CHAMBERS PROCEDURES: JUDGE ELIZABETH E. BROWN
UNITED STATES BANKRUPTCY COURT, DISTRICT OF COLORADO

DISCLOSURE STATEMENT PROCEDURES

a. Chambers Review Checklist. Chambers staff review proposed disclosure statements and plans to ensure they contain the following:

- A description of the nature of debtor's business and the reason for filing.
- A summary of how the plan will reorganize the debtor's business (sell assets, continue to operate but downsize, etc.).
- Projections for future operations (if applicable). If the projections show losses, there should be a discussion of how debtor will fund the losses. If the projections appear overly optimistic as compared to historical performance, there should be an explanation or basis for the change. If the debtor has no prior track record for the source of income, the proponent must state the basis for its projected revenues.
- A description of claims, treatment for each class of claims, and a statement as to whether the class is impaired or not.
- For each secured class, a description of the collateral securing the lien, its relative priority (first mortgage, second mortgage and the like), whether the creditor will retain its lien, an estimate of the value of the collateral and the basis for the same, whether interest will be paid and at what rate, and the basis for the selected interest rate.
- An adequate default provision in the plan, including the remedies creditors will have upon default.
- A post-confirmation retention of jurisdiction provision that is not overly broad.
- If not all impaired classes vote to accept the plan, an indication of how the debtor will satisfy the absolute priority rule. A description of (if applicable) whether existing equity will be cancelled; if new equity will be issued, who will receive new equity; what is being exchanged for any new equity; and whether others than old equity will be given an opportunity to acquire the new equity.
- A description of whether the proponent will leave the case open after substantial consummation or will seek to close the case subject to reopening.
- A description of the reorganized debtor's management and their compensation.
- A deadline and/or process for claim objections and a description of any escrow for disputed claims.

- A description of potential claims of the debtor (such as avoidance actions) and what will happen to them and/or who will pursue litigation.

- If a liquidating trust is to be established, provisions identifying the trustee, how a replacement trustee may be selected, and a copy of the trust instrument.

- An adequate liquidation analysis that takes into account possible avoidance actions.

- A description of who will have settlement authority post-confirmation and whether court approval of settlements will be required.

- A clear description of the executory contracts and/or unexpired leases that will be assumed, assumed and assigned, or rejected. A list of assumed contracts and leases should be attached, including an indication of the amount necessary to cure defaults. The proponent should file a separate motion to assume, assign, or reject so that the non-debtor party has an opportunity to object to the proposed treatment of the lease/contract.

- An estimation of administrative claims and whether they will be paid on the effective date of the plan.

- An indication of whether estate property will vest in the re-organized debtor following confirmation.

- Eliminate any inconsistencies between the plan and the disclosure statement or within the disclosure statement itself.

b. Notice of Court Comments Prior to Hearing.

Regardless of whether any party files an objection to the proposed disclosure statement, the Court has an independent obligation to ensure adequate disclosure. In this division, we strive to provide counsel for the plan proponent with advance notice of any concerns the Court has with the disclosure statement (in addition to those that may have been raised by the parties). We do this, not to impose the Court's demands on the plan proponent, but to give counsel an opportunity to address these concerns at the hearing on the disclosure statement, without being "blind-sided" in court. It is perfectly acceptable for counsel to explain to the Court why the concerns may be unfounded.

Often times, however, counsel will address these concerns and the objections raised by the parties in a new red-lined draft that counsel will tender before or during the hearing. It is the Court's hope that this will save counsel the need to do this twice – once to meet the objections and then later after a hearing to address the Court's concerns raised only at the hearing. By consulting the Chambers Review Checklist above, counsel may avoid the necessity of Court comments altogether.

c. "Facially Unconfirmable" Plans.

The following are excerpts from this Court's decision in *In re K Lunde, LLC*, 513 B.R. 587 (Bankr. D. Colo. 2014):

> [Although raised in an objection to a disclosure statement, sometimes a creditor's objections are actually raising issuing as to the confirmability of the Debtors' plan.] "Ordinarily, confirmation issues are reserved for the confirmation hearing, and not addressed at the disclosure statement stage." *In re Larsen*, 2011 WL 1671538, at *2 n.7 (Bankr. D. Idaho May 3, 2011). Courts have long held, however, that "if it appears there is a defect that makes a plan inherently or patently unconfirmable, the Court may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing." *Id.* (citations omitted); *see also In re Am. Capital Equip., LLC*, 688 F.3d 145, 154 (3rd Cir. 2012) (listing cases); *In re Deming Hospitality, LLC*, 2013 WL 1397458, at *1 (Bankr. D.N.M. Apr. 5, 2013). The rationale given for this short-circuited process is that the estate and parties should not bear the expense and effort required by the full confirmation process if there is a fatal flaw that makes the plan unconfirmable as a matter of law. These decisions draw on a bankruptcy court's § 105(a) power to control its own docket, and provide that it is within the bankruptcy court's discretion to withhold approval of the disclosure statement on this basis. *Am. Capital Equip., LLC*, 688 F.3d at 154.
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> A plan is "patently unconfirmable where (1) confirmation 'defects [cannot] be overcome by creditor voting results' and (2) those defects 'concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.'" *Id.* at 154-55 (citing *In re Monroe Well Serv.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987)). The defect complained of here is the plan's separate classification of Mesa County's secured claim and its characterization of this class as an impaired class. This raises a legal question, as to which no party has raised a genuine issue of material fact. Technically, voting results could overcome this defect. For example, if class four voted in favor of the Debtors' plan, then this alleged defect would not make the plan unconfirmable. Both parties acknowledge, however, that the Creditor will control the vote of both classes two and four. The Debtors accept the Creditor's statement that it will vote both its secured and unsecured claims to reject this plan. Thus, while theoretically voting results *could* overcome the defect, it is undisputed that the Debtors will not be able to secure a necessary impaired, accepting class without counting the vote of Mesa County as a separate impaired class. For these reasons, the Court deems this confirmation issue appropriate for adjudication in advance of a confirmation hearing.