

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

In re

Case No. 02-35482

KINDRICK TRUCKING COMPANY, INC.

Debtor

**MEMORANDUM ON ADEQUACY OF SECOND AMENDED
DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN**

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

Presently before the court for consideration is the adequacy of the Second Amended Disclosure Statement for the Second Amended Plan filed by the Debtor on September 9, 2003. An objection to the adequacy of the Second Amended Disclosure Statement was filed by CitiCapital Commercial Corporation (CitiCapital).¹ An objection to the Debtor's original Disclosure Statement filed by the United States Trustee was withdrawn on September 8, 2003, after the filing of the Debtor's Second Amended Disclosure Statement. A hearing on the adequacy of the Second Amended Disclosure Statement and CitiCapital's Objection was held on September 11, 2003. The court took this matter 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 September 9, 2003, the Debtor filed the Second Amended Disclosure Statement, along with the Debtor's Second Amended Plan. CitiCapital's Objection is based upon the following averments that the Second Amended Disclosure Statement: (1) fails to disclose the Debtor's pre-petition and post-petition relationship with TAG Transport, Inc. (TAG); (2) fails to disclose whether there are accounts owed to the Debtor from TAG, and if so, fails to value these accounts and describe potential collectibility; and (3) fails to adequately describe any transactions entered into with insiders, namely, Gary Kindrick, son of the Debtor's principals.

¹ CitiCapital originally filed its Objection to the Adequacy of the Debtor's Amended Disclosure Statement and Amended Plan on August 6, 2003. The Objection before the court is the Amended Objection by CitiCapital Commercial Corporation to the Adequacy of the Debtor's Second Amended Disclosure Statement and Amended Plan filed on September 17, 2003.

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 it pertains to § 1125, subsection (a) provides the following definitions:

(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). Most courts consider the following, non-exhaustive list 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

CitiCapital is a creditor of the Debtor by virtue of an Agreement dated March 21, 2002, regarding several conditional sales contracts executed by the Debtor. At that time, CitiCapital was a secured creditor of the Debtor; however, the Debtor has sold equipment in which CitiCapital held a security interest, whereby CitiCapital has become an unsecured creditor. A portion of the collateral was sold to TAG, a company that had previously been renting the equipment from the Debtor, for a net sale of \$124,592.00 for the benefit of the estate.

In its Objection, CitiCapital argues that the Debtor has not disclosed adequate information regarding its relationship with TAG. First, it states that TAG's principal is Gary Kindrick, son of the Debtor's principals, who is owed compensation for running the Debtor's operations from August 2000 through July 2002, that was not addressed in the Second Amended Plan. Second, CitiCapital asserts that the Debtor allowed TAG to use the Debtor's property pre-petition for which the Debtor was never compensated. Third, CitiCapital avers that TAG was delinquent in payments under its prior lease with the Debtor, but these accounts receivable and/or any other monetary claims owed to the Debtor by TAG are not discussed in the Second Amended Disclosure Statement.

Disclosure of any possible collectibles owed to and/or from the Debtor is necessary for creditors to adequately determine "what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution;" however, mere allegations that additional claims possibly exist without more substantial evidence do not convince the court that the Debtor's

Second Amended Disclosure Statement contains inadequate information. CitiCapital has not offered any evidence in support of its assertions that the Debtor is actually entitled to any additional funds from TAG or that it owes any outstanding compensation to Mr. Kindrick. As such, the court finds that CitiCapital's Objection is without merit, and its concerns should be more properly addressed at confirmation.

An order consistent with this Memorandum will be entered.

FILED: October 9, 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. 02-35482

KINDRICK TRUCKING COMPANY, INC.

Debtor

ORDER

For the reasons stated in the Memorandum on Adequacy of Second Amended Disclosure Statement for Second Amended Plan filed this date, the court directs that the Amended Objection by CitiCapital Commercial Corporation to the Adequacy of the Debtor's Second Amended Disclosure Statement and Amended Plan filed by CitiCapital Commercial Corporation on September 17, 2003, is **OVERRULED**. The Debtor's Second Amended Disclosure Statement filed on September 9, 2003, is **APPROVED** as containing adequate information. A hearing on confirmation of the Second Amended Plan filed by the Debtor on September 9, 2003, will be set by a separate order.

SO ORDERED.

ENTER: October 9, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE