

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 04-41352
RANDALL JOSEPH HAKE and *
* MARY ANN HAKE, *
* CHAPTER 11 *
* Debtors. *
* HONORABLE KAY WOODS *
*

ORDER APPROVING SECOND AMENDED DISCLOSURE STATEMENT

Debtors Randall J. Hake and Mary Ann Hake ("Debtors") filed their Chapter 11 petition on March 25, 2004. No committee of unsecured creditors has been appointed in this case. It is apparent from the docket that this case is essentially a two party dispute involving the Debtors and Buckeye Retirement Co. L.L.C., Ltd. ("Buckeye"), which is the largest creditor in this case.

After the expiration of the exclusive periods in 11 U.S.C. § 1121, Debtors filed (i) Debtors' Plan of Reorganization, and (ii) Debtors' Disclosure Statement ("Disclosure Statement") on October 3, 2005. On November 9, 2005, Buckeye filed Objections by Buckeye Retirement Co. L.L.C., Ltd. to Debtors' Disclosure Statement (the "Original Objection"). Buckeye's Original Objection was an eleven page document containing 37 numbered paragraphs. Also on November 9, 2005, Saul Eisen, United States Trustee for Region 9 ("Trustee") filed Objection of the United States Trustee to Debtors' Joint Disclosure Statement (the "UST Objection"). A hearing on Debtors' Disclosure Statement was held on November 16, 2005, at which time Debtors acknowledged that they needed to amend the Disclosure Statement in order to address the Original Objection and the UST Objection. The Court ordered Debtors to file an amended disclosure statement by December 31, 2005 and set the hearing on such amended

disclosure statement for January 25, 2006, with a deadline for objections of January 17, 2006. Debtors timely filed Debtors' First Amended Joint Disclosure Statement ("Amended Disclosure Statement") and Debtors' Amended Joint Plan of Reorganization on December 30, 2005. On January 17, 2006, Buckeye filed Objections by Buckeye Retirement Co., L.L.C., Ltd. to Debtors' First Amended Joint Disclosure Statement (Docket No. 285) and Debtors' Amended Joint Plan of Reorganization (Docket No. 286) (the "Second Objection"). This document consisted of three pages and eight numbered paragraphs. Nowhere in Buckeye's Second Objection does Buckeye restate or incorporate the Original Objection.

This Court held a hearing on Debtors' Amended Disclosure Statement (the "Hearing"), which lasted nearly two days. The Hearing started on January 25, 2006 and was continued to February 9, 2006. Despite the Court's efforts to keep the focus of the Hearing on the issue of disclosure and whether the Amended Disclosure Statement comported with 11 U.S.C. § 1125 to provide "adequate information," as defined in that section, Buckeye unnecessarily prolonged the Hearing by belaboring issues not relevant to adequate disclosure.¹

On the first day of the Hearing, counsel for Debtors began his presentation with a recitation of how Debtors had made "significant revisions from the original disclosure statement to address, as was set forth at the prior hearing, the various objections of both the U.S. Trustee's Office² and the [sic] Buckeye."

¹Indeed, in response to the Court's efforts to keep the Hearing focused on the matter at hand, Buckeye's counsel accused the Court of not being interested in the truth. Regrettably, Buckeye demonstrated disrespect to the Court several times during the Hearing.

²The Trustee acknowledged that the UST objection was resolved by Debtors' Amended Disclosure Statement.

(Transcript of January 25, 2006 hearing at p. 20, lines 2-6.) After describing how the objections to the Disclosure Statement had been addressed, counsel for Debtors addressed Buckeye's Second Objection. He stated that Debtors were willing to make certain further revisions, but disputed the validity of other objections in the Second Objection. At the conclusion of Debtors' opening statement, the Court asked Buckeye to summarize its position with respect to the Amended Disclosure Statement. The Court stated:

And if you'd like to hear from [sic] Buckeye's argument before you put on your first witness, that might make some sense. It may be a way to understand what and which of Buckeye's objections still are outstanding.

I'm assuming since the objection to the amended disclosure did not incorporate the original objection, that those objections have all been satisfied by the amended disclosure statement and that we're only dealing with the response that was filed on January 17th, but if that's not the case, then I'll seek clarification of that.

(Transcript of January 25, 2006 hearing at p. 32, lines 3-14.) Counsel for Debtors stated that the Court had set forth Debtors' assumption about Buckeye's objections, as well. (*Id.*, lines 15-18.)

Buckeye then summarized its objections, which included only the objections set forth in the Second Objection. As set forth above, the Court articulated its assumption that by not incorporating

the Original Objection into the Second Objection, the objections in the Original Objection were deemed satisfied. Buckeye's summary of its position was in accord with the assumption; Buckeye's counsel discussed the Second Objection and mentioned only one of the objections in the Original Objection, *i.e.*, the issue of disclosure about the charging order against Hake P.E. At the conclusion of Buckeye's presentation of its objections, counsel for Buckeye stated, "Judge, I believe that's a fair summary of our argument." (Transcript of January 25, 2006 hearing at p. 39, lines 17-18.)

Despite the opportunity to fully set forth all of its objections to the Amended Disclosure Statement on the first day of the Hearing and its failure to discuss the Original Objection, Buckeye's initial volley on the second day of the Hearing was to announce that Buckeye had not waived any of its objections in the Original Objection. When the Court attempted to get Buckeye to clarify which of the objections in the Original Objection had not been satisfied, counsel for Buckeye insisted that each of the 37 paragraphs continued to have validity. This position was in direct contradiction to Buckeye's initial summary of its objections.

As set forth herein, Buckeye did not have a good faith basis to insist that all of the objections in the Original Objection were still valid. This Court finds that Buckeye did, indeed, waive the objections that were not incorporated into the Second Objection. This waiver occurred by Buckeye's (i) failure to restate or incorporate the Original Objection into the Second Objection; and (ii) affirmative statement that counsel had set forth a "fair summary" of Buckeye's objections on the first day of the Hearing that did not include the Original Objection (except the issue concerning

Buckeye's charging order against Hake P.E.). To the extent that Buckeye believes that it can and did revoke its waiver of such objections, this Court finds that Buckeye did not effectively do so. Nonetheless, the Court will address Buckeye's Original Objection, as set forth below.

The Original Objection

Paragraphs 1 - 3 set forth factual information or legal argument that do not constitute objections. Paragraph 4 sets forth Buckeye's objection that Debtors failed to disclose information about Hake P.E., which is subject to a charging order in favor of Buckeye. Debtors included information about Hake P.E. as another asset subject to the Buckeye charging order at page 8 of the Amended Disclosure Statement. Debtors have disclosed all of their post petition earnings in their monthly operating reports and they have disclosed that Hake P.E.'s only income arises if and when Mr. Hake performs services through Hake P.E. (Amended Disclosure Statement at p. 17.) This Court finds that the Amended Disclosure Statement contains disclosure necessary for a hypothetical reasonably informed investor to make an informed judgment about the plan. This Court finds that the objection in paragraph 4 is moot and is deemed satisfied.³

³The Debtors' inclusion of information in the Amended Disclosure Statement that satisfies this objection shows the disingenuousness of Buckeye's counsel's statement that all of the 37 numbered paragraphs in the Original Objection continued to be at issue. Buckeye did not have a good faith basis to raise the Original Objection on the second day of the Hearing. Buckeye made no attempt to determine if, indeed, there continued to be any unresolved issues in the Original Objection. The purpose of Buckeye's position appears to be to cause delay for the Debtors and unnecessary work for the Court. Through Buckeye's experience with this Court, it was aware that the Court would have likely ruled from the bench concerning whether the Amended Disclosure Statement provided adequate information. Because of Buckeye's insistence that its Original Objection remained unresolved, however, this Court was not in a position to rule at the conclusion of the Hearing, as it otherwise would have done. Subsequent to the Hearing, the Court had to spend numerous hours comparing each of the objections in the Original Objection to the Amended Disclosure Statement because of Buckeye's untimely and wrongful assertion that these objections had not been satisfied.

Paragraph 5 contains an objection regarding the valuation of Hake P.E. There was no evidence at the Hearing concerning a different valuation of Hake P.E. Buckeye's conclusory statement that Hake P.E. "must be worth more than \$500" is not supported by the record. Debtors have incorporated further disclosure about the value of Hake P.E. at page 17 of the Amended Disclosure Statement. Based on Debtors' disclosure in the Amended Disclosure Statement, this objection is moot and is deemed satisfied. See footnote 3, *supra*.

Paragraph 6 is essentially redundant of the objection in paragraph 5; it is also moot and is deemed satisfied. See footnote 3, *supra*.

In paragraphs 7 and 8, Buckeye objects to Section II of the (original) Disclosure Statement and specifically finds the word "refinancing" objectionable. The residence in question is no longer property of the estate, but is now owned by the Hake Family Trust. Pursuant to the transaction in question, Buckeye's lien was satisfied and released. Debtor Randall Hake continues to remain liable on the first mortgage note secured by the residential property. These facts are all adequately disclosed. Debtors disclose in Section III, page 9, of the Amended Disclosure Statement that Debtors have stayed current in the payment on this mortgage and are permitted to rent the property as long as they pay the mortgage. This disclosure is adequate. The objections in paragraphs 7 and 8 are moot and deemed satisfied. See footnote 3, *supra*.

Paragraph 9 contains Buckeye's objection regarding Randall Hake's shareholder loans to Hake Contracting Corporation ("Hake Contracting"). Specifically, Buckeye demands disclosure about the amount due on the loans and repayment terms. Buckeye also objects

because these repayments should be disclosed as property of the estate. Debtors have disclosed that Hake Contracting is subject to Buckeye's judgment and that Hake Contracting owes Mr. Hake approximately Two Hundred Ninety-Four Thousand Five Hundred Forty Dollars (\$294,540.00). (Amended Disclosure Statement at p. 17.) The Amended Disclosure Statement also provides that the outstanding loan is not collectible unless Mr. Hake chooses to provide services through Hake Contracting. This information addresses Buckeye's objection. The Amended Disclosure Statement contains adequate information on this subject. The objection in paragraph 9 is moot and deemed satisfied. See footnote 3, *supra*.

The correction Buckeye requested in paragraph 10 was made by Debtors in the Amended Disclosure Statement at page 9 (as well as being represented at the November 16, 2005 hearing that it would be changed).⁴ This objection is moot and is deemed satisfied.

Paragraph 11 takes issue with an alleged Four Hundred Fifty Dollar (\$450.00) expense, which Buckeye objects to as not being "ordinary and necessary living expenses." Buckeye elicited no testimony about this alleged expense at the Hearing and, thus, it is deemed abandoned or waived. In addition, the amount in question is de minimis. As a consequence, this Court determines that the requested disclosure is not necessary for a hypothetical reasonably informed investor to make an informed judgment about the plan. The objection in paragraph 11 is overruled.

Buckeye objects in paragraph 12 to Debtors' disclosure about Hake Contracting. Debtors made changes to the Amended

⁴This correction alone shows the disingenuous nature of Buckeye's counsel's statements that **all** 37 numbered paragraphs in the original objection continued to be at issue. See footnote 3, *supra*.

Disclosure Statement at page 17 that address the issues Buckeye raised in paragraph 12. This objection is moot and deemed satisfied. See footnote 3, *supra*.

Buckeye spent a great deal of the Hearing eliciting testimony regarding alleged pre-petition fraudulent transfer claims and preferences. In paragraph 13 Buckeye objects to Debtors' characterization that they made a "thorough review and analysis of such claims, and found no merit to Buckeye's contentions." Pages 10 - 13 of the Amended Disclosure Statement provide a summary of the alleged wrongful transactions and the Debtors' belief as to their merits. In addition, Debtors have revised this section to include that they will pursue and anticipate recovering on the claim against Christopher Hake arising out of the Wishka Estate. It is information about the alleged fraudulent transactions themselves that is important for the hypothetical reasonably informed investor to have. Buckeye has not objected to the disclosure of the description of the transactions at issue. Because the transactions are actually described (and Buckeye has not objected to that disclosure), a hypothetical reasonably informed investor would have adequate information to make an informed judgment about the plan. The objection in paragraph 13 is moot and deemed satisfied. See footnote 3, *supra*.

In paragraph 14, Buckeye objects to Section V of the (original) Disclosure Statement that the Two Hundred Eighty-Four Thousand Dollar (\$284,000.00) payment is "too low." Debtors revised this amount upward to Three Hundred Thirty Thousand One Hundred Fifteen Dollars (\$330,115.00) in the Amended Disclosure Statement, thus mooting this objection. This objection is moot and is deemed

satisfied. See footnote 3, *supra*.

Paragraph 15 does not contain any objection to disclosure. As a consequence, it is moot and is deemed satisfied. See footnote 3, *supra*.

In paragraph 16, Buckeye objects to Debtors' assumption that they will be successful in objecting to Buckeye's Claim Nos. 5, 6 and 7, which are based on state court actions alleging preferences and fraudulent transfers. As this Court has previously ruled, these actions are in the nature of collection actions, which are currently stayed by 11 U.S.C. § 362 and will be enjoined, after confirmation, by 11 U.S.C. § 524. To the extent such actions may continue to have viability, they are actions that belong to the bankruptcy estate and may no longer be pursued by an individual creditor such as Buckeye. Buckeye's insistence that this objection remains open is especially disingenuous in light of this Court's December 9, 2005 Order Granting Debtors' Objection to Claims of Buckeye (claim nos. 5, 6 and 7). Thus, this disclosure is no longer based on an "assumption," but is based on an accomplished fact. This objection is moot and is deemed satisfied. See footnote 3, *supra*.

In paragraph 17, Buckeye requests additional disclosure regarding what assets Debtors would sell "if necessary." Although Debtors have not provided any further disclosure on this point, it would be clear to a hypothetical reasonably informed investor that the assets that might be sold would be determined by the amount necessary to fund the plan if Randall Hake earned lower excess earnings. Because the current information is adequate and any additional information would be speculative, this objection is overruled.

The Amended Disclosure Statement includes the disclosure

requested by Buckeye in paragraph 18. The objection in paragraph 18 is moot and is deemed satisfied. See footnote 3, *supra*.

In paragraphs 19, 20 and 21, Buckeye objects that the scope of the appraiser's assignment did not include Hake Contracting, Hake P.E. or Brookfield Building Corp. Nowhere in these paragraphs does Buckeye object to the disclosure about the appraisal, which appears to be fully disclosed. The fact that these entities were not included in the appraisal is disclosed on page 17 of the Amended Disclosure Statement. The objections in paragraphs 19, 20 and 21 are moot and deemed satisfied. See footnote 3, *supra*.

Paragraph 22 contains Buckeye's objection to the failure to disclose certain information about tax credits. The tax credits are fully explained in the appraisal of Debtors' assets. Randall Hake also testified that all of the tax credits had been fully allocated and that they could no longer be sold. Disclosure about the tax credits is adequate. As a consequence, the objection in paragraph 22 is moot and deemed satisfied. See footnote 3, *supra*.

Paragraphs 23 - 29 do not contain any objections regarding disclosure and are not applicable to the Amended Disclosure Statement. See footnote 3, *supra*.

Buckeye raises issues about the tax credits again in paragraph 30. For the reasons set forth regarding the objection in paragraph 22, the objection in paragraph 30 is also moot and deemed satisfied. See footnote 3, *supra*.

Paragraphs 31 - 33 incorporate Buckeye's objections regarding certain information that it considers "irrelevant." The discount rate is disclosed, which is information that a hypothetical reasonably informed investor would need. Although Buckeye objects

to certain items as irrelevant, Buckeye does not allege that the disclosure is misleading. As a consequence, even if irrelevant, such information may be included in the Amended Disclosure Statement. The objections in paragraphs 31 - 33 are overruled.

Buckeye objects to disclosure about Debtors' jewelry in paragraph 34. Debtors and Mr. Roman testified that, subsequent to filing the Amended Disclosure Statement, Debtors provided additional jewelry for appraisal and the Debtors affirmatively stated on the record at the Hearing that they would include this additional information (collective appraisal of \$200) in a further amended disclosure statement. The objection in paragraph 34 has been fully addressed.

In paragraph 35, Buckeye objects to Debtors' failure to disclose "beneficial interests in entities" that Randall Hake controls. Despite extensive questioning about this subject at the Hearing, there is no evidence that there are other entities that should be disclosed. The objection in paragraph 35 is overruled.

Paragraph 36 contains Buckeye's objections that Debtors failed to list certain assets or that such assets were undervalued. Debtors are not obligated to list each and every asset that they have or own. Nevertheless, the Amended Disclosure Statement does provide information about the oil and gas lease interests, the alleged fraudulent transfer actions and the Hake Family Trust. To the extent Debtors may own "bronze cowboy statues," these items do not appear to be significant. Disclosure in the Amended Disclosure Statement about Debtors' assets is adequate to address Buckeye's objections in paragraph 36, which is overruled.

Buckeye's final objection in paragraph 37 of the Original

Objection is based on the allegation that the section 341 meeting was not concluded and that Buckeye has not completed discovery. These objections are without merit. Buckeye has shown a pattern of delay in these proceedings. Buckeye acknowledged that it wanted to take certain Rule 2004 examinations approximately a year a half prior to the Hearing and yet failed to take any action to examine these individuals until shortly before the Hearing. It is this Court's opinion that Buckeye threw out the "red herring" that its Original Objection was still open and viable for the purpose of delaying a decision on the Amended Disclosure Statement and, thus, providing itself with additional time to attempt what it calls discovery and what others have described as harassment. As pointed out above, many of the objections in the Original Objection were moot at the time of the Hearing because they had already been addressed in the Amended Disclosure Statement. Many of the other paragraphs in the Original Objection did not raise issues regarding disclosure. Buckeye tactically uses its alleged need for additional discovery whenever the case appears to be moving toward conclusion. Buckeye should not be rewarded for this type of "trial strategy." The objections in paragraph 37 are meritless and are overruled.

The Second Objection

In addition to the objections set forth above, Buckeye filed the Second Objection, which sets forth the following objections:

In paragraph 1, Buckeye postulates that it and other creditors would receive more under a Chapter 7 liquidation. The relevant issue is whether the liquidation analysis disclosed in the Amended Disclosure Statement is adequate for purposes of a

hypothetical reasonably informed investor to make an informed judgment about the plan. See 11 U.S.C. § 1125. Debtors represented that they will further amend the Amended Disclosure Statement to reflect Buckeye's offer to purchase, which was made subsequent to Debtors' filing of the Amended Disclosure Statement. Debtors' counsel proffered language regarding this purchase offer, which this Court finds to adequately disclose this subject. Consequently, this Court finds that the objection has been satisfied.

Buckeye objects in paragraph 2 to Debtors' failure to disclose that Mr. Hake is a "convicted felon." Based on the nature of the wrongdoing (false information on an application) and the length of time that has passed since this incident occurred, it does not appear necessary for inclusion in a disclosure statement. However, Debtors have volunteered to include this fact in a footnote on page 6 of the Amended Disclosure Statement, which this Court finds would provide adequate information for a hypothetical reasonably informed investor. As a consequence, this objection is deemed satisfied.

In paragraph 3, Buckeye objects to Debtors' failure to disclose that Mr. Hake "knowingly and intentionally submitted a materially false and misleading loan application." Based on the Debtors' willingness to include information in a footnote regarding this loan application, this Court finds that such information constitutes "adequate information." Buckeye is not entitled to require Debtors to editorialize about the "knowing and intentional" nature of the action since Debtors dispute that characterization. As long as the facts are adequately described, as Debtors have indicated, a hypothetical reasonably informed investor will be able to make an

informed judgment about the plan. As a consequence, this objection is deemed satisfied.

Buckeye's objection to Debtors' failure to disclose that they filed a "bogus" mortgage in the amount of One Hundred Sixty Thousand Dollars (\$160,000.00) is set forth in paragraph 4. The testimony and documents in this case demonstrate that the claim against the estate for this mortgage is Sixty Thousand Dollars (\$60,000.00) rather than One Hundred Sixty Thousand Dollars (\$160,000.00). There is no evidence to require this mortgage to be pejoratively characterized as "bogus." The mortgage resulted from a transaction pursuant to which Buckeye (which had a charging lien at that time) released its lien on the property in consideration of payment of more than One Hundred Thousand Dollars (\$100,000.00) before the property was transferred from Debtors to the Hake Family Trust. In addition, this objection is essentially the same objection as paragraphs 7 and 8 of the Original Objection, which were found to be moot and deemed satisfied, above.

Buckeye objects in paragraph 5 to Debtors' failure to list all assets in the Disclosure Statement, which is similar to the objection in paragraph 36 of the Original Objection. Debtors concede that they did not include Mrs. Hake's fur coat and have agreed to describe the coat and its appraised value in the Amended Disclosure Statement. Contrary to Buckeye's objection, the Account Receivable of Two Hundred Ninety-Four Thousand Dollars (\$294,000.00) is listed, as well as a description of the federal tax credits. See above. Mrs. Hake's "gem stone" jewelry is listed, and the costume jewelry is probably not material. Nevertheless, Debtors have agreed to include a description and valuation of the costume jewelry in

the Amended Disclosure Statement. See discussion, *supra*. There was no evidence at the Hearing regarding furniture or other personal property located at the Debtors' residence that was not included in the appraisal. To the extent these objections have not already been addressed, above, they are deemed satisfied or overruled.

In paragraph 6, Buckeye objects that Debtors "materially undervalued" a number of their assets. As set forth above, Buckeye does not object to the disclosure of the valuation of any of the Debtors' assets (except as set forth and resolved relating to the jewelry and the fur coat). Buckeye's objection is as to the valuations themselves rather than the disclosure of such valuations. As a consequence, this objection is overruled.

Buckeye's last objection in paragraph 7 deals with this Court's order dated January 17, 2005 granting a motion to quash the subpoena of Christopher Hake. This objection does not raise any issue relating to the Disclosure Statement, but is an example of Buckeye' pejorative rhetoric. Buckeye states that the Court was "unfair[] and unreasonabl[e]" in granting the motion to quash the subpoena. Although Buckeye has the right to zealously argue its position, the excessive use of "unfair[] and unreasonabl[e]" (four times in 15 lines of type) demonstrates an example of Buckeye's counsel's actions that go beyond mere zealous representation. Taken as a whole, Buckeye's conduct shows disrespect for the Court and misuse of Court proceedings and the Court's resources. See footnote 1, *supra*. In any event, the objection does not provide a basis to find that the Amended Disclosure Statement does not contain adequate information. As a consequence, this objection is also

overruled.

Based upon Debtors' representation that they will further revise the Amended Disclosure Statement, this Court finds that disclosure comports with the requirements of 11 U.S.C. § 1125. Conditioned upon such revisions being made to the Amended Disclosure Statement, this Court will approve a second amended disclosure statement. The Court directs Debtors to further amend and file a second amended plan and second amended disclosure statement. Provided that Debtors have made all of the changes that they represented would be made, the Court will issue an order approving such second amended disclosure statement.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**