

Utah State Bar Mid-Year Meeting

CRITICAL ISSUES FACING THE CORPORATE CLIENT CONSIDERING CHAPTER 11 IN TODAY'S ECONOMY

Honorable William T. Thurman, Chief Judge
United States Bankruptcy Court, District of Utah

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I. Chapter 11 Statistics for Utah and the rest of the Country

- A. *See* attached chart for the number of chapter 11 filings in Utah, Delaware, and the Southern District of New York
- B. *See* attached chart for National Trends

II. Advising the Corporate Client

- A. If you represent a client, what should you be considering in conjunction with a potential bankruptcy filing?
 - 1. Should the business consider any pre-bankruptcy planning?
 - a. It is all in the timing. In many if not most instances the Business usually waits until the last minute to contact you to let you know that they may need to file bankruptcy. Usually, they have a pressing issue such as a foreclosure, repossession or an immediate litigation response due. Under those circumstances, it is difficult to do much pre-bankruptcy planning. If the Business is not in immediate danger of some catastrophic event then there are some things that you should do to assist your Business client in preparing for a bankruptcy filing. For instance, consider the following:
 - i. Making sure employees are paid and they have cashed their checks before the filing so that there is no break in their income.
 - ii. If there are critical vendors, the Business will want to make sure that they have remained current on those accounts. Bringing a past due account current, however, will open the door for potential preference actions so the Business will want to avoid bringing past due accounts current. If past due accounts are brought current, there is a 90 day look-back on payments to non-insiders and a 1 year look-back at payments to insiders. The Business owner should be made aware of this issue.
 - iii. The Business may want to involve its primary lenders in a discussion regarding post petition financing. If there current lenders are unwilling to provide post petition financing then the Business will need to analyze whether there are any potential that may be willing to lend to the Business and make post petition funding available to the Business.

- iv. The Business needs to consider its relationship with any creditor that has a lien on accounts and inventory. To the extent it can maintain a good relationship with this creditor, it will be critical to structuring a cash collateral stipulation
 - v. The Business should do everything it can to make sure they are current on their tax filings and tax payments, especially 940s and 941s.
- b. Every Business should know the basics of chapter 11 even if things are running well. So take the opportunity to discuss bankruptcy with your Business clients now so that they will know that they need to speak to you earlier rather than later if they start experiencing a downturn or other negative event in their Business.
 - c. The first question your Business client needs to address is whether the Business is viable? Can it meet its ongoing expenses? Are the conditions that have led to their consideration of a bankruptcy temporary and short term or are they long term? Do they have sufficient resources to weather the storm (*i.e.* continue to operate until conditions change?) Are there things the Business has done or can do to improve its situation such as reduce costs, jettison unprofitable portions of its business or increase income?
 - d. If the business is not truly a viable entity, in other words, it really has no chance of turning around, then chapter 11 bankruptcy is probably not worth filing. This is a critical decision that should be made prior to the filing if at all possible. If not made prior to the filing then it should be made as early in the case as possible.
 - e. Chapter 11 is very expensive. Besides the \$1,039 filing fee, there is usually a substantial retainer paid to the attorney and there are quarterly fees that must be paid to the US Trustee. **See Quarterly Fee Schedule** attached hereto.
2. What are the considerations and what impact will they have if a filing occurs?
- a. Early in the case (usually on the first day or so), the Business will need to address several issues and potential motions including: Use of Cash Collateral, Post Petition Financing, Appointment of Counsel, Special Noticing Issues such as a Motion to Limit Notice, Special Administrative Procedures such as the Payment of Interim Fees on a Monthly Basis, Motion for Payment of Utilities, and Motion to Incur Debt for Payment of Insurance on an Installment Basis.

- b. Depending on the aggressiveness of the creditors, the Business Debtor needs to be prepared to respond to objections to the motions set forth in paragraph 1 above and to respond to motions initiated by creditors such as Motions for Relief from Stay and/or Motions to Assume or Reject Executory Contracts or Leases.
- c. One of the most important considerations for both Debtors and Creditors to keep in mind in conjunction with a bankruptcy filing is that the framers of the Bankruptcy Code designed a system that was to encourage negotiations. Each side is given a certain amount of chips and you play those chips to get the best “deal” that you can get. Therefore, it is critical to maintain open communication lines and flexibility in attempting to resolve issues in a Chapter 11 case.
- d. The Debtor will be required to file Monthly Operating Reports with the Court and the US Trustee’s Office. Besides keeping all parties in interest informed on the financial status of the Debtor’s case, it also provides the Debtor with the opportunity to inform the parties in interest of the Debtor’s progress in the case.
- e. There is a possibility that the Debtor will have an Unsecured Creditors’ Committee appointed in the case. Again, if there is a Committee appointed, it can be either a positive or a negative event for the Debtor. The Committee almost always hires counsel to represent the Committee. Counsel for the Debtor should make an effort to involve counsel for the Committee as much as possible and to gain the confidence and support of the counsel for the Committee. The Committee can be an extremely valuable ally or your worst enemy in the Debtor’s efforts to reorganize. Communicating often and openly with the Committee’s counsel will be a must for Debtor’s counsel if the Debtor intends to succeed in its reorganization efforts.

B. If you are not a bankruptcy attorney, what should you do?

- 1. Be aware of non-bankruptcy options such as business dissolution, selling assets, closing the doors of the business and potential liability to its owners, and things you should do and not do if negotiating with a creditor outside the bankruptcy context. In order to do these things well it is helpful if you know what will happen inside a bankruptcy case if your client were to file.
- 2. Bankruptcy is a specialized field that is fraught with potential pitfalls. While you want to learn as much as you possibly can about Bankruptcy, it is not recommended that you start your education by filing a Chapter 11 case.

3. Obtain a set and learn the Local Rules.
 4. Associate with experienced bankruptcy counsel. Expect to remain involved in the case. Because of your long term association with your client, your knowledge and experience can be invaluable to bankruptcy counsel. In some instances, you may be hired as Special Counsel to take advantage of your special expertise and knowledge.
- C. Some general questions that may be discussed?
1. What can Chapter 11 do for me or my company? It can buy you time so that you can either reorganize or orderly liquidate the Business.
 2. Generally, how long does it take? Typically, a Chapter 11 takes approximately one year to work through the process and to obtain confirmation of a Plan. Confirmed plans can go out for an extended period of time. Under the Local Rules, however, the Debtor must file a Motion to Close a Chapter 11 case within 1 year of confirmation.
 3. Is there a way to shorten the process? Obviously, it depends on several factors including, but not limited to, the following: the nature of the business, the state of the outside factors affecting the viability of the business, the Debtor's motivation and desire to complete the process quickly, the cooperation of the parties in interest and the Debtor's ability to meet its commitments.
 4. Is there some way to lengthen out the process to buy some time to allow the market to recover? Again, the factors listed above will affect the length of the case. In this regard, the Debtor's ability to make and keep its commitments and to comply with the Bankruptcy Code and Court orders will provide the Debtor with the greatest opportunity to extend the time needed in bankruptcy to effectuate a viable plan of reorganization.
 5. What will it cost? Chapter 11 bankruptcy is extremely expensive. Retainers vary depending on the nature of the case and what the Debtor hopes to accomplish. In addition, there are quarterly fees that must be paid to the US Trustee's Office. Furthermore, if an Unsecured Creditors' Committee is appointed, they will generally hire counsel and that counsel's fees are usually paid by the Debtor.
 6. What can the business expect from its creditors and customers if a Chapter 11 is filed? Hopefully, the creditors are going to be reasonable but be prepared for a fight if you get a creditor that is unwilling to be reasonable. Remember the tougher the fight the more expensive the case will be for both the Debtor and its creditors. Most creditors, however, are reasonable and will often be more than willing to work with the Debtor once the Debtor files bankruptcy so long as the Debtor is reasonable with them.

Again, in most instances, the Debtor can avoid a lot of unnecessary fighting with creditors if the Debtor will communicate. As for customers, they may not even know your client is in bankruptcy. The most difficult issue the Debtor will face is from the competition telling customers that because the Debtor is in bankruptcy they will not be able to deliver the goods or services. This can have an extremely negative impact on the Debtor and in some ways becomes a self-fulfilling prophecy. In this regard, customers may need to be educated on the bankruptcy process, which may include a letter or other communication from the Debtor explaining why the Debtor filed, what the Debtor expects to do to ensure the customers' needs and orders are met, how and when the Debtor anticipates emerging from bankruptcy. These can be tricky issues and counsel will want to be involved in any such communication.

7. Where to file?

- a. Venue of bankruptcy cases is governed by 28 U.S.C. § 1408. Under this statute, a bankruptcy case may be filed in the judicial district:
 - i. where the debtor has (during the 180 days prior to filing the case, or for the greater portion of such 180 day period) its
 - domicile,
 - residence,
 - principal place of business in the U.S., or
 - principal assets in the U.S., or
 - ii. where a case is pending for the debtor's affiliate, general partner or partnership.
- b. Many national law firms prefer to file cases in Delaware or the Southern District of New York. They know the judges there and know the laws in those circuits.
- c. The choice of venue probably will be determined by the choice of lawyers. If the debtor has several options available to him, it probably would be best off filing in the district where its attorneys have experience, are known to the judiciary and are comfortable.
- d. In some cases, the question of venue may be influenced by an important issue that may be the subject of a circuit split. For instance, there is a split in circuit law on the subject of the assumption and assignment of a patent license. In such a case, the

debtor may prefer to file in a district where the law is favorable to the debtor on that issue.

III. **Small business Chapter 11 Debtors as a viable option**

A. Small Business Cases and Debtors Under the Bankruptcy Code

1. A small business case is one filed by a small business debtor; defined by the Bankruptcy Code as a person or any affiliate of such person who is engaged in commercial or business activities (not including a person that primarily owns or operates real property) that has aggregate non-contingent liquidated secured and unsecured debts that do not exceed \$2,190,000. 11 U.S.C. § 101(51C) & (51D).
2. To be a small business debtor the U.S. Trustee must not have appointed a committee of unsecured creditors, or the court must determine that the committee is not sufficiently active. 11 U.S.C. § 101(51D).

B. Is There Any Way to Avoid Being Treated as a Small Business Debtor?

1. Generally no, unless an unsecured creditors committee is appointed by the U.S. Trustee. This exception represents the congressional goals that small business cases be expedited and subjected to greater oversight through the bankruptcy process. Additional oversight is not needed if there is an active creditors committee.
2. It is the duty of the debtor in a voluntary chapter 11 case to state, in the petition, if it is a small business debtor. In an involuntary case, the debtor shall file, within 15 days of the order of relief, a statement declaring their small business debtor status. Fed. Rules of Bankr. P. 1020(a).
3. Once a debtor has declared his small business status, judicial and equitable estoppel will likely bar a change of that status. *See In re Save Our Springs (S.O.S.) Alliance, Inc.*, 393 B.R. 452, 463 (Bankr. W.D. Tex. 2008) (at late stage of heavily expedited case small business debtor was judicially and equitably estopped from changing small business status.).

C. Small Business Debtor Plan Filing Deadline (11 U.S.C. § 1121(e))

1. Section 1121(e)(1) grants the small business debtor a 180-day exclusivity period to file a plan of reorganization.
2. The plan and a disclosure statement (if any) shall be filed within 300 days. 11 U.S.C. § 1121(e)(2).
3. It is very difficult for a small business debtor to extend either of these time periods. To do so under §1121(e)(3), the debtor must demonstrate by a “preponderance of the evidence that it is more likely than not that the

court will confirm a plan within a reasonable period of time,” and a new deadline is imposed before the existing deadline has passed.

D. The Plan Confirmation Process and Requirements (11 U.S.C. § 1129(e))

1. The Court “shall” confirm a small business debtor plan within 45 days of filing unless the time is extended under § 1121(e)(3).
2. Section 1129(e) imposes a heavy duty on the court. The plan must either be approved or the debtor must demonstrate by a “preponderance of the evidence” that the court will approve a plan. In either case, this must be done within 45 days and can be extremely difficult in light of the court’s remaining docket.
3. Language of the statute is clear, the debtor’s failure to comply with deadlines under §§ 1121(e) and 1129(e) will result in the dismissal of the case. *See In re Caring Heart Home Health Corp., Inc.*, 380 B.R. 908 (Bankr. S.D. Fla. 2008) (case dismissed where extension of the 45 day deadline to confirm plan was not extended prior to the deadline); *see also In re Save Our Springs (S.O.S.) Alliance, Inc.*, 393 B.R. at 463 (case dismissed where small business debtor did not timely obtain a plan confirmation.).

E. Other Specific Duties of the Small Business Debtor (11 U.S.C. § 1116)

1. Section 1116(1) requires that the debtor attach to the petition (or in involuntary cases within seven days of order of relief) either: (a) the most recent balance sheet, statement of operations, cash-flow statement, and its federal tax return, or (b) declare under oath that the documents have not been prepared and that taxes were not filed.
2. Section 1116(2) requires that the debtor attend, through senior management, meetings scheduled by the court and the trustee including the 341 meeting, unless the court waives the requirement by finding “extraordinary and compelling circumstances.”
3. Section 1116(3) provides that the debtor “timely file all schedules and statements of financial affairs.” An extension limited to 30 days may be granted by the court with notice and a hearing, absent “extraordinary and compelling circumstances.”
4. Section 1116(4) provides that all filings must be in accordance with the Federal Rules of Bankruptcy Procedure and the local rules.
5. Section 1116(5) requires small business debtors to “maintain insurance customary and appropriate to the industry.”

6. Section 1116(6) requires that the debtor file all taxes.
7. Section 1116(7) allows the U.S. Trustee to inspect business premises, books and records, subject to reasonable times and notices.
8. “Failure to append Small Business Documents does not mandate dismissal. However, it can be a reason to dismiss, . . . if it constitutes ‘cause’ under section 1112.” Therefore, failure to append requires analysis of cause for dismissal under § 1112. *See In re Franmar, Inc.*, 361 B.R. 170, 178 (Bankr. D. Colo. 2006).

F. Additional Small Business Debtor Reporting Requirements (11 U.S.C. § 308(B))

1. Section 308(B) requires periodic filing of financial reports including:
 - a. Profitability;
 - b. Projected cash receipts and disbursements;
 - c. Comparisons of actual cash receipts and disbursements with prior projections;
 - d. Other reports concerning debtors’ compliance with Bankruptcy Rules and timely filing of taxes.

G. Benefits of Being a Small Business Debtor (11 U.S.C. § 1125(f))

1. Section 1125(f) permits the court to do one of three things for a small business debtor:
 - a. Determine that the plan has adequate information and a separate disclosure statement is not necessary (§ 1125(f)(1));
 - b. Approve a disclosure statement submitted on standard forms adopted under 28 USC § 2075 (§ 1125(f)(2));
 - c. Conditionally approve a disclosure statement allowing consolidation of the final hearing on the disclosure statement with confirmation of the plan itself (§ 1125(f)(3)).

H. Serial Filings by Small Business Debtors (11 U.S.C. § 362(n))

1. Automatic stay is not applicable for a small business case where the debtor:
 - a. Is a debtor in a small business case pending at the time that the petition is filed;

- b. Was the debtor in a small business case, which was dismissed within two years of the date of the order for relief in the current case;
 - c. A small business plan was confirmed for the debtor within two years of the date of the order of relief; or
 - d. Is an entity that has acquired substantially all of the assets of a small business debtor described above “unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.”
- 2. Section 362(n) treats a purchaser of assets from a small business debtor as a serial filer if the seller had availed itself of bankruptcy relief at any time within two years, and presumes bad faith by the purchaser unless the presumption is rebutted.
- 3. Additionally, section 362(n) all but precludes a subsequent chapter 7 liquidation, unless friendly creditors will file an involuntary petition because there is no way a chapter 7 can work without the automatic stay.
- I. Heightened Oversight by the U.S. Trustee (28 U.S.C. § 586)
 - 1. Section 586(a)(7)(A) specifically requires the U.S. Trustee to:
 - a. Investigate the debtor’s viability;
 - b. Inquire about the business plan;
 - c. Explain the required monthly operating and other reports that must be filed.
- J. Section 586(a)(7)(B) provides that the U.S. Trustee, if appropriate, may visit the debtor’s business, assess the state of the debtor’s books and records, and verify that taxes are filed.
- K. Section 586(a)(7)(C) provides that the U.S. Trustee identify promptly whether the debtor will be unable to confirm a plan by diligently monitoring the debtor’s activities.
- L. New Official Forms for Small Business Debtors (approved December 2008)
 - 1. Form B25A Sample Plan (*see attached*)
 - 2. Form 25B Sample Disclosure Statement (*see attached*)

3. Form 25C Small Business Monthly Operating Report (*see attached*)

IV. Sales of Assets in Bankruptcy

- A. “Free and Clear” Sales. One significant advantage that is available only in bankruptcy is a sale “free and clear” of all liens, claims and interests. Such sales, however, require bankruptcy court approval.
- B. Where a sound business reason exists and the sale would be in the interests of creditors, the Bankruptcy Court may approve a sale of substantially all of the debtor’s assets prior to confirmation of a plan. See 11 U.S.C. § 363(b)(1).
 1. In re Medical Software Solutions, Inc., 268 B.R. 431 (2002) is a good example of a successful sale under section 363 of the Bankruptcy Code.
 - a. Less than 30 days after the case was filed, the debtor filed a motion to sell substantially all of its assets to an “insider.”
 - b. The debtor had engaged in substantial efforts to locate a buyer of the debtor as a “going concern” both pre- and post-petition.
 - c. Upon a “first day” motion by the debtor, which was joined by the US Trustee, the court had appointed an “examiner” to investigate the possibility of a sale of substantially all of the debtor’s assets to an insider.
 - d. After a full evidentiary hearing and after considering the examiner’s report, the Court concluded that a “sound business purpose” existed for the sale, that the price was fair and reasonable, that notice was reasonable, and that the buyer was acting in good faith.
 - e. Applying these facts to the law, more fully described below, the sale was approved two months and one day after the bankruptcy case first was filed.
 2. A sale of a debtor’s assets should be authorized pursuant to Bankruptcy Code section 363 if a sound business purpose exists for doing so. See, e.g., In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983); In re Martin, 91 F.3d 395 (3d Cir. 1996); In re Titusville Country Club, 128 B.R. 396 (W.D. Pa. 1991); In re Industrial Valley Refrigeration and Air Conditioning Supplies, Inc., 77 B.R. 15 (E.D. Pa. 1987); In re Anchor Exploration Co., 30 B.R. 802, 808 (N.D.Okla. 1983) (bankruptcy court has wide-latitude in approving sale of substantially all of the estate assets under section 363(b)); In re Allison, 39 B.R. 300, 301-02 (D.N.M. 1984) (“The clear weight of authority authorizes the sale of all or substantially all of the debtor’s assets pursuant to Section 363(b) in a chapter 11

proceeding, even absent a disclosure statement, plan, and vote of the creditors.”).

3. “In order to approve a sale of substantially all the Debtor's assets outside the ordinary course of business, the following elements must be met. The Debtor must show (1) that a sound business reason exists for the sale; (2) there has been adequate and reasonable notice to interested parties, including full disclosure of the sale terms and the Debtor's relationship with the buyer; (3) that the sale price is fair and reasonable; and (4) that the proposed buyer is proceeding in good faith.” Medical Software Solutions, Inc., 268 B.R. at 439-40. See also Lionel Corp., 722 F.2d at 1071 (identifying the “sound business purpose” test); In re Abbotts Dairies of Penn., Inc., 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification test of Lionel, and adding the “good faith” requirement); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991) (adopting Lionel).

4. As Collier notes:

There has been disagreement historically on the issue of whether and under what circumstances a chapter 11 debtor may sell substantial assets under section 363. It is now generally accepted that section 363 allows such sales in chapter 11, provided, however, that the sale proponent demonstrates a good, sound business justification for conducting the sale prior to confirmation (other than appeasement of the loudest creditor), that there has been adequate and reasonable notice of the sale, that the sale has been proposed in good faith, and that the purchase price is fair and reasonable. These factors are considered to assure that the interests of all parties in interest are protected and that the sale is not for an illegitimate purpose.

3 Collier on Bankruptcy (15th Rev. 2002), ¶363.02[4].

5. Under Bankruptcy Code section 363(f), a debtor-in-possession may sell property free and clear of any lien, claim or interest in such property if:
 - (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
 - (2) such entity consents;
 - (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
 - (4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

6. Because Bankruptcy Code section 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to approve the sale of the Assets free and clear of liens, claims, encumbrances, and other interests (collectively, the “**Interests**”). See 11 U.S.C. § 363(f); Michigan Employment Security Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (section 363(f) written in disjunctive; court may approve sale “free and clear” provided at least one of the subsections is met); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343 (E.D. Pa. 1988) (same).

C. Likewise, a plan of reorganization or plan of liquidation in a chapter 11 case may provide for the sale of some or all of the debtor’s assets. See 11 U.S.C. §§ 1123(a)(5)(D) and 1123(b)(4).

1. As with sales under section 363 of the Bankruptcy Code, sales pursuant to a confirmed plan may be “free and clear.” 11 U.S.C. § 1129(b)(2)(A)(ii).
2. Under a confirmed plan, the debtor also may have the option of substituting collateral or other consideration which provides the “indubitable equivalent” to the secured creditor. 11 U.S.C. § 1129(b)(2)(A)(iii). In this manner, the Debtor may be able to sell assets subject to lien and use the money without paying the proceeds to the secured creditor.

D. Assumption and Assignment of Executory Contracts and Leases

1. The Bankruptcy Court empowers a debtor in bankruptcy (a) to cure defaults under pre-bankruptcy contracts and leases, and (b) to assign those contracts to third parties.
2. Under Bankruptcy Code section 365(a), a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Bankruptcy Code section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor. This subsection provides:

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

3. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” EBG Midtown South Corp. v. McLaren/Hart Env. Engineering Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 593 (S.D.N.Y. 1992); see In re Prime Motor Inns Inc., 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994) (“[a]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance”); Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1988).
4. Among other things, adequate assurance may be provided by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. See, e.g., In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).
5. Assignment of contracts and leases is permitted under section 365(f)(2) of the Bankruptcy Code, which provides, in pertinent part:

The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

V. **Impact of Recent Supreme Court Ruling**

- A. *Florida Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (U.S. 2008)

1. The chapter 11 Debtor Piccadilly, before submitting its plan, filed a motion under §363(b)(1) to sell substantially all of its assets outside of the ordinary course of business and received authorization to do so from the Bankruptcy Court. Simultaneously, Piccadilly was granted stamp tax exemption to the transference of those assets under 11 U.S.C. §1146(a). Prior to the plan's confirmation, petitioner Florida Department of Revenue objected, arguing that the stamp tax exemptions fell outside §1146(a) exemption. Although the Bankruptcy Court granted Piccadilly Summary Judgment on the issue and the ruling was affirmed by the Eleventh Circuit, the Supreme Court reversed. There was no objection within the case concerning the transfer of assets under §363(b)(1), the case concerned the language of the tax exemption within §1146(a). The Supreme Court held that §1146(a) should be interpreted narrowly "Section 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed." 128 S.Ct. at 2339.
2. *Piccadilly*, has no general implications concerning the sale or transference of assets under §363. However, where a tax exemption is sought pursuant to §1146(a), it will only be granted where the transfer occurs after the confirmation of the plan.

VI. First Day Motions

- A. There are many motions that may be important and, depending upon the particular case, should be filed on the "first day" or very soon after the petition date. Following is a list (not exhaustive) of some of the "first day motions" that a corporate debtor and its attorneys should consider filing very early in the case, and some of the information relevant to such filings:
 1. Motion for Order Prohibiting Utilities from Altering, Refusing or Discontinuing Service:
 - a. all utilities and their addresses;
 - b. account numbers;
 - c. identify the amount owed on each account as of the petition date;
 - d. identify the amount, if any, of any amount on deposit with the utility;
 - e. projection of monthly usage during the case; and
 - f. "adequate assurance of payment, in the form of a deposit or other security."

2. Motion for Authority to Pay Pre-Petition Wages (up to a maximum of \$10,950 per employee – arising from services rendered within 180 days before the petition date):
 - a. list of employees;
 - b. gross wages payable to each employee; and
 - c. aggregate amount of employment taxes payable by The debtor in connection with requested payroll.

3. Motion to Pay Contributions to Employee Benefit Plans (up to a maximum of \$10,950 multiplied by the number of employees in each plan):
 - a. identification of each employee benefit plan;
 - b. identification of number of employees participating in the plan; and
 - c. aggregate contribution to each plan (e.g., premiums to health insurance).

4. Motion to Pay Critical Vendors:
 - a. List of all critical vendors (being as conservative as possible);
 - b. total amount due to each, nature of goods/services provided, and when provided to the debtor;
 - c. total amount proposed to be paid to each “critical vendor”; and
 - d. please note that, under case law that has developed in recent years, payments of pre-petition claims has been widely criticized. Accordingly, if feasible debtor should pay critical vendors pre-petition.

5. Motion to reject leases and executory contracts:
 - a. list all of leases and executory contracts to be rejected;
 - b. Name and address of each counterparty to the lease/contract;
 - c. the date of the lease/contract;
 - d. brief explanation of each lease or contract; and

- e. brief summary of the benefit/detriment of continuing and/or discontinuing the lease or contract (*i.e.*, why the lease/contract is burdensome and/or has no value to the estate).
6. Application to Employ General Bankruptcy Counsel.
7. Application to Employ financial/restructuring advisers. To complete the application, the following information will be needed:
 - a. terms of engagement;
 - b. resumes of professionals;
 - c. hourly rates of any persons who may provide services; and
 - d. affidavit of disinterestedness.
8. Motion to Approve Use of Cash Collateral. To complete the motion you will need the following information:
 - a. identify all cash that constitutes the proceeds of collateral and/or other pre-petition assets/collateral that may be converted into cash (*e.g.*, inventory and receivables);
 - b. cash projections going forward;
 - c. projected expenses;
 - d. budget; and
 - e. collateral projections.
9. Motion to Approve Debtor-in-Possession Financing.
10. Motion to Approve Cash Management System
 - a. The United States Trustee generally requires closure of all pre-petition bank accounts and opening of one or more new debtor-in-possession bank accounts.
 - b. If changing accounts would cause disruption in The debtor's business operations, then we may need to seek authority to maintain its current accounts and cash management system.
 - c. Provide a detailed description and a chart of the debtor's cash management system.

d. Provide an explanation as to why it is important to continue the pre-petition cash management system (*i.e.*, how changing accounts may injure the debtor and its bankruptcy estate).

11. Motion to Extend Time to File Schedules and Statement of Financial Affairs
12. Motion for Authority to Pay Sales, Use and Franchise Taxes
13. Motion for Authority to Pay Pre-Petition Shipping Charges
14. Motion to Establish § 503(b)(9) Claims Procedure (for reclamation claims – goods delivered within 45 days pre-petition)
15. Motion to Honor Customer Programs
16. Motion Regarding Information Provided to Creditors Committee (to limit disclosure of confidential information)
17. Motion to Authorize Employee Incentive Programs
18. Motion to Limit Notice
19. Applications to Employ Other Professionals

APPENDIX

Chapter 11 Filing Statistics

District of Utah

**For the years: 2005, 2006, 2007, 2008
January 1, 2009 - February 24, 2009**

Year	Total CH 11
2005	37
2006	22
2007	24
2008	77
2009 (As of February 24, 2009)	9

Chapter 11 Filing Statistics for New York Southern and Delaware

For the Years: 2005, 2006, 2007, 2008 and
January 1, 2009 - February 24, 2009

Delaware	Total	New York	Total
Year	CH 11	Year	CH 11
2005	158	2005	790
2006	203	2006	370
2007	223	2007	242
2008	1029	2008	571
2009 (As of February 24, 2009)	229	2009 (As of February 24, 2009)	245

National Total of Chapter 11 Filings

(Source: Administrative Office US Courts Statistical Division)

National Total for Chapter 11 Filings	Total
Year	
2005	6,800
2006	5,163
2007	6,353
2008	Not Available
2009 (As of February 24, 2009)	Not Available

United States Bankruptcy Court

_____ District of _____

In re _____,

Debtor

Case No. _____

Small Business Case under Chapter 11

[NAME OF PLAN PROPONENT]'S DISCLOSURE STATEMENT, DATED [INSERT DATE]

Table of Contents

[Insert when text is finalized]

I. INTRODUCTION

This is the disclosure statement (the “Disclosure Statement”) in the small business chapter 11 case of _____ (the “Debtor”). This Disclosure Statement contains information about the Debtor and describes the [insert name of plan] (the “Plan”) filed by [the Debtor] on [insert date]. A full copy of the Plan is attached to this Disclosure Statement as Exhibit A. ***Your rights may be affected. You should read the Plan and this Disclosure Statement carefully and discuss them with your attorney. If you do not have an attorney, you may wish to consult one.***

The proposed distributions under the Plan are discussed at pages __ - __ of this Disclosure Statement. [General unsecured creditors are classified in Class __, and will receive a distribution of ___ % of their allowed claims, to be distributed as follows _____.]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the “Court”) will consider when deciding whether to confirm the Plan,
- Why [the Proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. This section describes the procedures pursuant to which the Plan will or will not be confirmed.

1. *Time and Place of the Hearing to [Finally Approve This Disclosure Statement and] Confirm the Plan*

The hearing at which the Court will determine whether to [finally approve this Disclosure Statement and] confirm the Plan will take place on [insert date], at [insert time], in Courtroom _____, at the [Insert Courthouse Name, and Full Court Address, City, State, Zip Code].

2. *Deadline For Voting to Accept or Reject the Plan*

If you are entitled to vote to accept or reject the plan, vote on the enclosed ballot and return the ballot in the enclosed envelope to [insert address]. See section IV.A. below for a discussion of voting eligibility requirements.

Your ballot must be received by [insert date] or it will not be counted.

3. *Deadline For Objecting to the [Adequacy of Disclosure and] Confirmation of the Plan*

Objections to [this Disclosure Statement or to] the confirmation of the Plan must be filed with the Court and served upon [insert entities] by [insert date].

4. *Identity of Person to Contact for More Information*

If you want additional information about the Plan, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted. [The Court's approval of this Disclosure Statement is subject to final approval at the hearing on confirmation of the Plan. Objections to the adequacy of this Disclosure Statement may be filed until _____.]

II. BACKGROUND

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor's business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor's insiders as defined in §101(31) of the United States Bankruptcy Code (the "Code") and their relationship to the Debtor. For each insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the two years prior to the commencement of the Debtor's bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor Before and During the Bankruptcy

During the two years prior to the date on which the bankruptcy petition was filed, the officers, directors, managers or other persons in control of the Debtor (collectively the "Managers") were [List the Managers of the Debtor prior to the petition date].

The Managers of the Debtor during the Debtor’s chapter 11 case have been: [List Managers of the Debtor during the Debtor’s chapter 11 case.]

After the effective date of the order confirming the Plan, the directors, officers, and voting trustees of the Debtor, any affiliate of the Debtor participating in a joint Plan with the Debtor, or successor of the Debtor under the Plan (collectively the “Post Confirmation Managers”), will be: [List Post Confirmation Managers of the Debtor.] The responsibilities and compensation of these Post Confirmation Managers are described in section ___ of this Disclosure Statement.

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor’s bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor’s bankruptcy case:

- Describe any asset sales outside the ordinary course of business, debtor in possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers [Choose the option that applies]

[Option 1 – If the Debtor does not intend to pursue avoidance actions]

The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

[Option 2 – If the Debtor intends to pursue avoidance actions]

The Debtor estimates that up to \$_____ may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

Transaction	Defendant	Amount Claimed

[Option 3 – If the Debtor does not yet know whether it intends to pursue avoidance actions]

The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. **Claims Objections**

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. The procedures for resolving disputed claims are set forth in Article V of the Plan.

H. **Current and Historical Financial Conditions**

The identity and fair market value of the estate's assets are listed in Exhibit B. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in Exhibit C.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case are set forth in Exhibit D.] [A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in Exhibit D.]

III. **SUMMARY OF THE PLAN OF REORGANIZATION AND TREATMENT OF CLAIMS AND EQUITY INTERESTS**

A. **What is the Purpose of the Plan of Reorganization?**

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. **Unclassified Claims**

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. As such, the Plan Proponent has *not* placed the following claims in any class:

1. *Administrative Expenses*

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 507(a)(2) of the Code. Administrative expenses also include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment.

The following chart lists the Debtor's estimated administrative expenses, and their proposed treatment under the Plan:

Type	Estimated Amount Owed	Proposed Treatment
Expenses Arising in the Ordinary Course of Business After the Petition Date		Paid in full on the effective date of the Plan, or according to terms of obligation if later
The Value of Goods Received in the Ordinary Course of Business Within 20 Days Before the Petition Date		Paid in full on the effective date of the Plan, or according to terms of obligation if later
Professional Fees, as approved by the Court.		Paid in full on the effective date of the Plan, or according to separate written agreement, or according to court order if such fees have not been approved by the Court on the effective date of the Plan
Clerk's Office Fees		Paid in full on the effective date of the Plan
Other administrative expenses		Paid in full on the effective date of the Plan or according to separate written agreement
Office of the U.S. Trustee Fees		Paid in full on the effective date of the Plan
TOTAL		

2. *Priority Tax Claims*

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor’s estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

Description (name and type of tax)	Estimated Amount Owed	Date of Assessment	Treatment
			Pmt interval = [Monthly] payment = Begin date = End date = Interest Rate % = Total Payout Amount = \$
			Pmt interval = [Monthly] payment = Begin date = End date = Interest Rate % = Total Payout Amount = \$

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. *Classes of Secured Claims*

Allowed Secured Claims are claims secured by property of the Debtor’s bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor’s claim is less than the amount of the creditor’s allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor’s secured prepetition claims and their proposed treatment under the Plan:

<u>Class #</u>	<u>Description</u>	<u>Insider? (Yes or No)</u>	<u>Impairment</u>	<u>Treatment</u>
	<i>Secured claim of:</i> Name = Collateral description = Allowed Secured Amount = \$ _____ Priority of lien = Principal owed = \$ _____ Pre-pet. arrearage = \$ _____ Total claim = \$ _____		[State whether impaired or unimpaired]	[Monthly] Pmt = Pmts Begin = Pmts End = [Balloon pmt] = Interest rate % = Treatment of Lien = [Additional payment required to cure defaults] =
	<i>Secured claim of:</i> Name = Collateral description = Allowed Secured Amount = \$ _____ Priority of lien = Principal owed = \$ _____ Pre-pet. arrearage = \$ _____ Total claim = \$ _____		[State whether impaired or unimpaired]	Monthly Pmt = Pmts Begin = Pmts End = [Balloon pmt] = Interest rate % = Treatment of Lien = [Additional payment required to cure defaults] =

2. *Classes of Priority Unsecured Claims*

Certain priority claims that are referred to in §§ 507(a)(1), (4), (5), (6), and (7) of the Code are required to be placed in classes. The Code requires that each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim. However, a class of holders of such claims may vote to accept different treatment.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (a)(7) of the Code and their proposed treatment under the Plan:

Class #	Description	Impairment	Treatment
	Priority unsecured claim pursuant to Section [insert] Total amt of claims = \$	[State whether impaired or unimpaired]	
	Priority unsecured claim pursuant to Section [insert] Total amt of claims = \$	[State whether impaired or unimpaired]	

3. *Class[es] of General Unsecured Claims*

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of §1122(b) convenience class if applicable.]

The following chart identifies the Plan's proposed treatment of Class[es] __ through __, which contain general unsecured claims against the Debtor:

Class #	Description	Impairment	Treatment
	[1122(b) Convenience Class]	[State whether impaired or unimpaired]	[Insert proposed treatment, such as "Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law"]
	General Unsecured Class	[State whether impaired or unimpaired]	Monthly Pmt = Pmts Begin = Pmts End = [Balloon pmt] = Interest rate % from [date] = Estimated percent of claim paid =

4. *Class[es] of Equity Interest Holders*

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company (“LLC”), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan’s proposed treatment of the class[es] of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition debtor had issued multiple classes of stock.]

Class #	Description	Impairment	Treatment
	Equity interest holders	[State whether impaired or unimpaired]	

D. Means of Implementing the Plan

1. *Source of Payments*

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. *Post-confirmation Management*

The Post-Confirmation Managers of the Debtor, and their compensation, shall be as follows:

Name	Affiliations	Insider (yes or no)?	Position	Compensation

E. Risk Factors

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor’s ability to make payments and other distributions required under the Plan.]

F. Executory Contracts and Unexpired Leases

The Plan, in Exhibit 5.1, lists all executory contracts and unexpired leases that the Debtor will assume under the Plan. Assumption means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Exhibit 5.1 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption of your unexpired lease or executory contract, the proposed cure of any defaults, or the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Exhibit 5.1 will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[The Deadline for Filing a Proof of Claim Based on a Claim Arising from the Rejection of a Lease or Contract Is _____. Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and Equity Interest Holders Concerned with How the Plan May Affect Their Tax Liability Should Consult with Their Own Accountants, Attorneys, And/Or Advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum: (1) Tax consequences to the Debtor of the Plan; (2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. CONFIRMATION REQUIREMENTS AND PROCEDURES

To be confirmable, the Plan must meet the requirements listed in §§ 1129(a) or (b) of the Code. These include the requirements that: the Plan must be proposed in good faith; at least one impaired class of claims must accept the plan, without counting votes of insiders; the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and the Plan must be feasible. These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. A creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both (1) allowed or allowed for voting purposes and (2) impaired.

In this case, the Plan Proponent believes that classes _____ are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes _____ are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. *What Is an Allowed Claim or an Allowed Equity Interest?*

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either (1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or (2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest. When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

***The deadline for filing a proof of claim in this case was _____.
[If applicable – The deadline for filing objections to claims is _____.]***

2. *What Is an Impaired Claim or Impaired Equity Interest?*

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it is in a class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered impaired if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. *Who is **Not** Entitled to Vote*

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not “allowed claims” or “allowed equity interests” (as discussed above), unless they have been “allowed” for voting purposes.
- holders of claims or equity interests in unimpaired classes;

- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code; and
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan;
- administrative expenses.

Even If You Are Not Entitled to Vote on the Plan, You Have a Right to Object to the Confirmation of the Plan [and to the Adequacy of the Disclosure Statement].

4. *Who Can Vote in More Than One Class*

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless (1) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and (2) all impaired classes have voted to accept the Plan, unless the Plan is eligible to be confirmed by “cram down” on non-accepting classes, as discussed later in Section [B.2.].

1. *Votes Necessary for a Class to Accept the Plan*

A class of claims accepts the Plan if both of the following occur: (1) the holders of more than one-half (1/2) of the allowed claims in the class, who vote, cast their votes to accept the Plan, and (2) the holders of at least two-thirds (2/3) in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least two-thirds (2/3) in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. *Treatment of Nonaccepting Classes*

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan if the nonaccepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds nonaccepting classes is commonly referred to as a “cram down” plan. The Code allows the Plan to bind nonaccepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not “discriminate unfairly,” and is “fair and equitable” toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a “cramdown” confirmation will affect your claim or equity interest, as the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as Exhibit E.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. *Ability to Initially Fund Plan*

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as Exhibit F.

2. *Ability to Make Future Plan Payments And Operate Without Further Reorganization*

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments.

The Plan Proponent has provided projected financial information. Those projections are listed in Exhibit G.

The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of \$___. The final Plan payment is expected to be paid on _____.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You Should Consult with Your Accountant or other Financial Advisor If You Have Any Questions Pertaining to These Projections.

V. EFFECT OF CONFIRMATION OF PLAN

A. **DISCHARGE OF DEBTOR** [If the Debtor is not entitled to discharge pursuant to 11 U.S.C. § 1141(d)(3) change this heading to “**NO DISCHARGE OF DEBTOR.**”]

[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]

Discharge. Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Option 2 -- If the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable]

Discharge. On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]

Discharge. On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt (i) imposed by the Plan, (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure, or (iii) of a kind specified in § 1141(d)(6)(B). After the effective date of the Plan your claims against the Debtor will be limited to the debts described in clauses (i) through (iii) of the preceding sentence.

[Option 4 – If § 1141(d)(3) is applicable]

No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or revoting on the Plan.

[If the Debtor is not an individual, add the following: “The Plan Proponent may also seek to modify the Plan at any time after confirmation only if (1) the Plan has not been substantially consummated *and* (2) the Court authorizes the proposed modifications after notice and a hearing.”]

[If the Debtor is an individual, add the following: “Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to (1) increase or reduce the amount of payments under the Plan on claims of a particular class, (2) extend or reduce the time period for such payments, or (3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan.”]

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VI. OTHER PLAN PROVISIONS

[Insert other provisions here, as necessary and appropriate.]

[Signature of the Plan Proponent]

[Signature of the Attorney for the Plan Proponent]

EXHIBITS

Exhibit A – Copy of Proposed Plan of Reorganization

Exhibit B – Identity and Value of Material Assets of Debtor

Exhibit C – Prepetition Financial Statements
(to be taken from those filed with the court)

Exhibit D – [Most Recently Filed Postpetition Operating Report][Summary of Postpetition Operating Reports]

Exhibit E – Liquidation Analysis

Plan Proponent’s Estimated Liquidation Value of Assets

Assets

a. Cash on hand	\$
b. Accounts receivable	\$
c. Inventory	\$
d. Office furniture & equipment	\$
e. Machinery & equipment	\$
f. Automobiles	\$
g. Building & Land	\$
h. Customer list	\$
i. Investment property (such as stocks, bonds or other financial assets)	\$
j. Lawsuits or other claims against third-parties	\$
k. Other intangibles (such as avoiding powers actions)	\$

Total Assets at Liquidation Value \$

Less:

Secured creditors’ recoveries \$

Less:

Chapter 7 trustee fees and expenses \$

Less:

Chapter 11 administrative expenses \$

Less:

Priority claims, excluding administrative expense claims \$

[Less:

Debtor’s claimed exemptions] \$

(1) Balance for unsecured claims \$

(2) Total dollar amount of unsecured claims \$

Percentage of Claims Which Unsecured Creditors Would Receive Or Retain in a Chapter 7 Liquidation: \$

Percentage of Claims Which Unsecured Creditors Will Receive or Retain under the Plan: _____% [Divide (1) by (2)]

_____%

Exhibit F – Cash on hand on the effective date of the Plan

Cash on hand on effective date of the Plan:	\$
<i>Less –</i>	
Amount of administrative expenses payable on effective date of the Plan	-
Amount of statutory costs and charges	-
Amount of cure payments for executory contracts	-
Other Plan Payments due on effective date of the Plan	-
	\$
Balance after paying these amounts.....	

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:

\$	Cash in Debtor's bank account now
+	Additional cash Debtor will accumulate from net earnings between now and effective date of the Plan [state the basis for such projections]
+	Borrowing [separately state terms of repayment]
+	Capital Contributions
+	Other
\$	Total [This number should match “cash on hand” figure noted above]

Exhibit G – Projections of Cash Flow and Earnings for Post-Confirmation Period

Instructions for Form Disclosure Statement

BACKGROUND AND GENERAL INSTRUCTIONS

1. This small business chapter 11 disclosure statement form is promulgated pursuant to § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This form may be used in cases where the debtor (whether an individual or an artificial entity) is a small business debtor within the meaning of § 101(51D) of the Code. This form provides a format for disseminating to parties in interest information about the plan of reorganization in a debtor's small business chapter 11 case, so that those parties can make reasonably informed judgments whether to accept, reject or object to the plan. Because the relevant legal requirements for and effects of a plan's confirmation may vary depending on the nature of the debtor, and because the details of any proposed reorganization necessarily vary, this form is intended to provide a format for disclosure, rather than a specific prescription for the language or content of a disclosure statement in any particular case. The form highlights the factual and legal disclosures required by § 1125 of the Code in connection with the plan's confirmation. It is not intended to restrict the plan's proponent from providing additional information where that would be useful.
2. Proponents are encouraged to present material information in as clear a fashion as possible, including, where feasible, in an accompanying executive summary, approved by the court, that highlights particular creditors' or interest holders' voting status and treatment under the plan.
3. Some language in this form appears in brackets. The bracketed language sometimes instructs the plan's proponent to provide certain information, and sometimes provides optional or alternative language that should be used when and where appropriate. Proponents should make the necessary insertions and/or delete inapplicable language.

SPECIFIC INSTRUCTIONS

INTRODUCTORY SECTION

4. The introductory section describes the purpose of the disclosure statement, provides procedural information regarding confirmation of the plan, including where to obtain additional information, indicates whether particular claimants or interest holders will be entitled to vote on the plan, and details the procedures and deadlines for filing objections to confirmation of the plan. A copy of the plan should be attached to the debtor's disclosure statement as

Exhibit A. Where the proposed distribution to unsecured creditors and other classes can be succinctly summarized, describe that distribution in the second introductory paragraph.

5. In some cases, the court will approve the debtor's disclosure statement prior to solicitation of acceptance or rejection of the plan. See Rule 3017. In other cases, the court may conditionally approve the disclosure statement, and combine the hearing on the adequacy of disclosure and the hearing on confirmation of the plan into one hearing. See Rule 3017.1. Use the bracketed language as appropriate in subsections I.B. and I.C.

BACKGROUND SECTION

6. The second part of disclosure statement provides a history of the debtor's business, both before and during the debtor's bankruptcy case. In this section, the plan proponent should describe the debtor's business, the events that led to the filing of the debtor's bankruptcy petition, and the key events in the debtor's bankruptcy case, and identify the people who managed the debtor during the case and who will manage the debtor after the plan is confirmed. The proponent should disclose its intentions with regard to, and the status of, avoidance actions. If the debtor or proponent intends to bring an avoidance action against a particular creditor or equity interest holder, the disclosure statement should disclose this fact so that the creditor or equity interest holder can use that information to determine the value of its claim or interest when considering whether to accept or reject the plan. If the debtor or plan proponent is uncertain as to what avoidance actions might be brought, that fact should be disclosed as well, so that claimants and equity interest holders can take that information into account, as well, when considering whether to accept or reject the plan.
7. A schedule of the debtor's material assets, along with the basis for their valuation should be attached to the debtor's disclosure statement as Exhibit B. Under § 1116 of the Code, the debtor must also file its most recent prepetition financial statements with the petition. These financial statements should be attached to the debtor's disclosure statement as Exhibit C.
8. Sections 434 and 435 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and § 308 of the Code require the debtor to file periodic operating reports with the court. The most recent such reports, or a summary of the filed reports, should be attached to the debtor's disclosure statement as Exhibit D.

SUMMARY OF PLAN

9. The third part of the disclosure statement describes the treatment of various creditors and equity interest holders who will receive distributions under the plan. Because the treatment of certain claims, such as administrative expense claims, allowed under § 503 of the Code, and priority tax claims, allowed under §507(a)(8) of the Code, is statutorily specified, these claims are not placed into classes. Secured creditors are generally each placed in their own class, with the particular treatment specified for that class. Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8) of the Code. While it is not required, the proponent may, where applicable, wish to classify claims under § 507(a)(9) and (10) of the Code. Finally, the disclosure statement should describe the treatment of the general unsecured claimants and equity interest holders. An administrative convenience class may be created pursuant to § 1122(b) of the Code, and other classes of unsecured claims may be created to the extent permitted by applicable case law. Also, while the suggested language of the form contemplates that plan distributions will be in the form of monthly payments, other forms of consideration are permitted and this section of the disclosure statement should be modified to describe clearly the form(s), methods and timing of payments to be made under the particular plan.
10. The disclosure statement should also detail the sources of funds for payments to be made under the plan. These should include the sources of funds for payments to be made on the effective date of the plan (detailed in Exhibit F), and the source of payments that will be made over the life of the plan. The description should be supported by projections about the income and profitability of the debtor. The plan proponent must also fully describe post-confirmation management, as required by § 1129(a)(5) of the Code. The disclosure statement should also describe any risk factors that might influence the debtor's ability to complete the payments or affect the value of the distributions provided for under the plan. Also, the disclosure statement should list any material executory contracts that will be assumed pursuant to the plan, as well as any material contracts that will be rejected. To the extent possible, the tax consequences of the plan should also be summarized.

CONFIRMATION REQUIREMENTS AND PROCEDURES SECTION

11. The fourth part of the disclosure statement sets forth the procedures and requirements for confirmation. In this regard, the disclosure statement should inform creditors and equity interest holders of (1) which class they are in, (2) whether they are entitled to vote, and (3) the amount of their claim allowed for voting purposes. This may be accomplished in the disclosure statement itself or, as noted above, in a summary statement, approved by the court, and sent to

the parties in interest along with the disclosure statement. A liquidation analysis of the debtor should be attached to the disclosure statement as Exhibit E. As noted above, the sources of funds for payments to be made on the effective date of the plan should be detailed in Exhibit F, and projections about the profitability and cash flow of the debtor's business after confirmation should be attached to the disclosure statement as Exhibit G.

EFFECT OF PLAN CONFIRMATION

12. The fifth part of the disclosure statement describes the effect of plan confirmation. The language used here should be chosen with care, as the effect of confirmation differs depending on whether the debtor is an individual, partnership, or corporation, and on whether the debtor will continue in business post-confirmation or will, instead, be liquidated.
13. If the plan provides that, after its confirmation, property of the estate will vest in and be distributed by someone other than the debtor, the disclosure statement should identify any such property and the person in whom the property will vest.

OTHER PROVISIONS

14. Other provisions may be added in Part VI as desired and appropriate.

United States Bankruptcy Court

District of _____

In re _____,
Debtor

Case No. _____

Small Business Case under Chapter 11

[NAME OF PROPONENT]'S PLAN OF REORGANIZATION, DATED [INSERT DATE]

ARTICLE I
SUMMARY

This Plan of Reorganization (the "Plan") under chapter 11 of the Bankruptcy Code (the "Code") proposes to pay creditors of [insert the name of the debtor] (the "Debtor") from [specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income].

This Plan provides for _____ classes of secured claims; _____ classes of unsecured claims; and _____ classes of equity security holders. Unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately ___ cents on the dollar. This Plan also provides for the payment of administrative and priority claims [if payment is not in full on the effective date of this Plan with respect to any such claim (to the extent permitted by the Code or the claimant's agreement), identify such claim and briefly summarize the proposed treatment.]

All creditors and equity security holders should refer to Articles III through VI of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

- 2.01 Class 1. All allowed claims entitled to priority under § 507 of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).
- 2.02 Class 2. The claim of _____, to the extent allowed as a secured claim under § 506 of the Code.

[Add other classes of secured creditors, if any. Note: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]

2.03 Class 3. All unsecured claims allowed under § 502 of the Code.

[Add other classes of unsecured claims, if any.]

2.04 Class 4 . Equity interests of the Debtor. [If the Debtor is an individual, change this heading to “The interests of the individual Debtor in property of the estate.”]

ARTICLE III
TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS,
U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

3.01 Unclassified Claims. Under section §1123(a)(1), administrative expense claims, [“gap” period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.

3.02 Administrative Expense Claims. Each holder of an administrative expense claim allowed under § 503 of the Code [, and a “gap” claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan (as defined in Article VII), in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.

3.03 Priority Tax Claims. Each holder of a priority tax claim will be paid [specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].

3.04 United States Trustee Fees. All fees required to be paid by 28 U.S.C. §1930(a)(6) (U.S. Trustee Fees) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code. Any U.S. Trustee Fees owed on or before the effective date of this Plan will be paid on the effective date.

ARTICLE IV
TREATMENT OF CLAIMS AND INTERESTS UNDER THE PLAN

4.01 Claims and interests shall be treated as follows under this Plan:

Class	Impairment	Treatment
Class 1 - Priority Claims	[State whether impaired or unimpaired.]	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan as defined in Article VII, or the date on which such claim is allowed by a final non-appealable order. Except: _____."]
Class 2 – Secured Claim of [Insert name of secured creditor.]	[State whether impaired or unimpaired.]	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add class[es] of secured claims if applicable]
Class 3 - General Unsecured Creditors	[State whether impaired or unimpaired.]	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity Security Holders of the Debtor	[State whether impaired or unimpaired.]	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

ARTICLE V
ALLOWANCE AND DISALLOWANCE OF CLAIMS

5.01 Disputed Claim. A disputed claim is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02 Delay of Distribution on a Disputed Claim. No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 Settlement of Disputed Claims. The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

ARTICLE VI
PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.01 Assumed Executory Contracts and Unexpired Leases.

(a) The Debtor assumes the following executory contracts and/or unexpired leases effective upon the [Insert “effective date of this Plan as provided in Article VII,” “the date of the entry of the order confirming this Plan,” or other applicable date]:

[List assumed executory contracts and/or unexpired leases.]

(b) The Debtor will be conclusively deemed to have rejected all executory contracts and/or unexpired leases not expressly assumed under section 6.01(a) above, or before the date of the order confirming this Plan, upon the [Insert “effective date of this Plan,” “the date of the entry of the order confirming this Plan,” or other applicable date]. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than _____ (___) days after the date of the order confirming this Plan.

ARTICLE VII
MEANS FOR IMPLEMENTATION OF THE PLAN

[Insert here provisions regarding how the plan will be implemented as required under §1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, as well as who will be serving as directors, officers or voting trustees of the reorganized debtor.]

ARTICLE VIII
GENERAL PROVISIONS

8.01 Definitions and Rules of Construction. The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].

8.02 Effective Date of Plan. The effective date of this Plan is the eleventh business day following the date of the entry of the order of confirmation. But if a stay of the confirmation order is in effect on that date, the effective date will be the first business day after that date on which no stay of the confirmation order is in effect, provided that the confirmation order has not been vacated.

8.03 Severability. If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

8.04 Binding Effect. The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

8.05 Captions. The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 Controlling Effect. Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of _____ govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

[8.07 Corporate Governance. [If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]]

ARTICLE IX **DISCHARGE**

[If the Debtor is not entitled to discharge under 11 U.S.C. § 1141(d)(3) change this heading to
“**NO DISCHARGE OF DEBTOR.**”]

9.01. **[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]**
Discharge. Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Option 2 -- If the Debtor is a partnership and section 1141(d)(3) of the Code is not applicable]

Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]

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Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt: (i) imposed by this Plan; (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure; or (iii) of a kind specified in § 1141(d)(6)(B).

[Option 4 – If § 1141(d)(3) is applicable]

No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

**ARTICLE X
OTHER PROVISIONS**

[Insert other provisions, as applicable.]

Respectfully submitted,

By: _____
The Plan Proponent

By: _____
Attorney for the Plan Proponent

Instructions for Small Business Plan of Reorganization Form

BACKGROUND AND GENERAL INSTRUCTIONS

1. This small business chapter 11 plan of reorganization form is promulgated pursuant to § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It may be used in cases where the debtor (whether an individual or an artificial entity) is a small business debtor under § 101(51D) of the Code. This form is intended to be used in conjunction with the small business chapter 11 disclosure statement form (Official Form 25B). Because the type of debtor and the details of the proposed plan will vary from case to case, this form is intended to provide an illustrative format, rather than a specific prescription for the language or content of a plan in any particular case.
2. Some language in this form appears in brackets. The bracketed language sometimes instructs the plan's proponent to provide certain information and sometimes provides optional or alternative language that should be used when and where appropriate. Proponents should make the necessary insertions and/or delete inapplicable language.

SPECIFIC INSTRUCTIONS

SUMMARY

3. The first article should provide a summary of the debtor's proposed plan. It should describe the manner in which the plan will be consummated and the source of funds for payments to be made under the plan. These sources might include an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income. The summary should also describe the treatment of the various classes of claimants under the plan.

CLASSIFICATION OF CLAIMS AND INTERESTS

4. The second article describes each class of claimants that will receive a distribution under the plan. The first class consists of claimants entitled to priority pursuant to § 507 of the Code other than those entitled to priority under § 507(a)(2), (3), or (8). The next class or group of classes consists of creditor(s) with allowed secured claims. Secured creditors are usually classified individually, with each secured creditor being placed in its own separate class. Classes of secured creditors should be added as necessary. Next, unsecured claimants, not entitled to priority, should be classified. The proponent may, to the extent allowed by law, create additional classes of unsecured claims, including an administrative convenience class pursuant to

§1122(b) of the Code. The last class consists of equity security holders of the debtor. If the debtor is an individual, this class consists of the interests of the individual Debtor in property of the estate.

TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS, U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

5. The treatment of certain claims, such as administrative expense claims, allowed under § 503 of the Code, and priority tax claims, allowed under §507(a)(8) of the Code, is statutorily specified. These claims are not, therefore, placed into classes. Their treatment is described in the third article.

TREATMENT OF CLAIMS AND INTERESTS UNDER THE PLAN

6. The fourth article specifies the treatment accorded the various classes of claims and interests provided for under the plan.
7. Priority claimants other than those allowed under §§ 503 and 507(a)(8) must be classified and paid in full under the plan unless the claimant agrees otherwise.
8. Each secured creditor is generally placed in its own class, with a particular treatment specified for that class. Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).
9. The plan should describe the treatment of the general unsecured claims. An administrative convenience class may be created pursuant to § 1122(b) of the Code, and other classes of unsecured claims may be created to the extent permitted by applicable law.
10. Finally, the plan should describe the treatment of equity securities.

ALLOWANCE AND DISALLOWANCE OF CLAIMS

11. The fifth article addresses the treatment of disputed claims. A “disputed claim” is a claim that has not been allowed or disallowed. No distribution will be made on account of a disputed claim unless such claim is allowed. The debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019.

PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

12. The sixth article deals with executory contracts and unexpired leases. The plan proponent should list all executory contracts and unexpired leases that it has already assumed, or which it intends to assume under the plan. All other executory contracts will be deemed rejected.
13. The seventh article describes how the plan will be implemented. It should

indicate the source of any funds that will be used to pay claims and interests under the plan, and it should also list the persons who will be serving as the management of the debtor after the plan is confirmed.

GENERAL PROVISIONS

14. The eighth article provides certain general provisions. Definitions from the Code are incorporated by reference, and any other definitions required by the plan should be listed in section 7.01 of the plan. If a governing law clause is desired, it should be included here, and if the debtor is a corporation, provisions required by §1123(a)(6) of the Code should be included.

DISCHARGE

15. The ninth article describes the effect of discharge under the plan. When and whether the debtor is entitled to a discharge will depend, among other things, upon whether the debtor is an individual, partnership, or corporation, and whether the debtor is continuing in business after consummation of the plan. The proponent should choose the appropriate language from the options provided.

OTHER PROVISIONS

16. To the extent that other provisions, not provided in the plan, are desired, they should be placed in the tenth article.

UNITED STATES BANKRUPTCY COURT

District of Utah

In re _____,

Debtor

Case No. _____

Small Business Case under Chapter 11

SMALL BUSINESS MONTHLY OPERATING REPORT

Month: _____

Date filed: _____

Line of Business: _____

NAISC Code: _____

IN ACCORDANCE WITH TITLE 28, SECTION 1746, OF THE UNITED STATES CODE, I DECLARE UNDER PENALTY OF PERJURY THAT I HAVE EXAMINED THE FOLLOWING SMALL BUSINESS MONTHLY OPERATING REPORT AND THE ACCOMPANYING ATTACHMENTS AND, TO THE BEST OF MY KNOWLEDGE, THESE DOCUMENTS ARE TRUE, CORRECT AND COMPLETE.

RESPONSIBLE PARTY:

Original Signature of Responsible Party

Printed Name of Responsible Party

Questionnaire: *(All questions to be answered on behalf of the debtor.)*

	Yes	No
1. IS THE BUSINESS STILL OPERATING?	<input type="checkbox"/>	<input type="checkbox"/>
2. HAVE YOU PAID ALL YOUR BILLS ON TIME THIS MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
3. DID YOU PAY YOUR EMPLOYEES ON TIME?	<input type="checkbox"/>	<input type="checkbox"/>
4. HAVE YOU DEPOSITED ALL THE RECEIPTS FOR YOUR BUSINESS INTO THE DIP ACCOUNT THIS MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
5. HAVE YOU FILED ALL OF YOUR TAX RETURNS AND PAID ALL OF YOUR TAXES THIS MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
6. HAVE YOU TIMELY FILED ALL OTHER REQUIRED GOVERNMENT FILINGS?	<input type="checkbox"/>	<input type="checkbox"/>
7. HAVE YOU PAID ALL OF YOUR INSURANCE PREMIUMS THIS MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
8. DO YOU PLAN TO CONTINUE TO OPERATE THE BUSINESS NEXT MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
9. ARE YOU CURRENT ON YOUR QUARTERLY FEE PAYMENT TO THE U.S. TRUSTEE?	<input type="checkbox"/>	<input type="checkbox"/>
10. HAVE YOU PAID ANYTHING TO YOUR ATTORNEY OR OTHER PROFESSIONALS THIS MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
11. DID YOU HAVE ANY UNUSUAL OR SIGNIFICANT UNANTICIPATED EXPENSES THIS MONTH?	<input type="checkbox"/>	<input type="checkbox"/>
12. HAS THE BUSINESS SOLD ANY GOODS OR PROVIDED SERVICES OR TRANSFERRED ANY ASSETS TO ANY BUSINESS RELATED TO THE DIP IN ANY WAY?	<input type="checkbox"/>	<input type="checkbox"/>
13. DO YOU HAVE ANY BANK ACCOUNTS OPEN OTHER THAN THE DIP ACCOUNT?	<input type="checkbox"/>	<input type="checkbox"/>

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- 14. HAVE YOU SOLD ANY ASSETS OTHER THAN INVENTORY THIS MONTH?
- 15. DID ANY INSURANCE COMPANY CANCEL YOUR POLICY THIS MONTH?
- 16. HAVE YOU BORROWED MONEY FROM ANYONE THIS MONTH?
- 17. HAS ANYONE MADE AN INVESTMENT IN YOUR BUSINESS THIS MONTH?
- 18. HAVE YOU PAID ANY BILLS YOU OWED BEFORE YOU FILED BANKRUPTCY?

TAXES

DO YOU HAVE ANY PAST DUE TAX RETURNS OR PAST DUE POST-PETITION TAX OBLIGATIONS?

IF YES, PLEASE PROVIDE A WRITTEN EXPLANATION INCLUDING WHEN SUCH RETURNS WILL BE FILED, OR WHEN SUCH PAYMENTS WILL BE MADE AND THE SOURCE OF THE FUNDS FOR THE PAYMENT.

(Exhibit A)

INCOME

PLEASE SEPARATELY LIST ALL OF THE INCOME YOU RECEIVED FOR THE MONTH. THE LIST SHOULD INCLUDE ALL INCOME FROM CASH AND CREDIT TRANSACTIONS. *(THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)*

TOTAL INCOME \$ _____

SUMMARY OF CASH ON HAND

Cash on Hand at Start of Month \$ _____

Cash on Hand at End of Month \$ _____

PLEASE PROVIDE THE TOTAL AMOUNT OF CASH CURRENTLY AVAILABLE TO YOU **TOTAL** \$ _____

(Exhibit B)

EXPENSES

PLEASE SEPARATELY LIST ALL EXPENSES PAID BY CASH OR BY CHECK FROM YOUR BANK ACCOUNTS THIS MONTH. INCLUDE THE DATE PAID, WHO WAS PAID THE MONEY, THE PURPOSE AND THE AMOUNT. *(THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)*

TOTAL EXPENSES \$ _____

(Exhibit C)

CASH PROFIT

INCOME FOR THE MONTH *(TOTAL FROM EXHIBIT B)* \$ _____

EXPENSES FOR THE MONTH *(TOTAL FROM EXHIBIT C)* \$ _____

(Subtract Line C from Line B) **CASH PROFIT FOR THE MONTH** \$ _____

UNPAID BILLS

PLEASE ATTACH A LIST OF ALL DEBTS (INCLUDING TAXES) WHICH YOU HAVE INCURRED SINCE THE DATE YOU FILED BANKRUPTCY BUT HAVE NOT PAID. THE LIST MUST INCLUDE THE DATE THE DEBT WAS INCURRED, WHO IS OWED THE MONEY, THE PURPOSE OF THE DEBT AND WHEN THE DEBT IS DUE. *(THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)*

TOTAL PAYABLES \$ _____

(Exhibit D)

MONEY OWED TO YOU

PLEASE ATTACH A LIST OF ALL AMOUNTS OWED TO YOU BY YOUR CUSTOMERS FOR WORK YOU HAVE DONE OR THE MERCHANDISE YOU HAVE SOLD. YOU SHOULD INCLUDE WHO OWES YOU MONEY, HOW MUCH IS OWED AND WHEN IS PAYMENT DUE. *(THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)*

TOTAL RECEIVABLES \$ _____

(Exhibit E)

BANKING INFORMATION

PLEASE ATTACH A COPY OF YOUR LATEST BANK STATEMENT FOR EVERY ACCOUNT YOU HAVE AS OF THE DATE OF THIS FINANCIAL REPORT OR HAD DURING THE PERIOD COVERED BY THIS REPORT.

(Exhibit F)

EMPLOYEES

NUMBER OF EMPLOYEES WHEN THE CASE WAS FILED? _____

NUMBER OF EMPLOYEES AS OF THE DATE OF THIS MONTHLY REPORT? _____

PROFESSIONAL FEES

BANKRUPTCY RELATED:

PROFESSIONAL FEES RELATING TO THE BANKRUPTCY CASE PAID DURING THIS REPORTING PERIOD? \$ _____

TOTAL PROFESSIONAL FEES RELATING TO THE BANKRUPTCY CASE PAID SINCE THE FILING OF THE CASE? \$ _____

NON-BANKRUPTCY RELATED:

PROFESSIONAL FEES NOT RELATING TO THE BANKRUPTCY CASE PAID DURING THIS REPORTING PERIOD? \$ _____

TOTAL PROFESSIONAL FEES NOT RELATING TO THE BANKRUPTCY CASE PAID SINCE THE FILING OF THE CASE? \$ _____

PROJECTIONS

COMPARE YOUR ACTUAL INCOME AND EXPENSES TO THE PROJECTIONS FOR THE FIRST 180 DAYS OF YOUR CASE PROVIDED AT THE INITIAL DEBTOR INTERVIEW.

	Projected	Actual	Difference
INCOME	\$ _____	\$ _____	\$ _____
EXPENSES	\$ _____	\$ _____	\$ _____
CASH PROFIT	\$ _____	\$ _____	\$ _____

TOTAL PROJECTED INCOME FOR THE NEXT MONTH: \$ _____

TOTAL PROJECTED EXPENSES FOR THE NEXT MONTH: \$ _____

TOTAL PROJECTED CASH PROFIT FOR THE NEXT MONTH: \$ _____

ADDITIONAL INFORMATION

PLEASE ATTACH ALL FINANCIAL REPORTS INCLUDING AN INCOME STATEMENT AND BALANCE SHEET WHICH YOU PREPARE INTERNALLY.



U.S. Department of Justice

United States Trustee Program

NOTICE OF REVISED CHAPTER 11 QUARTERLY FEE SCHEDULE

Pursuant to Section 213 of Title II, Division B, Consolidated Appropriations Act, 2008, (P.L. 110-161), the chapter 11 quarterly fee schedule established by 28 U.S.C. §1930(a)(6) is amended effective January 1, 2008. The following chart displays the revised quarterly fee schedule for calendar quarters beginning January 1, 2008.

<u>Disbursement Range</u>	<u>Quarterly Fee</u>
\$0 to \$14,999.99	\$325
\$15,000 to \$74,999.99	\$650
\$75,000 to \$149,999.99	\$975
\$150,000 to \$224,999.99	\$1,625
\$225,000 to \$299,999.99	\$1,950
\$300,000 to \$999,999.99	\$4,875
\$1,000,000 to \$1,999,999.99	\$6,500
\$2,000,000 to \$2,999,999.99	\$9,750
\$3,000,000 to \$4,999,999.99	\$10,400
\$5,000,000 to \$14,999,999.99	\$13,000
\$15,000,000 to \$29,999,999.99	\$20,000
\$30,000,000 or more	\$30,000

All other quarterly fee related procedures remain unchanged. The fee is due on the last day of the calendar month following the calendar quarter for which the fee is owed, starting with the quarter in which the case commenced, and continuing until and including the quarter in which the case is dismissed, converted to another chapter of the Bankruptcy Code, or closed by the court. Interest will be charged on unpaid quarterly fees, pursuant to 31 U.S.C. 3717.

The mailing address for quarterly fee payments is:

U.S. Trustee Payment Center
Post Office Box 70937
Charlotte, NC 28272-0937

The address above also appears on the instructions and payment form included with the monthly quarterly fee statement.

Please address any questions concerning this change to your local Office of the U.S. Trustee.