valid since Debtor's Amended Disclosure Statement reflects total debt of \$1,668,864.00 on the filing date, which would exclude Debtor from the definition of "family farmer" as set out in Code §101(17).

determination of feasibility at the time of plan confirmation pursuant to Code §1129(a)(11).

The response by his counsel that the Debtor is without funds to retain an accountant to prepare projections is almost self-defeating, acknowledging, as it does, the Debtor's inability to retain and pay for essential professional services. Furthermore, the suggestion that creditors perform their own projections is not worthy of comment by the Court.

Thus, the Court will provide the Debtor with one final opportunity to amend his already amended DS by filing with the Court a detailed liquidation analysis which will set forth each encumbered asset, its estimated present value and the present estimated indebtedness encumbering that asset, together with the name of the creditor or creditors to which the indebtedness is owed.

In addition, the Debtor will prepare and file with the Court, with or without the assistance of an accountant, projections of income and expenses for the years 1989 through 1993. These projections shall be based upon the Debtor's actual income and expenses over the past two years, with a consideration given to the current market price of milk, the number of cows milking, the cull rate, the herd level and the pounds per cow of butter fat content, etc.

Finally, the Court directs the Debtor to file a separate projection of land sales which will specifically identify the land to be sold by acreage and location, any and all encumbrances existing against the title to such land, and a time table within

which it is anticipated such sales can be accomplished. This will include any applications for the appointment of real estate brokers.

The Court will provide the Debtor forty-five (45) days from the date of entry of this Order within which to file with the Court and serve all objecting creditors, including the UST, the additional disclosures required herein.

Thereafter, the Court will forthwith schedule a further hearing on the approval of the First Amended Disclosure Statement incorporating said additional disclosures.

In the event that the Debtor fails to file such additional disclosures, this Order shall constitute a denial of approval of both the Disclosure Statement filed with the Court on June 3, 1988 and the First Amended Disclosure Statement filed with the Court on September 6, 1988.

IT IS SO ORDERED.

Dated at Utica, New York

this day of January, 1989

STEPHEN D. GERLING
U.S. Bankruptcy Judge