

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
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October 19, 2009

MEMORANDUM

TO: JOHN D. FIERO, ESQ.
THOMAS A. WILLOUGHBY, ESQ.

FROM: JUDGE DENNIS MONTALI

SUBJECT: HELLER EHRMANN LLP - NO. 08-32514

The first scheduled hearing on the Disclosure Statement (DS) is set for November 9, 2009. While the Joint Plan of Liquidation (Plan) and the DS may be amended or modified before then, and parties may have objections to the adequacy of the DS, I thought it would be useful to set forth, as an informal tentative ruling, some of my concerns about those two documents.

You do not need to respond to this memorandum. It is entirely possible that I have simply missed the answer to some of my questions elsewhere in the documents. Similarly, you may have a simple explanation of or response to something I have questioned. You should anticipate commenting as appropriate at the November 9 hearing.

If and when you amend either document, I request the following. First, please avoid titles such as "Amended Joint Plan, etc." and/or "Amended Disclosure Statement, etc". This inevitably leads to "Second Amended, etc., etc.) Instead, use the same titles as on the documents that were filed on October 8, 2009, followed in each instance by the date of the filing. Thus, the first time you amend the Plan, title it "Joint Plan of Liquidation Of Heller Ehrmann LLP (October __, 2009)", and so on for subsequent iterations of the Plan and DS.

Second, each time you do that, please provide chambers with hard copies of the same document, both "clean" and "redlined" against the prior version. You do not need to file the redlined versions but please make sure parties in interest can receive them from

you upon request. Please also have the electronic versions of each (in Word or Word Perfect) available for chambers, but only send them if my law clerk requests them from you by e-mail.

As per my usual practice, I will begin my comments by addressing the Plan, as the DS cannot be adequate if there are ambiguities or other problems with the Plan. Where I make a comment requesting a change in the Plan, I will not take the time to point out where conforming changes will be needed in the DS. That should be obvious. Please also excuse the informality in some of the comments. This is in the interest of time, and the context should be obvious. References are to page and line numbers (or to the first line of a paragraph or section), except where noted.

Plan:

3:14 - How will Admin claimants know of the Admin. Claims Bar Date?

3:26 - 4:2 - limiting an non-objected to Claim to the scheduled amount or the listed priority seems contrary to the statutory presumption of section 502(a).

6:17 - "Settlement Agreement" is not a defined term. Perhaps this should be "Biggars Settlement Agreement."

7:26 - shouldn't "Jose" be "Francisco"???

9:8-10 - I question how a claim that has not be liquidated can be a "Contingent Claim." Further, the definition here seems to conflict with the definition of Unliquidated Claim at 17:12-14.

10:9-17 - The definition in (ii) conflicts with the Disallowed Claim definition in ¶1.50. Further, a claim filed after the bar date may still be presumptively allowed under section 501(a) until there is an objection under section 502(b)(9). Same with a Contingent or Unliquidated Claim. The claim can't be Disputed until there is an objection.

10:22 - The court has no authority to estimate a Disputed Claim. Section 502(c) is available for contingent and unliquidated claims.

12:7 - the Corpus is said to be what is sufficient to pay costs of file transfer and disposition; this is narrower than the purposes described in ¶5.13(a) & (b).

13:10 - "Self Insured Retention Amount" is not a defined term.

14:11 - The fee arrangement for the Plan Administrator should be

disclosed, preferably in the DS.

15:4 - Shouldn't the term be "Rejected Contracts"?

15:10-17 - There should be a Rejected Claim Bar Date for any contracts rejected after 30 days prior to the Bar Date and prior to Confirmation, unless you are certain that there will be none.

16:¶¶1.101 & 1.102 & ¶5.1(ii) - Please explain in the Plan or the DS whether and to whom the amounts and payors of the Shareholder Settlement Payments will be disclosed. If they will not be, please indicate whether the same information will be filed under seal. Assuming the Plan proponents contemplate maintaining confidentiality, then please be prepared to explain in some general way the methodology and process by which the Committee fixed the amounts of those payments.

16:22 - The identity of the Shareholder Liquidation Trustee should be disclosed no later than the time of final approval of the DS; making that disclosure 10 days before the confirmation objection deadline is too late. Why can't it be done in this section (see example in ¶1.84, or in ¶5.14)?

18:19 - Please insert an exception for Professional Fees, dealt with in ¶3.3.

19:7 - "Debtor's Reclamation Report" is not a defined term.

19:¶3.3 - Please add reference to the court's Guidelines for Compensation, etc..

19:24 - I do not believe I could confirm a plan providing 5% interest on tax claims in the face of §511 without the affirmative consent of each tax agency.

20:27 - How are the secured creditors' attorneys fees and costs protected if they prevail?

21:12 & 21 - Terms such "full satisfaction, settlement, release and discharge" and "full and final satisfaction" appear to conflict with section 1141(d)(3) and should be deleted.

22:8 & 17 - Is the use of different but similar terms ("five per cent (5%) per annum" and "five percent simple interest") intentional or inadvertent?

24:22-23 - the reference to "premium for a professional E&O policy" is duplicated in ¶5.15. Is this intentional or inadvertent?

24:26 - What happens when the Plan Administrator seeks approval

of fees and expenses? Notice to whom? Who may object? What is the role of the court? This question comes up later in a few other places and needs to be clarified throughout the Plan and DS. As a general matter I believe that in a liquidating case such as this, even after the Effective Date, there must be some recourse to the court for parties who want to complain about professional fees (and administrators' and trustees' fees) and the court must maintain some responsibility over, and authority to reduce, those fees when necessary. That being said, I have no problem with a simplified "scream or die" procedure until final applications are submitted and am willing to consider a specific proposal for something less burdensome than the traditional full-blown fee application procedure.

25:7-23 - See prior comment. I have the same concern about settlement "without supervision" and "free of any restrictions", followed by provisions that direct the Plan Administrator to file a motion for approval of the settlement or the abandonment. Who may object? What is the role of the court? Are the settlements subject to Rule 9019 and the A & C factors? And what does it mean that the Committee members have no duty or obligation? The Committee is dissolved per ¶5.16, with one limited exception not applicable here.

26:24 & 27:1-4 - See prior comments. Who reviews/approves the adequacy of the reserve if there is a dispute? the Liquidation Budget?

27:14 - "Dissolution Plan" is not a defined term.

28:4 - "MPC Equity" is not a defined term.

28:23 -25 - See prior comments.

29:22-27 - Are there any "regular amortized payments" or "payments due upon maturity" in the Plan? Aren't all Creditors, at least Class 5 until paid, "affected"? And what is meant by "seek appropriate relief to enforce its rights under the Plan"?

30:¶5.21 - Are there any standards to determine when there should be a distribution to creditors? Any minimum dollar amount, or % amount?

31:7-8 - On settlement of claims objections, same question as in 25:7-23, above.

31:14 & 28 - See prior comment about court's lack of authority to estimate disputed claims.

31:27 & 32:20 - "5.15" should be "5.23".

33:14 - "5.27" should be "5.28".

33:¶5.28. If a creditor fails to claim one cash distribution, the forfeiture of all distributions after that seems too harsh. One strike and you're out won't fly.

34:7 - Change "its" to "his".

34:¶5.29 - Has the U.S. Trustee agreed to perform these functions after the Effective Date?

35:¶5.34 - "Professionals" is defined in ¶1.90 to be those whose employment has been approved, presumably prior to Confirmation. Since this provision is to permit employment of others after the Effective Date, a different term is necessary.(e.g. "professionals").

Again, here I have the same questions about the role of the court and the right of others to be heard. Note that Art. IX (vi) reserves jurisdiction to resolve disputes re fees; it does not deal with any determinations made by the court sua sponte, or after a hearing but in the absence of any objection.

35:27 - "Substantial consummation" is defined in §1101(2) and may occur quite early in the case. Thus I question whether there really will be quarterly reports as per ¶5.33. Please include in the DS when the proponents expect substantial consummation and a final decree.

36:¶6.1.1 - See prior comment re "Rejected Contracts." "Exhibit B" should be "Exhibit A". If additions can be made to the contracts being assumed up to 10 days before confirmation objections are due, that does not seem fair to counterparties who dispute the cure amounts. Is there any reason why the Exhibit A can't be completed by the time of final approval of the DS? And couldn't the Cure Amounts be set forth in Exhibit A rather than as part of the DS, as per 37:2-3?

37:23 - "6" should be "VI".

38:¶7.1; 39:3-7; 44:¶10.6 - Is section 1146(c) even implicated in the slightest in this case? If not, why is this language necessary, three times?

39:14:16 & 40:14 - This language reads like a discharge. See prior comment (21:12 & 21) and explain why it is necessary.

39:¶8.3 - Why is this section necessary? Section 362(c)(1)&(2) does the job without having to get into the whole thicket of injunctions in plans.

41:41 - Change "is determined that would otherwise result" to "results".

41:2-14 - Please be prepared to show me authority that would permit this language in a Ch 11 plan.

46: I require the signatures of principals of the proponents in addition to signatures of counsel. The signatures of the chairs of the Dissolution Committee and the Committee will suffice.

Disclosure Statement

3:24-27 - Why can't voters submit their ballots or requests for replacement ballots by e-mail or fax?

13:8 - The full name of the landlord (see 17:2) should be used.

15: Here or somewhere in the DS, please list the names of the original members of the Committee, followed by the names of the present members.

15:11 - Please add the deadline for filing governmental claims.

25:8 - Please explain here or at 30:1-2 with a range of dollar amounts, what might happen to these figures if the litigation against B of A and Citibank is unsuccessful.

25:10-18 - Creditors in Class 5 should be given the proponents' best estimate of when the first distributions to them might be made.

27:5 - See prior Plan comment 16: ¶¶1.101 & 1.102 & ¶5.1(ii). Apart from the specific amounts from specific shareholders, there needs to be some explanation of how this will work. What amount is money is expected? When will it be received? Is there a minimum amount that must be collected? Other details?

30:21-22 - Please update as much as possible (and as permitted by Judge Newsome) by the November 9 hearing.

41:16-17 - The Plan Administrator is already identified in Plan at ¶1.84. His affiliations and compensation arrangements should be disclosed no later than in the final DS.

41:F - Please update this discussion following the October 28, 2009, hearing.

48:3-5 - The DS should state that the court has authorized that exhibit to be filed under seal.

49:G - Please include an estimate the amount of priority tax claims.

50:Table - I would like an estimate of the total professional fees (paid and anticipated), by professional, through the Effective Date.

58:7 - The DS should state the objection deadline or make reference to the deadline set forth in the order approving the DS or the notice of the hearing on confirmation.

58:C - Why is this paragraph necessary?

61: I require the signatures of principals of the proponents in addition to signatures of counsel. The signatures of the chairs of the Dissolution Committee and the Committee will suffice.