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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re:	)	CHAPTER 11
CATHOLIC BISHOP OF NORTHERN ALASKA, an Alaskan religious corporation sole,	)	Case No. 08-00110-DMD
Debtor.	)	Date: June 15, 2009 Time: 1.00 p.m.

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO "MOTION FOR ORDER UNDER 11 U.S.C. § 1121(d) EXTENDING EXCLUSIVE PERIOD WHILE DEBTOR SOLICITS ACCEPTANCE OF ITS PLAN OF REORGANIZATION"

The Official Committee of Unsecured Creditors (the "Committee") of the Catholic Bishop of Northern Alaska (the "Debtor") hereby objects to the "Motion For Order Under 11 U.S.C. § 1121(D) Extending Exclusive Period While Debtor Solicits Acceptance Of Its Plan Of Reorganization" (the "Motion"). Having filed its chapter 11 case over 15 months ago essentially for the purpose of addressing the claims of survivors of child sexual abuse and having made

during that time no material progress toward a consensual resolution of such creditors' claims, the Committee opposes as unjustified and counterproductive the Debtor's Motion to extend the period to solicit plan acceptance (the "Solicitation Exclusivity Period") on two grounds: (1) the Debtor has not established cause for the extension and (2) as a matter of law, the Debtor is not entitled to continued plan exclusivity during its solicitation period.

I.

THE DEBTOR HAS NOT ESTABLISHED CAUSE

FOR AN EXTENSION OF EXCLUSIVITY

The Motion should be denied. With the Debtor and Committee – the two key constituencies in this case -- unable to make progress through mediation, the best way forward would be to set the stage for the filing of competing plans.

Section 1121(d) of the Bankruptcy Code provides that the Court may reduce or increase the l20-day or 180-day exclusive periods for a debtor to file and solicit acceptances of its reorganization/liquidation plan if "cause" exists. 11 U.S.C. § 1l21(d). Requests to extend or reduce a period of exclusivity should "be granted neither routinely nor cavalierly." *In re McLean Indus., Inc.*, 87 B.R. 830,834 (Bankr. S.D.N.Y. 1987); *In re Curry Corp.*, 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992) ("This court will not routinely extend the exclusivity period absent a showing of 'cause' when creditors object to such requests for extensions."); *In re Pine Run Trust, Inc.*, 67 B.R. 432, 434 (Bankr. E.D. Pa. 1986) ("Furthermore, both the language and purpose of this statutory provision require that an extension not be granted routinely.").

The burden is on the Debtor to demonstrate the existence of good "cause" warranting an extension of its Solicitation Exclusivity Period. *In re Newark Airport Hotel LP*, 156 B.R. 444,

451 (Bankr. D.N.J.), affd, *FGH Realty Credit Corp. v. New Airport/Hotel LP*, 155 B.R. 93 (D.N.J. 1993). The Debtor has failed to meet this burden.

Although the applicable statute requires "cause" to be shown for an extension of any exclusivity period (11 U.S.C. § 1121(d)), a "cause" standard alone is not very instructive. The Committee, however, agrees with the Debtor on at least this: in deciding whether to grant this Motion, the "transcendant consideration is whether adjustment of exclusivity will facilitate moving the case forward toward a fair and equitable resolution." *In re Henry Mayo Newhall Memorial Hosp.*, 282 B.R. 444, 453 (9th Cir. BAP 2002). *See* Motion, p. 5.

The *Newhall Memorial Hosp.* case centered around a dispute over control of a 217-bed hospital in Los Angeles County owned by the debtor, a California nonprofit public benefit corporation. In *Newhall Memorial Hosp.*, the Bankruptcy Appellate Panel engaged in a de novo review of a bankruptcy court's decision to extend exclusivity. It found "cause" for an extension of exclusivity to be a "close case" (282 B.R. at 452) where the Court below had described the facts as follows:

> [The bankruptcy court] saw the situation as: (1) a first extension; (2) in a complicated case; (3) that had not been pending a long time, relative to its size and complexity; (4) in which the debtor did not appear to be proceeding in bad faith; (5) had improved operating revenue … (6) had shown a reasonable prospect for filing a viable plan; (7) was making satisfactory progress negotiating with key creditors; (8) did not appear to be seeking an extension of exclusivity to pressure creditors and (9) was not depriving the Committee of material or relevant information.

Id. at. 444.

The foregoing facts lead the Court in *Newhall Memorial Hosp.* to note that "[t]he case is unquestionably close and calls for a delicate exercise of judgment." *Id.* at 447. In explaining its rationale, the Court in *Newhall Memorial Hosp.* explained that it generally agreed with the notion that termination of exclusivity often facilitates a consensual reorganization:

> Professors Epstein, Nickles, and White have cogently debunked the proposition that complex cases require extended exclusivity, negotiations are facilitated by extended exclusivity, and pending litigation warrants extended exclusivity. [Citation omitted]... There is truth in their observation, backed by examples from prominent cases, that a likely consequence of the denial of an extension of exclusivity is "not that creditor plans will be proposed and approved, but that the threat of such plans will cause the debtor to come forward more quickly than he might otherwise." [Citation omitted.]

282 B.R. at 453.

Moreover, the *Newhall Memorial Hosp.* Court also found that where the debtor is a nonprofit corporation, the possible absence of protection in the plan process from a debtor through the absolute priority rule "counsels against extending exclusivity." *Id.* Yet, in *Newhall Memorial Hosp.*, the Court importantly found the debtor was making "satisfactory progress negotiating with key creditors." 282 B.R. at 452.

Here, the Debtor, the Catholic Bishop of Northern Alaska ("CBNA"), cannot demonstrate that "cause" exists for another extension of its solicitation exclusivity period because it has not made good faith progress toward confirming a consensual plan. Despite the Committee stipulating with the Debtor to two extensions of the Debtor's exclusive period to file a Plan, CBNA admits that it has been unable to reach any consensus with the Committee:

> CBNA participated in mediation with the Committee in October 2008 in an attempt to resolve certain issues consensually; the mediation was unsuccessful.

Motion, p. 3.

With one exception, the Debtor and the Committee have not had one substantive negotiation on any material plan issue since this case started. The one exception is that the parties did discuss the list from survivors of child sexual abuse of non-monetary measures that they would seek the Diocese to undertake to address creditors' concerns. By example, some villagers expressed the concern to Committee members that life cycle events (such as marriages) might not be valid if performed by an officiating priest who was an abuser. Although this issue

was “discussed,” the parties are at such a state of impasse that the Diocese did not even see fit to include its own watered down version of this and many other of such measures in either version of its plan.

The Diocese and the Committee have had two mediation sessions and, as the Debtor’s Amended Disclosure Statement recites, both mediations were failures. In fact, the second mediation was such a dismal failure that the Committee did not receive a single offer from the Debtor (save its original plan and a rewrite of the Committee’s offer as to non-monetary measures). As a result, the mediator terminated the mediation a day early.

The Debtor tries to create some specter of progress by stating that its Amended Plan reflects concerns expressed during the second mediation session. Yet, whatever progress the Debtor thought it eked out is belied by its own description of the upcoming disclosure statement and confirmation fights and that CBNA has not reached consensus with a single non-affiliated party:

> CBNA anticipates that the confirmation process will be hard fought…. [T]he Committee served a 26 page document request for production of documents on the Amended Disclosure Statement [and] is in the process of ramping up its litigation over property of the estate issues.

Motion, p.2.

Nonetheless, the Debtor argues that its various efforts culminating in the preparation and filing of the Amended Plan and Amended Disclosure Statement are sufficient to constitute "cause" for a further extension of the Solicitation Exclusivity Period. The Debtor also concludes that, as a result of its efforts, it “has made significant progress in this Reorganization Case in proposing its Amended Plan." The fact, however, that the Debtor has filed an Amended Plan and a Revised Disclosure Statement without the support of, and not an iota of direct input by, the Committee hardly demonstrates sufficient progress to warrant an additional extension of the Solicitation

Exclusivity Period. More importantly, the Debtor's own statement in the Motion that it "has made significant progress in this Reorganization Case in proposing its Amended Plan" underscores its core misunderstanding of the extent of the Committee's opposition to the current plan.

The Debtor does acknowledge that providing "just compensation" to child sexual abuse survivors is a necessary ingredient of any plan:

> CBNA filed this Reorganization Case in order to pay just compensation to victims of sexual abuse perpetrated by individuals associated with the Fairbanks Diocese…

Disclosure Statement, pp. 7-8. Yet, no plan in this case can provide "just compensation" to survivors of child sexual abuse – whose abuse often included the exertion of control by the abuser -- if the plan doesn't fairly reflect and incorporate the reasonable views of such survivor claimants.

The Debtor's Plan, however, was not consensual or collaborative. It was filed unilaterally by CBNA on the very last day to do so within the exclusive period. The Debtor also filed its amended Plan unilaterally.[1]

The Debtor's plan is a non-starter. The Debtor's amended plan amounts to nothing more than a litigation tactic. As will be set forth in the Committee's soon to be filed disclosure statement objection, besides the proposed disclosures being inadequate, the plan itself is not confirmable on its face. It does not, nor even attempts, to meet the best interests or fair and equitable tests and suffers from other equally fatal infirmities. Instead, the proposed plan offers survivors of child sexual abuse recoveries of only a fraction of their claims, while proposing to

[1] Debtor's litigious and non-consensual approach to this case is at odds with its constant pleas of poverty and potential administrative insolvency. Certainly, the litigation path that the Debtor has chosen will create a greater administrative burden on the Debtor than some modifications to the Amended Plan.

pay virtually all other constituencies in full and while rapidly restoring and expanding all of the Debtor's programs. The Committee sees the Plan as intended to pressure the child sexual abuse survivors to capitulate and accept the lower recoveries dictated by CBNA. This is not progress.

There are no facts here that warrant an extension of the exclusivity period. CBNA has failed to promulgate a plan that provides for a fair sharing of the pain from CBNA's alleged insolvency. CBNA has made no progress toward reaching a consensual resolution of this case with its key creditors. Thus, an extension of the exclusive period would be counterproductive and should be denied.

Importantly, this Court's denial of the Debtor's Motion will not end its chances to have its Amended Disclosure Statement approved or to solicit and confirm its Amended Plan. *See, e.g., In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1005 (Bankr. N.D. Ind. 1990) ("Denying such a motion only affords creditors its right to file the plan; there is no negative effect upon the Debtor's co-existing right to file its plan."); *In re Grossinger's Assocs.*, 116 B.R. 34,36 (Bankr. S.D.N.Y. 1990) ("[L]oss of plan exclusivity does not mean the debtor is foreclosed from promulgating a meaningful plan of reorganization; only that the right to propose a Chapter II plan will not be exclusive with the debtor"). Rather, denying the Motion at this time will level the playing field and permit the Committee to file a competing plan. *See, e.g., Curry Corp.*, 148 B.R. at 756 (denying debtor's motion to extend exclusive periods, noting that extensions "should not be employed as a tactical device to put pressure on creditors to yield to a plan that they might consider unsatisfactory").

The Committee believes that terminating the Debtor's Solicitation Exclusivity Period and thereby authorizing the Committee (and any other constituencies) to file a plan is the best way, at

this time in this case, to facilitate meaningful negotiations among the Debtor's creditors and other parties in interest or, otherwise, confirm a plan acceptable to the Debtor's creditors.

II.

This Court Should Allow the Official Committee the Opportunity to Prepare and File Its Own Proposed Plan and Accompanying Disclosure Statement

Inasmuch as the Committee desires to bring these bankruptcy cases to closure as efficiently, economically, and expeditiously as possible, the Committee stands ready, willing, and able to file its own plan and an accompanying disclosure statement in the bankruptcy case in the event of, and promptly upon, this Court's termination of the Solicitation Exclusivity Period as requested herein or confirmation that such period already has expired.

A. Once Exclusivity Ends, the Committee Can File a Plan.

Once exclusivity expires or is terminated, a "creditors' committee" or any other "party in interest" may file a plan of reorganization/liquidation. 11 U.S.C. § 1121(c). At that point, they are to have an equal opportunity to file a plan in a chapter 11 case. This was a major change from the Bankruptcy Act of 1898, under which only the debtor could file a plan. *See Jorgensen v. Federal Land Bank*, 66 B.R. 104, 107 (B.A.P. 9th Cir. 1986). "Allowing creditors to submit plans eliminate[s] the potential harm and disadvantages to creditors and democratize[s] the reorganization process." *Id.*

Heeding both the text and the underlying intent of section 1121 (c), numerous bankruptcy courts throughout the country have granted creditors the opportunity to file a competing plan of reorganization. *See, In re Kingbrook Dev. Corp.*, 261 B.R. 378 (Bankr. W.D.N.Y. 2001) (refusing to dismiss as creditor's plan was pending); *In re Dark Horse Tavern,* 189 B.R. 576 (Bankr. N.D.N.Y. 1995) (delaying conversion to chapter 7 to give any interested party a chance to file a plan); *In re BGNX, Inc.*, 76 B.R. 851, 853 (Bankr. S.D. Fla. 1987) (examining whether

"any" party can effect reorganization and dismissing only after finding that both plans were not confirmable).

Permitting the Committee's filing of a competing plan and accompanying disclosure statement will create a meaningful discourse among the Debtor's various creditors and other parties in interest, which should lead to the best possible result for all concerned parties. *In re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 133 (D.N.J. 1995) (affirming bankruptcy court's denial of Debtor's motion to extend exclusive period). Although the Debtor clearly has expended a significant amount of time, energy, and financial resources preparing the Original Plan and the Amended Plan, the Amended Plan, as noted above, is not confirmable and ignores the views of the Committee, which is the official fiduciary representative body for the largest creditor constituency (both in terms of number of creditors and in aggregate claim value).

The Motion, similar to the Plan itself, appears intended as a litigation tactic. This alone is grounds for denying it. *See In re Hoffinger Industries, Inc.*, 292 B.R. 639 (8th Cir. BAP 2003). The Debtors undoubtedly appreciate that were the Motion denied, absent prompt and meaningful progress in reaching a consensual resolution, the Committee could and would quickly, efficiently, and successfully propose and confirm its own plan. The Committee's plan likely would vary from the Debtor's in certain key but limited areas. For example, a Committee plan likely would explicitly preserve any and all potential causes of action by the Debtor's bankruptcy estates against third parties, including avoidance actions under Chapter 5 of the Bankruptcy Code and potential claims against various non-Debtor parties arising under applicable state law, *e.g.*, against the Parishes and the Holy See.

B. Competing Plans Should Be Considered On The Same Track.

As stated by the Court in *Newhall Memorial Hosp.*:

> Even if a competing plan were to be filed, the court would retain control over scheduling confirmation. It is, for example, common for competing plans to be placed on the same schedule so that they may be considered in tandem.

282 B.R. at 453.

The Committee should be afforded the opportunity to present its competing plan on the same schedule as the Debtor's Amended Plan. Having a differing timeline with respect to the approval of the Debtor's and Committee's disclosure statements and the solicitation of the Debtor's and Committee's plans would substantially prejudice the Debtor's creditors' ability to analyze and compare both the Official Committee's plan and the Debtor's Amended Plan to determine which plan is in their best interests and to vote accordingly.

In order for any plan and accompanying disclosure statement filed by the Committee to have a meaningful and fair opportunity to be considered by the Debtor's creditors, this Court should:

(i) place any disclosure statement filed by the Committee on the same approval track as the Debtor's Amended Disclosure Statement, or any amendment thereto; and

(ii) place any plan of reorganization filed by the Committee on the same track as the Debtor's Amended Plan, or any amendment thereto, with respect to its proposed solicitation and confirmation.

III.

CONCLUSION

Based on the foregoing, the Committee respectfully requests that the Court deny the Motion and grant such other and further relief as is just and proper.

Dated: June 12, 2009

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