

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:) Case No. 03-39184
)
Gerlinger, Inc.,) Chapter 11
)
Debtor.)
) JUDGE MARY ANN WHIPPLE

**ORDER REGARDING MOTION TO ESTABLISH PROCEDURES FOR
CONFIRMATION OF PLAN OF LIQUIDATION AND
APPROVE THE FORM OF SOLICITATION MATERIALS**

This case is before the court on Debtor's Motion to (I) Establish Procedures for Confirmation of Plan of Liquidation and (II) Approve the Form of Solicitation Materials [Doc. # 276]. Debtor seeks authority to send its Disclosure Statement and the Chapter 11 Plan to all parties-in-interest and asks the court to schedule a combined hearing on approval of the Disclosure Statement and confirmation of the Plan. Debtor suggests that 11 U.S.C. § 105(d)(2)(B)(vi) authorizes its proposed procedure. The court disagrees and will deny the motion to the extent it requests implementing procedures other than those specified in Fed. R. Bankr. P. 3017.

Section 105(d)(2)(B)(vi) provides that the court may "unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order . . . that . . . provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan." Ordering a combined hearing on the disclosure statement and confirmation of the plan in this case contravenes, and is therefore inconsistent with, the substance of 11 U.S.C. § 1125(b) and (f) and the implementing procedures specifically set forth in Fed. R. Bankr. P. 3017 and 3017.1. Under § 1125(b), acceptance or rejection of a plan may not be solicited unless a disclosure statement, approved after notice and a hearing, is transmitted to creditors. Rule 3017 requires a hearing on the disclosure statement before the court may approve it and only upon approval may the court order transmission of the plan and notice of the time within which acceptances and rejections of the plan may be filed. Debtor's proposed procedure is therefore inconsistent with the requirements of § 1125(b) and the procedure set forth in Rule 3017.

Although § 1125(f) and Rule 3017.1 provide that a combined hearing may be ordered after the court conditionally approves a disclosure statement, that authority applies only to a debtor that is a small business *and* has made a timely election to be considered a small business in a chapter 11 case. Fed. R. Bankr. P. 3017.1(a). A small business debtor who has made such an election must proceed under the accelerated procedures of 11 U.S.C. § 1121(f). Debtor has not made an election to proceed as a small business, nor does it appear to even qualify as a small business as its aggregate debts exceed \$2 million, *see* 11 U.S.C. § 101(51C). Section 105(d)(2)(B)(vi) does not authorize the court to combine the hearings on the approval of the disclosure statement and confirmation of the plan under these circumstances. Although there is little or no case law on this issue, the existence of specific authorization to do what Debtor asks in other circumstances not present in this case counsels against extending this authority beyond the situations Congress has expressly designated for its use. As noted without citation of relevant authority in *Collier on Bankruptcy*, “[a]n order combining the disclosure statement and confirmation hearings is inconsistent with section 1125 except in prepackaged cases or ‘small business’ cases.” 2 *Collier on Bankruptcy* ¶ 105.08, p. 105-84.9 (15th Ed. Rev.). While the court recognizes that the Bankruptcy Rules are not always a good fit in cases involving a Chapter 11 liquidation, this is a matter for Congress rather than the court to address.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtor’s motion be **DENIED** to the extent it requests implementing procedures other than specified in Fed. R. Bankr. P. 3017. A separate order setting a hearing on approval of the disclosure statement will be entered by the court.

/s/ Mary Ann Whipple

Mary Ann Whipple
United States Bankruptcy Judge