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HON. WHITMAN L. HOLT

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re: ASTRIA HEALTH, et.al. [1] Debtors in Possession,	Case No. 19-01189 FLK Chapter 11 Jointly Administered OBJECTION TO DEBTORS' DISCLOUSRE STATEMENT

The United States Trustee for Region 18 objects to the debtors' jointly proposed Disclosure Statement for the following reasons:

1. No Going Concern or Enterprise Value Provided.

The plan proposes the enterprise will continue to operate and being services to the Yakima area. The proponents do not provide a value for its going concern or

1 The Debtors, along with their case numbers, are as follows: Astria Health (19-01189), Glacier Canyon, LLC (19-01193), Kitchen and Bath Furnishings, LLC (19-01149), Oxbow Summit, LLC (19-01195), SHC Holdco, LLC (19-01196), SHC Medical Center-Toppenish (19-01190), SHC Medical Center-Yakima (19-01192), Sunnyside Community Hospital Association (19-01191), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197), Sunnyside Home Health (19-001198), Sunnyside Professional Services, LLC (19-01199), Yakima Home Care Holdings, LLC (19-01201), and Yakima HMA Home Health, LLC (19-01200).

enterprise. It should be added to the disclosures. *In Taffi v. United States (In re Taffi)*, 96 F.3d 1190 (9th Cir.1996) (en banc), *cert. denied*, 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987 (1997), we addressed the primary question in this case-valuation of collateral under § 506(a) when the debtor intends to retain the property. We stated that "[v]aluation must be accomplished within the actual situation presented." *Id. at 1192*. *In re Kim*, (9th Cir, 1997) 130 F.3d 863. *In re Prince*, 85 F.3d 314, (7th Cir. 1996)(goodwill of an orthodontics practice was included in the value of the debtor's interest for purposes of paying the unsecured class).

The Disclosure Statement does not provide any comparison of the loss or gain in the merger or transfer at the member level regarding the entity or the intercompany claims. Here, the debts created by the Yakima facility are the critical point in comparisons earlier in this case to Sunnyside's profitable operations and Toppenish's slightly profitable or break-even operations.

The Disclosure Statement does not explain why the value of the unbilled accounts receivables, touted in the early portion of the case as the pathway to reorganization, have disappeared. They simply are assigned to the Liquidation Trust.

This disclosure by the proponents of the debtors' value is foundational to

several matters in confirmation, any section 1129(b) considerations, and in assisting the creditors to vote to accept or reject the proposed plan.

2. "Deemed" Substantive Consolidation (or Any) is not Appropriate.

Substantive consolidation is an equitable doctrine designed to add benefits (ultimately distributions) to all creditors, not a subset of creditor(s), and designed to enhance an estate and its equitable distribution, not remove assets. The various Circuit opinions including *In re Bonham*, 229 F.3d 750 (9th Cir. 2000) are abundantly clear: its function is to combine the assets and liabilities of separate and distinct—but related—legal entities into a single pool and treat them as though they belong to a single entity. Its sole purpose of substantive consolidation of debtors in bankruptcy is to ensure the equitable treatment of all creditors. *Bonham*, at p. 764.

This plan uses the doctrine as a sword to cleave off the operating enterprise with no consideration for the unsecured creditors. Oddly, the result of disenfranchising a set of creditors was the scenario that *Owens Corning* 418 F.3d 195 (3rd Cir. 2005) reversed. *Bonham* observed the reason for, and impact of substantive consolidation is to benefit every creditor, saying:

> Commingling of assets and liabilities of debtor-entities justifies the

> substantive consolidation of their estates only when separately accounting for assets and liabilities of these distinct entities will reduce recovery of every creditor, i.e., when every creditor will benefit from the consolidation; moreover, this benefit should be from cost savings that make assets available, rather than from shifting of assets to benefit one group of creditors at another's expense.

In contrast to the Disclosure Statement's assertions of entanglement, the accounting of the debtors for each clinic and hospital shows in its financial reporting in the operating reports. The identification of the Yakima facility's losses was the foundation for the motion to allow the closure of the Yakima facility and to demonstrate its losses as a drain on Sunnyside and Toppenish. Further, the Schedules F and G in the Toppenish and Sunnyside hospital specific cases (19-01190 and 19-01191) are very clear in listing the debts and potential executory contracts and leases. The Disclosure Statement itself describes the relationship as centralized, not consolidated. See page 28.

The Disclosure Statement does not explain why the proponents wish to use the substantive consolidation doctrine in a new and novel manner, nor does it want to discuss the blunt reality of its effect to remove the cash flow source for any future payments for the unsecured creditors. Indeed, the Disclosure Statement asserts on page 32 that the Reorganized Debtor is "projected to generate positive

monthly EBIDA in every month subsequent to confirmation of the Plan sufficient to pay operating expenses in the normal course of business, debt service and capital expenditures ("capex") as needed." The Disclosure Statement does not explain why the Reorganized Debtor (no matter how many transfers are made at the ownership level) cannot fund payments to the unsecured creditors.

3. Exculpation Provisions are Broader than Ninth Circuit Authority Allows.

The exception to the Ninth Circuit's interpretation of section 524(e) found in *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995), *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) and *In re American Hardwoods, Inc*., 885 F.2d 621, 626 (9th Cir. 1989) is the *Blixeth v. Credit Suisse* 961 F.3d 1074 (9th Cir. 2020) in which the narrow liability release limited to releasing parties from liability for "any act or omission in connection with, relating to or arising out of the Chapter 11 cases" or bankruptcy filing, applied only to negligence claims, not claims for willful misconduct or gross negligence, and release covered only parties "closely involved" in drafting plan, such as lender.

The release and exculpation clauses in this plan are more akin to *Lowenschuss's* global release than *Blixeth v Credit Suisse*'s very narrow release.

In either interpretation, the Disclosure Statement does not plainly describe the effect and results of the provision on the unsecured creditors which may affect their votes. It is buried in the dense and all capital letters prose, which while may be legally sufficient, it does not communicate to the smaller unsecured claimants its meaning.

We understand the court will address this issue at the hearing.

4. No Disclosure regarding section 1129(a)(5).

Neither the plan nor the Disclosure Statement disclose who management will be nor their compensation. We understand the court has indicated this will be required of the proponents.

5. Definitive Documents are not Presented.

The trust documents and Exchange Debt Documents are not presented for review or assessment. The "devil is in the details" as many of these documents which will govern the operational aspects of the proposed plan.

6. Class 2(C) is Impaired and Entitled to Vote.

Class 2(C)'s contracts are not left unaltered as section 1124's definition

required. Four scenarios are possible for each of the members of this class, one of which is payment of the claim in full as soon as practicable after the Effective Date. Only the payment in full of the claim would potentially be better treatment than their contract terms, however, even a change of a contract for better treatment is an alteration of the existing contract. See, *In re L & J Anaheim Associates*, 995 F.2d 940 (9th Cir. 1993).

7. The Plan Is Not Signed.

The proposed plan is not signed by the proponents. See Docket no. 1471.

8. The Obligation to Pay Quarterly Fees Remains with the Reorganized Debtor.

The obligation to pay the quarterly fees due pursuant to 28 U.S.C. section 1930(a)(6) in imposed on the party(ies) who commenced the case. In this plan, the proponents seek to have a trust pay the quarterly fees, which is fine as an additional obligor. However, it does not alleviate the obligation on the Reorganized Debtor. The "becoming" the sole member by AH PH2 and then a transfer of sole ownership to AH System simply replaces them at the ownership level but does not extinguish the debtor entities' obligation. Nor can the plan be

confirmed without meeting that obligation under section 1129(a)(12).

Dated: July 30, 2020

Respectfully submitted,

GREGORY M. GARVIN
ACTING UNITED STATES TRUSTEE

/s/ Gary W. Dyer
Gary W. Dyer
Assistant US Trustee