

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
DW&P, LLC,) CASE NO. 07-22434 JPK
) Chapter 11
Debtor.)

ORDER FOR HEARING REGARDING DEBTOR'S
DISCLOSURE STATEMENT

On February 14, 2008, the debtor separately filed both a Disclosure Statement and a Plan of Reorganization. This is a "small business case" with respect to procedures regarding the disclosure statement and plan of reorganization specified in Chapter 11 of the Bankruptcy Code and the rules by which the provisions of that chapter are implemented. Among the provisions applicable to the procedure for reviewing and approving a disclosure statement and plan in a small business case is that stated in 11 U.S.C. § 1129(e), which states:

(c) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3). (emphasis supplied)

In order for a plan to comply with applicable provisions of Title 11 of the United States Code, it must be capable of being submitted to creditors and parties-in-interest for confirmation consideration. Before a plan can be submitted to creditors for balloting and other confirmation consideration, the Court must approve a disclosure statement with respect to the plan which provides "adequate information" as stated in 11 U.S.C. § 1125(b) as follows:

(b) An acceptance for rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets. (emphasis supplied)

A court may confirm a Chapter 11 plan only if the proponent of the plan has complied with the applicable provisions of Title 11 [11 U.S.C. § 1129(a)(2)], and thus, in order for a plan to be confirmed, a disclosure statement providing adequate information must have been provided to creditors in conjunction with submission of the plan to creditors and parties-in-interest.

Fed.R.Bankr.P. 3016(b) provides that in a Chapter 11 case, “a disclosure statement under § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court”. In this case, the debtor chose to file the disclosure statement with the plan. Fed.R.Bankr.P. 3017(a) states in pertinent part the following:

(a) Hearing on disclosure statement and objections

Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 25 days’ notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan.¹

The first nuance with respect to the process of approval of a disclosure statement and confirmation of a plan in a small business case is provided by the above-quoted provision of 11 U.S.C. § 1129(e), which in one sense if read very literally requires that the court hold a confirmation hearing with respect to a plan filed in a small business case within 45 days after the date the plan is filed. However, upon closer inspection, the requirement of an expedited confirmation hearing applies only with respect to a plan “that complies with the applicable provisions of this title”, which the Court deems to include the pre-condition of the existence of a

¹ The provisions of Interim Bankruptcy Rule 3017.1 regarding conditional approval of a disclosure statement do not apply to this case. First, the debtor did not request conditional approval of the disclosure statement. Secondly, for reasons which will be explained in this order, the Court determines that the disclosure statement fails to provide “adequate information” and cannot be conditionally approved.

disclosure statement upon which solicitation of acceptances of the plan may be premised. In this case the Court determines that the disclosure statement as submitted does not provide adequate information, particularly with respect to its complete lack of financial history concerning the debtor's pre-petition operation, financial information concerning the debtor's operation during the course of this Chapter 11 case, and meaningful projections concerning future income and expenses sufficient to allow creditors – who are being paid under an installment payment arrangement over time – to determine whether the provisions treating their claims in the plan are feasible. Thus, because the Court does not deem the disclosure statement to be susceptible to either final or even conditional approval, the 45 day period stated in § 1129(e) does not apply to this case.

Of equal inapplicability is the requirement of Fed.R.Bankr.P. 3017(a) that with respect to a hearing to consider the disclosure statement, the “plan and the disclosure statement shall be mailed with the notice of the hearing . . . to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan”. In the instance case, because the Court itself deems the disclosure statement to be inadequate and will require its amendment before submission to anyone for consideration of its adequacy under § 1125, the Court determines that it is an unnecessary expenditure of time and expense to provide a copy of the plan and disclosure statement to the foregoing-designated entities. The Court itself will provide notice of the hearing to the United States Trustee, to the debtor and to any party which has generally requested receipt of notice of matters relating to this case [there is no point in involving the Securities and Exchange Commission at this time, particularly due to the nature of this case].

The procedure that will be employed here is that a hearing will be held, to be attended by the debtor's counsel, at which the Court will address with that counsel the nature of the information deemed minimally necessary by the Court to provide adequate information to

creditors with respect to the proposed plan. The Court will then provide debtor's counsel with a deadline for the submission of an amended disclosure statement, which if deemed at least minimally acceptable by the Court, will be set for hearing for its approval upon notice as provided by applicable provisions of the Bankruptcy Code and Rules.

IT IS ORDERED that a hearing will be held on **April 16, 2008, at 10:15 A.M.**, to be attended by debtor's counsel, at which the Court will address the nature of information necessary to be included in the disclosure statement in order to minimally satisfy the Court that it is entitled to submission to creditors and parties-in-interest as potentially providing "adequate information" to those parties with respect to the plan.

Dated at Hammond, Indiana on March 18, 2008.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
US Trustee
Attorneys of Record