

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF:	)	CASE NO.	09-11860
	)	CHAPTER	11
CHARLES CLIFFORD McGEE	)	REG/jd	
CARRIE MARIE McGEE	)		
	)		
Debtors	)		

**ORDER TO FILE AMENDED PRETRIAL ORDER**

At Fort Wayne, Indiana, on April 21, 2010

Counsel for the debtors and Bank of America have filed a proposed pretrial order with regard to the issues raised by the Bank's objections to the adequacy of debtors' amended disclosure statement. Unfortunately, their submission does not satisfy the requirements of the local rules of this court, see, N.D. Ind. L.B.R. B-7016-1(c), and the court declines to approve it.

One of the things a pretrial order is to contain is a "separate statement by each party specifically identifying the theory of each claim or defense and a summary of the facts which party will endeavor to prove in support thereof." N.D. Ind. L.B.R. B-7016-1(c)(4). The debtors have endeavored to fulfill this requirement with the following statement: "The Debtors claim that the Amended Disclosure Statement meets the standards set forth in 11 U.S.C. § 1125(b), and therefore should be approved." Joint Pretrial Order filed Apr. 14, 2010, ¶ D. This tells the court nothing meaningful. The Bank's attempt to comply with this part of the rule is little better. In essence, it says only three things: The disclosure statement's "liquidation analysis is vague," "its financial assumptions are contradictory," and the plan's classification scheme is not fair and equitable to the Bank because its perfected lien upon the debtors' assets has not been recognized. Id. at ¶ E.

In a meaningful pretrial order, each parties' respective contentions should be responsive to the other's; the parties will not talk past each other by focusing on different things. In this instance,

that means the objector should identify the disclosure statement's perceived inadequacies with some degree with specificity and then explain why, by summarizing the facts it hopes to prove in support of its position.<sup>1</sup> Telling the court that the disclosure statement is vague, that debtors' financial assumptions are contradictory, and the proposed plan is not fair and equitable may provide an idea of the theory behind the objector's position, but it does not give any indication of the facts that it will attempt to prove in support of that position. In other words, why is does it believe the disclosure statement is vague, and why does it believe that the financial assumptions are contradictory?<sup>2</sup> Similarly, the Bank should explain why the plan's failure to recognize its claimed lien is such a fatal flaw that the court can leap over the issues associated with the adequacy of the disclosure statement and immediately determine the plan's confirmability at the present time. Perhaps if the Bank had been more specific, both in identifying its concerns and summarizing the facts it will endeavor to prove in support thereof, the debtor could have been and would have been more specific in formulating its own contentions concerning those objections and summarizing the facts it anticipates proving.

The lists of the exhibits that the parties anticipate using is also not adequate. The court's

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<sup>1</sup>The court recognizes that the debtor bears the burden of proving the adequacy of its disclosure statement. Nonetheless, in order to avoid filling up a pretrial order with irrelevancies and spending time at trial proving things that are not in issue, things work better if the objector identifies the disclosure statement's perceived deficiencies and then the proponent, both in its portion of the pretrial order and at trial, devotes its efforts to proving why the objector's perceptions are not correct. Proceeding in this fashion keeps the burden of proof where it belongs and yet avoids wasting time and effort by introducing evidence and making arguments concerning things that are not in issue.

<sup>2</sup>To some extent, it seems these objections may be nothing more than format issues – it is hard to tell without the required summary of evidence – and, if so, they might be overcome with a simple revision to the existing document without the need for the one day trial the parties have requested.

local rules require a pretrial order to contain “a list of exhibits which each party will offer into evidence at trial, except those to be used solely for impeachment or rebuttal, together with a stipulation concerning which, if any, exhibits may be received into evidence without further proof.”

N.D. Ind. L.B.R. B-7016-1(c)(8). This rule has not been complied with. To begin with, there is no stipulation, one way or the other, concerning the admissibility of any exhibits listed by either party. More fundamentally, the way in which some of their exhibits have been identified is not adequate.

The purpose for requiring a pretrial order to contain a list of each parties exhibits is two-fold. First, it informs all concerned about the exhibits which will be offered into evidence at trial. Secondly, if one party would object to a particular exhibit based upon the proposition that it has not been listed in the pretrial order, it assists the court in ruling on such an objection. As a result, there needs to be some degree of specificity in each parties’ list of exhibits so that if such an objection is made, the court can compare the exhibit being offered with the exhibits listed in the pretrial order and readily make a determination as to whether the document in question is or is not found upon that list. While some of the exhibits identified by each party satisfy this standard, some do not. For example, some of the Debtors’ anticipated exhibits include “pleadings and exhibits filed in adversary proceeding 10-01001” and “pleadings and exhibits filed in connection with [the Bank’s] motion to value security.” Pretrial Order at ¶ H(1)(e), (f). Similarly, the Bank’s list includes “any documents produced by the debtors,” and “any exhibit . . . otherwise identified by the debtors prior to trial.” *Id.* At 2, f and g. Which exhibits might these be? The court will wager that no one knows and, in the event of an objection, it would be impossible to tell simply by relying upon the pretrial order. Instead, the court would have to receive evidence concerning what had or had not been produced by the debtor or rummage through its own files to try to figure out whether a particular exhibit had been

introduced in connection with other litigation in the bankruptcy proceeding. That is not satisfactory. The parties can and should do better.

The pretrial order also contains no stipulations of any kind. See, N.D. Ind. L.B.R. B-7016(c)(5). Are there really no relevant fact the parties can agree upon, or have they simply failed to consider the question? The court suspects it is the latter because the parties have also failed to identify any contested legal or factual issues associated with the information contained in or needed by the disclosure statement.<sup>3</sup> Id. at (c)(6),(7).

The parties have asked the court to set aside an entire day on its calendar for the trial of this matter. While the court is ready, willing and able to do so, it questions whether the parties will really need that much time in order to present their cases with regard to the deficiencies in issue. It may well be that if they properly focus their attention on what they are fighting about, what they will be fighting with (the evidence they can bring to bear on a particular issue), and what they agree to, they may conclude that they do not need all the time they have requested. Nonetheless, if after having fully evaluated the issue, they conclude that they need every minute they have asked for (or conclude that they need more than a day), the court is ready, willing and able to provide them with what they need. It asks only that they make reasonably sure they need what they are asking for.

Debtors' and Bank of America shall, within fourteen (14) days of this date, jointly file an amended pretrial order which fully satisfies the requirements of the local rules of this court.

SO ORDERED.

/s/ Robert E. Grant  
Chief Judge, United States Bankruptcy Court

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<sup>3</sup>There is a "contested issue" portion of the pre-trial order, at ¶ F, but it relates to things other than the adequacy of the proposed disclosure statement.