

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re ) Chapter 11  
)  
UNITED PRODUCERS, INC. ) Case No. 05-55272  
) Jointly Administered  
)  
Debtors ) Judge Charles M. Caldwell  
)  
\_\_\_\_\_ ) Hrg: August 25, 2005 at 10:00 am

**OBJECTION OF THE UNITED STATES TRUSTEE TO JOINT  
DISCLOSURE STATEMENT OF UNITED PRODUCERS, INC.  
AND PRODUCERS CREDIT CORPORATION**

The Office of the United States Trustee ("U.S. Trustee") has received and reviewed the Joint Disclosure Statement of United Producers, Inc. and Producers Credit Corporation, which are dated July 13, 2005. With a few modifications and amendments, the U.S. Trustee believes that the Disclosure Statement contains "adequate information" upon which parties in interest will be able to make an informed judgment about the Plan as required by 11 U.S.C. § 1125. The U.S. Trustee requests the following modifications and amendments:

1. A Disclosure Statement should contain sufficient information about a plan of reorganization and other relevant information so the "creditors . . . whose rights are to be affected" can make an informed judgment as to whether or not to accept the proposed plan. H.R. Rep. No. 595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 226 (1977). 11 U.S.C. § 1125. In re Monnier Bros., 755 F. 2d 1336 (8<sup>th</sup> Cir. 1985). In re A.C. Williams Co., 25 B.R. 173 (Bankr. N.D. Ohio 1982).

2. Adequate information is that which would enable a hypothetical investor to make an informed judgment about the plan of reorganization. 11 U.S.C. § 1125. See also, In re Metrocraft Pub. Services, Inc., 39 B.R. 567 (Bankr. N.D. Ga. 1984) (Court identifies nineteen issues a disclosure statement should address.) In the absence of amendments to deal with such matters as are noted below, the United States Trustee recommends that the court not approve the proposed Disclosure Statement "as containing adequate information."

3. Payment of U.S. Trustee Quarterly Fees. The Disclosure Statement needs additional language with respect to the provisions of 28 U.S.C. § 1930, which require all cases pending under Chapter 11 to pay a quarterly fee until the case is dismissed, converted or closed by the Court. The Disclosure Statement on page 17 appears to address the payment of pre-confirmation of quarterly fees which may be due on the effective date of the Plan. Current language has no acknowledgment of the Debtors' continuing duty to pay quarterly fees post-confirmation or to file quarterly operating reports. The U.S. Trustee suggests the following language to be inserted:

*The Reorganized Debtors shall be responsible for timely payment of fees incurred pursuant to 28 U.S.C. § 1930(a)(6). After confirmation, the Reorganized Debtors shall file with the court and serve on the U.S. Trustee a quarterly financial report regarding all income and disbursements, including all plan payments, for each quarter (or portion thereof) the cases remain open.*

4. Estimate of Claims. The proposed Disclosure Statement fails to provide an estimate of various classes of claims. Additional information is needed concerning the total estimated amount of administrative claims, including professionals, to determine what is necessary on the effective date. Clarification is needed for administrative claims on pages 16-17 of the Disclosure Statement as well as page 30 for professional compensation.

The estimated amount of various other classes of claims, including, but not limited to, B2 and E2, will be helpful in future calculations of pro rata amounts to be distributed to general unsecured claims.

5. Compensation to Officers and Directors. The Disclosure Statement should include information which appears in the Plan regarding the compensation to officers and directors remaining in management post-confirmation. The Plan has an exhibit attached, Exhibit B, which should also be incorporated into the Disclosure Statement.

6. Superpriority Over Certain Causes of Actions. The Disclosure Statement sets forth the preservation of certain causes of actions beginning on page 40, including "those claims specified in sections 542, 543, 544, 546, 547, 548, 549, 550, 551, and 553 of the Bankruptcy Code." After all potential causes of actions are listed, a statement is made that CoBank's debt was conveyed a priority claim from causes of actions over all administrative claims. Additional information and language is necessary to explain the rights of CoBank to the various avoidance actions of the Debtors

which typically go to the benefit of the unsecured creditors.

7. Rejection of Executory Contracts and Unexpired Leases. The Disclosure Statement, at page 37, and the Plan, at page 28, discuss the treatment for the rejection of executory contracts and unexpired leases. On page 37, section C.1., it states that [t]he Plan will constitute a motion to reject such executory contracts and unexpired leases. Entry of the Confirmation Order by the Bankruptcy Court will constitute approval of the rejections . . .” The United States Trustee questions the due process of such notice to all those holders considering that the bar date for filing of a proof of claim “arising from the rejection” is thirty (30) days after the entry of the Confirmation Order.

8. Liquidation Analysis. The Disclosure Statement includes a short paragraph on page 53 captioned Alternatives to Plan. While detailed exhibits are attached to the Disclosure Statement, they should be specifically identified in the paragraph on page 53 to direct the reader to the actual exhibits.

9. Sale of Corporate Headquarters. Pending before the Court is Debtors’ motion to sell two (2) parcels of real property which constitutes the corporate headquarters of the Debtors. The terms of the sale include a lease provision whereby the Debtors will continue to operate from the same location. No information is contained in the Disclosure Statement regarding both the sale and the lease back terms, including the monthly cost to the Debtors. Additional information is necessary to determine the monthly expenses of the Debtors.

10. Post-Confirmation Conversion/Dismissal. The Plan needs a paragraph concerning what happens if the cases convert to Chapter 7 post-confirmation (i.e., assets that were property of the estates that were not distributed under the Plan should revert back to the estates and the Chapter 7 trustees). The U.S. Trustee suggests that the following paragraph be inserted into the Plan and Disclosure Statement:

*Post-Confirmation Conversion/Dismissal*

*A creditor or party in interest may bring a motion to convert or dismiss the cases under § 1112(7) after the Plan is confirmed if there is a default in performing the Plan. If the Court orders the cases converted after the Plan is confirmed, this Plan provides that property of the estates that have not been disbursed pursuant to the Plan will revert in the Chapter 7 estate and that the automatic stay*

*will be reimposed upon the revested property to the extent that relief from stay was not previously authorized by the Court during these cases.*

*The order confirming the Plan may also be revoked under very limited circumstances. The Court may revoke the order if and only if the order of confirmation was procured by fraud and if a party in interest brings a motion to revoke confirmation within 180 days after the entry of the order of confirmation.*

11. Final Decree Obligation. The Disclosure Statement and Plan need a sentence concerning the Debtors' obligation to file a motion for a final decree under 11 U.S.C. § 350(a). The U.S. Trustee suggests the following paragraph be inserted into the Plan and Disclosure Statement:

*Final Decree*

*Once the Plan has been substantially consummated, the Reorganized Debtors shall file a motion with the Court to obtain a final decree to close the case.*

12. No Authority for Third-Party Releases. The United States Trustee objects to the Debtors' attempt to release non-debtor parties from liability. Currently, the Disclosure Statement and Plan provide for the release from liability of CoBank. Because § 524(e) provides that only debts of the debtor are affected by the Chapter 11 discharge, the release and injunctive provisions of the Debtors' Plan contravene § 524(e), and unless they are deleted from the Plan, the Plan cannot satisfy the requirement of 11 U.S.C. § 1129(a)(1), which requires that a plan be confirmed only if it complies with all applicable provisions of Chapter 11. Moreover, because creditors were not given an opportunity to vote on the releases but are "deemed" to release, discharge and waive any claims by voting to accept the plan, the releases are non-consensual.

**A. The Release Provisions Contravene 11 U.S.C. § 524**

Section 524(e) of the Bankruptcy Code specifically provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or property of any other entity, for such debt." 11 U.S.C. § 524(e). Thus, only a debtor that has submitted to the burdens of the bankruptcy process is entitled to a discharge.

The Debtors should not be permitted to use the Chapter 11 Plan as a mechanism to obtain a release of non-debtor third parties who may be independently liable to creditors or interest holders. Allowing such releases and related injunctive provisions would result in non-debtors benefitting from a debtor's bankruptcy by obtaining their own releases.

Numerous cases have rejected or denied enforcement of a purported release of non-debtor parties through a plan of reorganization as being overly broad or in direct contravention of 11 U.S.C. §524(e). *See, e.g., In re Continental Airlines*, 203 F.3d 203 (3rd Cir. 2000) (release and injunctive provisions fell squarely within § 524(e) prohibition because they amounted to nothing more than a "lockstep discharge of non-debtor liability"); *In re Lowenschuss*, 67 F.3d 1394 (9<sup>th</sup> Cir. 1995), cert. denied, 517 U.S. 1243 (1996)("Section 524(e) does not ... provide for the release of third parties from liability"); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)("Section 524(e) prohibits the discharge of debts of nondebtors"); *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992)("the language of [§ 524(e)] reveals that no one else reaps a similar benefit"); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1980), *modified sub nom.*, 932 F.2d 898 (10th Cir. 1991)(permanent injunction purporting to release non-debtors from liability improperly insulates nondebtors in violation of § 524(e)).

Simply put, these cases hold that release and injunctive provisions, such as the ones at issue here, render a plan unconfirmable because the bankruptcy court "lacks the power to confirm plans of reorganization which do not comply with applicable provisions of the Bankruptcy Code." *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995).

A literal reading of 11 U.S.C. §524(e) and 11 U.S.C. §1141(d)(3) mandates the conclusion that neither the Debtor nor related parties and insiders should be released or discharged through the Plan. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235,241, 109 S. Ct. 1026, 1030-31 (1989) (holding interpretation begins with the literal language of the statute). Because the Plan and its proponents violate the express terms of 11 U.S.C. §524(e) and 1141(d)(3), the confirmation tests of 11 U.S.C. §1129(a)(1) and (2) are not met and confirmation of the Plan must be denied.

**B. The Release Provisions Are Impermissible Under Applicable Sixth Circuit Precedent.**

Debtors fail to establish that the non-debtor releases satisfy the seven part test identified by

the Sixth Circuit in *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning)*, 280 F. 3d 648, 658 (6th Cir. 2002). In *Dow Corning*, the Sixth Circuit held that seven factors must be present to enjoin a non-consenting creditor's claim against a non-debtor. Those factors include: (1) there is an identity of interests between the debtor and the third party; (2) the non-debtor has contributed substantial assets to the reorganization; (3) the injunction is essential to reorganization, namely, the reorganization hinges on the reorganization; (4) the impacted class has voted overwhelmingly to accept the plan; (5) the plan provides a mechanism to pay for all, or substantially all, of the claims of the class affected by the release; (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and, (7) the bankruptcy court made a record of specific factual findings that support its conclusions. *Id.* at 658.

The third-party releases in *Dow Corning* arose under a very different set of factual circumstances than those presented in this case. As the Sixth Circuit noted, the Dow Corning chapter 11 arose in the context of years of litigation involving the manufacture of silicone gel breast implants with claims involving hundreds of thousands of women. The Sixth Circuit justified its decision to permit bankruptcy court approval of non-debtor release by noting how "the bankruptcy court, as a forum for resolving large and complex mass litigations, has substantial power to reorder creditor-debtor relations needed to achieve a successful reorganization." *Id.* at 656.

This particular chapter 11 case presents issues that are unlike the complex claims in *Dow Corning* and Debtors will be unable to meet the factors established in the case. Accordingly, the releases are impermissible pursuant to applicable Sixth Circuit precedent. Debtors cannot satisfy the confirmations standards of 11 U.S.C. § 1129(a) while seeking to release non-debtors.

WHEREFORE, for the reasons stated above, the United States Trustee respectfully requests that the Court enter an order requiring amendments to the Plan and disclosure statement consistent with the above.

DATED: July 21, 2005

OFFICE OF THE UNITED STATES TRUSTEE

By: /s/ Lenore Kleinman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTORS' JOINT PLAN AND DISCLOSURE STATEMENT was served by ordinary First Class U.S. Mail Service or by EMAIL via ECF upon Reginald W. Jackson, Attorney for the Debtors, 52 East Gay Street, (P.O. Box 1008), Columbus, Ohio 43215 (43216-1008) this 21<sup>st</sup> day of July, 2005.

/s/ Lenore Kleinman

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Lenore Kleinman