

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-30998

ECHOTA DEVELOPMENT, LP

Debtor

**MEMORANDUM ON ADEQUACY OF
DEBTOR'S AMENDED DISCLOSURE STATEMENT**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

Presently before the court is the adequacy of the Amended Disclosure Statement for Second Amended Plan Dated April 3, 2003, Proposed by Debtor Echota Development, Limited Partnership (Second Amended Disclosure Statement). Objections to the Second Amended Disclosure Statement were filed by Branch Banking and Trust Company (BB&T) and John W. Holden, Jr. and Ken Rayburn (collectively, Holden and Rayburn). A hearing on the adequacy of the Second Amended Disclosure Statement and the objections thereto was held on April 17, 2003. The matter was taken under advisement for ruling without further hearing.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

On April 3, 2003, the Debtor filed the Second Amended Disclosure Statement, along with the Debtor's Second Amended Plan of Reorganization Dated April 3, 2003 (Second Amended Plan). On April 10, 2003, Holden and Rayburn filed a Restated Objections to Debtors' [sic] Disclosure Statements.¹ BB&T filed its Objection to Adequacy of Debtor's Proposed Second Amended Disclosure Statement on April 14, 2003.²

¹ On February 27, 2003, Holden and Rayburn filed the Objections of John W. Holden, Jr. and Ken Rayburn to Disclosure Statement Relating to Debtor's First Amended Plan of Reorganization. In their Restated Objections, Holden and Rayburn stated that they had not received the "Third Amended Disclosure Statement," so they were reaffirming and restating their earlier February 27, 2003 Objections. The court presumes that they incorrectly referred to a third amended disclosure statement instead of the Second Amended Disclosure Statement as issue.

² On March 3, 2003, the U.S. Trustee's Objections to Debtor's Amended Disclosure Statement was filed, with regards to the Debtor's first amended disclosure statement. On April 18, 2003, the United States Trustee filed a Notice of Withdrawal of U.S. Trustee's Objections to Debtor's [Second Amended] Disclosure Statement.

Holden and Rayburn primarily base their objections upon (1) valuation issues regarding their claim; and (2) Tennessee state law issues regarding a possible usury defense. BB&T has two issues upon which it bases its objections: (1) valuation of sixty lots that the Debtor proposes to sell; and (2) issues concerning a 75-acre tract of real property on North Smoky Mountain Way (the Real Property), including (a) valuation of the Real Property based upon an appraisal and title search that was conducted for BB&T, (b) whether the Real Property is essential to the Second Amended Plan, (c) whether marketing the Real Property will provide a benefit to creditors, and (d) whether the proposal to sell the Real Property is realistic.³ In support of its objection, BB&T states that a recent title examination of the Real Property shows that there are four mortgages on the Real Property and that property taxes owed to the City of Sevierville and Sevier County have not been paid since 1998.

II

The filing of disclosure statements is governed by 11 U.S.C.A. § 1125(b), which provides:

An acceptance or 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.

11 U.S.C.A. § 1125(b) (West 1993). As they pertain to § 1125, subsection (a) provides the following definitions:

³ This 75 acres is a portion of the Real Property listed in the Debtor's Second Amended Disclosure Statement as "81.1 Acres on North Smoky Mountain Way."

(a) In this section—

(1) “adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, that 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, but adequate information need not include such information about any other possible or proposed plan; and

(2) “investor typical of holders of claims or interests of the relevant class” means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

11 U.S.C.A. § 1125(a) (West 1993).

The court must determine adequacy on a case-by-case basis. *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988). Although a non-exhaustive list, most courts consider the following factors in making their determination of adequacy:

(1) the circumstances that gave rise to the filing of the bankruptcy petition; (2) a complete description of the available assets and their value; (3) the anticipated future of the debtor; (4) the source of the information provided in the disclosure statement; (5) a disclaimer, which typically indicates that no statements or information concerning the debtor or its assets or securities are authorized, other than those set forth in the disclosure statement; (6) the condition and performance of the debtor while in Chapter 11; (7) information regarding claims against the estate; (8) a liquidation analysis setting forth the estimated return that creditors would receive under Chapter 7; (9) the accounting and valuation methods used to produce the financial information in the disclosure statement; (10) information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor; (11) a summary of the plan

of reorganization; (12) an estimate of all administrative expenses, including attorneys' fees and accountants' fees; (13) the collectibility of any accounts receivable; (14) any financial information, valuations or *pro forma* projections that would be relevant to creditors' determinations of whether to accept or reject the plan; (15) information relevant to the risks being taken by the creditors and interest holders; (16) the actual or projected value that can be obtained from avoidable transfers; (17) the existence, likelihood and possible success of non-bankruptcy litigation; (18) the tax consequences of the plan; and (19) the relationship of the debtor with affiliates.

Scioto Valley Mortgage Co., 88 B.R. at 170-71 (citations omitted). "In short, a proper disclosure statement must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). Generally, other issues are left for confirmation; however, it is sometimes appropriate to find a disclosure statement inadequate "where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible." *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990).

III

In the court's opinion, the objections of Holden and Rayburn are strictly confirmation issues and, as such, they do not support the contention that the disclosure statement does not contain adequate information as required by § 1125(a) and (b). Likewise, BB&T's objections regarding valuation, whether the Real Property is essential to the Second Amended Plan, benefit to the creditors, and whether the Debtor's proposal to sell the Real Property is realistic are issues to be addressed during confirmation.

On the other hand, BB&T's objection regarding the Debtor's disclosure of the liabilities connected with the Real Property does concern the adequacy of the Second Amended Disclosure Statement. The Debtor's disclosure regarding the Real Property is as follows:

This property is also so-called "resort" raw land property suitable for development. Debtor proposes to sell the land as is. Debtor expects to be able to sell 10 acres of this property in year one after the Effective Date, again with a 10% sales cost. This property in the aggregate, based upon recent appraisals, has a value of \$4,866,000. The present amount of liens on the property is \$2,563,000.

Although the Debtor gives an amount of liens owing on the Real Property, it does not adequately describe the nature of the encumbrances. The disclosure does not specify that there are four mortgages owed on the Real Property and to whom and, more significantly, it does not reveal that there are city and county property taxes due from 1998 to present. Without this information, the Second Amended Disclosure Statement does not contain adequate information as required by § 1125(a) and (b).

IV

The court will direct that the Debtor, within ten (10) days, shall amend the Second Amended Disclosure Statement to include specific information regarding the obligations owed on the 75 acres of Real Property, encompassed within the 81.1 acres on North Smoky Mountain Way.

An order consistent with this Memorandum will be entered.

FILED: April 23, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-30998

ECHOTA DEVELOPMENT, LP

Debtor

ORDER

For the reasons stated in the Memorandum on Adequacy of Debtor's Amended Disclosure Statement filed this date, the court directs the following:

1. The Restated Objections to Debtors' [sic] Disclosure Statements filed April 10, 2003, by John W. Holden, Jr. and Ken Rayburn is **OVERRULED**.
2. The Objection to Adequacy of Debtor's Proposed Second Amended Disclosure Statement filed on April 14, 2003, by Branch Banking and Trust Company is **OVERRULED** in part and **SUSTAINED** in part.
3. The Debtor shall, within ten (10) days, further amend its Amended Disclosure Statement for Second Amended Plan Dated April 3, 2003, Proposed by Debtor Echota Development, Limited Partnership filed April 3, 2003, to include specific information regarding the obligations owed on the 75 acres of real property, encompassed within the 81.1 acres on North Smoky Mountain Way.
4. Upon the Debtor's filing of its further amended disclosure statement, the court will rule on the adequacy of the disclosure statement without further notice or hearing.

SO ORDERED.

ENTER: April 23, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE