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11 **UNITED STATES BANKRUPTCY COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

<p>13 In re:</p> <p>14</p> <p>15 BORREGO COMMUNITY HEALTH</p> <p>16 FOUNDATION,</p> <p>17 Debtor-in-Possession.</p>	<p>) Case No.: 22-02384-LT11</p> <p>)</p> <p>) OBJECTION AND RESERVATION</p> <p>) OF RIGHTS OF THE UNITED</p> <p>) STATES TRUSTEE TO (I)</p> <p>) INTERIM APPROVAL OF THE</p> <p>) ADEQUACY OF DISCLOSURE IN</p> <p>) THE COMBINED JOINT</p> <p>) DISCLOSURE STATEMENT AND</p> <p>) CHAPTER 11 PLAN OF</p> <p>) LIQUIDATION AND (II) MOTION</p> <p>) TO APPROVE SOLICITATION</p> <p>) PROCEDURES</p> <p>)</p> <p>) Date: December 6, 2023</p> <p>) Time: 9:30 a.m.</p> <p>) Dept.: Three (3)</p> <p>) Judge: Hon. Laura S. Taylor</p>
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18 Tiffany L. Carroll, the Acting United States Trustee (the “UST”), files this
19 objection (the “Objection”) and reservation of rights with respect to: (i) the Joint
20 Combined Disclosure Statement (“Disclosure Statement”) and Chapter 11 Plan of
21 Liquidation (the “Plan”) filed on November 22, 2023 (ECF No. 1141) filed by the
22 Debtor and the Official Committee of Unsecured Creditors (the “Committee” and
23 together with the Debtor, the “Plan Proponents”), and (ii) the Plan Proponents’ joint
24 motion for an order approving solicitation procedures for the Disclosure Statement
25 and Plan (ECF No. 1092) (the “Solicitation Procedures Motion”). In support of her
26 Objection, the UST respectfully represents as follows:
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28



1 **I. INTRODUCTION**

2 1. The UST objects to the approval of the Disclosure Statement because
3 it does not meet the requirements of section 1125 of the Bankruptcy Code.

4 2. The Disclosure Statement fails to provide adequate information about
5 the Plan in several important respects. Notably, the Disclosure Statement does not:

- 6 a. include the Liquidating Trust Agreement or disclose the
7 identity or affiliations of the Liquidating Trustee and the Post-
8 Effective Date Board of Directors members. This
9 information is highly relevant to creditors' assessment of the
10 Plan, including whether to entrust liquidation to the
11 Liquidating Trustee or a Chapter 7 trustee.
- 12 b. adequately address the payment quarterly fees under 28
U.S.C. §1930(a)(6) if a case is reopened after entry of a final
decree.
- 13 c. adequately address the filing of post-confirmation quarterly reports.

14 3. The UST reserves her right to object to Plan confirmation issues prior
15 to the Combined Hearing.

16 **II. STATEMENT OF FACTS**

17 **A. General Case Background**

18 4. On September 12, 2022, the Debtor commenced this voluntary case
19 under Chapter 11 of the United States Bankruptcy Code. *See* ECF No. 1. The
20 Debtor is currently a debtor-in-possession under sections 1107 and 1108 of the
21 Bankruptcy Code. The Debtor is represented by Dentons US LLP. *See* ECF No.
22 292.

23 5. On September 26, 2022, the UST appointed the Committee. *See* ECF
24 No. 49. The Committee is represented by Pachulski, Stang, Ziehl & Jones LLP.
See ECF No. 287.

25 6. On September 16, 2022, the UST appointed Dr. Jacob Nathan Rubin,
26 MD, FACC as the patient care ombudsman for the Debtor (the "PCO"). *See* ECF
27 No. 25.

28 7. According to the first day declaration of Isaac Lee, the Debtor was

1 “organized in the early 1990s to operate a holistic health clinic.” *See* ECF No. 7, at
2 p. 4 of 26. The Debtor has “since grown to approximately 700 employees serving
3 over 94,000 patients in 18 clinics and 6 mobile units throughout San Diego and
4 Riverside counties.” *Id.*

5 8. On March 13, 2023, the Court approved the sale of substantially all of
6 the Debtor’s assets to DAP Health. *See* ECF No. 559. The sale closed on July 31,
7 2023. *See* ECF No. 823.

8 **B. The Plan**

9 9. The Plan contemplates the formation of a Liquidating Trust¹, which
10 will be funded in accordance with the Liquidating Trust Agreement; a document
11 that is not attached to the Plan and Disclosure Statement. *See* Plan, at pp. 86-87 of
12 116 (§§ 15.6).

13 10. The Plan classifies general unsecured claims in Class 3. Holders of
14 general unsecured claims will receive their *pro rata* share of the Class A Trust
15 Beneficial Interests, which would entitle unsecured creditors to Distributions to be
16 made by the Liquidating Trust on account of Allowed general unsecured claims
17 from the Class A Liquidating Trust Assets. *See* Plan, at pp. 18, 68 of 116 (§§ 3.A,
18 10.3).

19 11. Class A Liquidating Trust Assets would consist of: (i) the Remaining
20 Cash; and (ii) (a) 67% of the first \$1 million of Net Recovery, (b) 33% of the second
21 \$1 million of Net Recovery, and (c) for any Net Recovery thereafter, the Pro Rata
22 share of such Net Recovery among the Holders of Class A Trust Beneficial Interests
23 and Class B Trust Beneficial Interests. *Id.*

24 12. According to the Solicitation Procedures Motion, the Debtor will file
25 a Plan Supplement no later than January 5, 2024, which is 3 days before the
26 proposed voting deadline of January 8, 2024. *See* Solicitation Procedures Motion,
27

28 ¹ Capitalized terms not otherwise defined in this Objection shall have the meanings
ascribed to them in the Plan

1 at pp. 12-13 of 74. The Plan Supplement will include, among other things, (i) the
2 identity of the initial Liquidating Trustee,² (ii) the identity of the initial Co-
3 Liquidating Trustee,³ (iii) the identity of the directors serving on the Post-Effective
4 Date Board of Directors,⁴ and (iv) the form of Liquidating Trust Agreement. *See*
5 Plan, at pp. 26-27 of 116 (§ 3.A).

6 13. The Post-Effective Date Debtor will be dissolved after (i) the CHOW
7 is approved and (ii) the receipt of all payments related to Medi-Cal and Medicare.
8 *See* Plan, at p. 84 of 116 (§ 15.5.a.iv).

9 14. The Liquidating Trustee shall seek authority for entry of the Final
10 Decree, closing the Chapter 11 Case, after all Disputed Claims have become
11 Allowed Claims or have been disallowed by Final order, and all Distributions with
12 respect to Allowed Claims have been made. *See* Plan, at pp.73-74 of 116 (§ 11.11).

13 **C. Quarterly Fees and Post-Confirmation Reports under the Plan**

14 15. The Plan provides for the payment of statutory fees to the UST under
15 28 U.S.C. § 1930(a)(6) (“Quarterly Fees”) at P. 64 of 116 (§8.3). While it provides
16 for “U.S. Trustee Fees⁵ until the closing, dismissal, or conversion of the Chapter 11
17 to another chapter,” there is no provision for payment of Quarterly Fees if the case
18 is re-opened.

19 16. The Plan does not address the filing of post-confirmation quarterly
20 reports pursuant to 28 C.F.R. § 58.8.⁶ *See* Plan, at p. 107 of 116 (§ 20.9). However,

21 ² According to the Plan, the Liquidating Trustee shall be selected by the Debtor with the
22 consent of the Committee. *See* Plan, at p. 87 of 116 (§ 15.7).

23 ³ According to the Plan, the Co-Liquidating Trustee shall be selected by the Committee
24 with the consent of the Debtor. *See* Plan, at p. 87 of 116 (§ 15.7).

25 ⁴ The Post-Effective Date Board of Director members’ duties and obligations include
26 overseeing the Liquidating Trustee in his/her capacity as president of the Post-Effective Date
27 Debtor. *See* Plan, at p. 84 of 116 (§ 15.5.b.i).

28 ⁵ “U.S. Trustee Fees” is not defined in the Plan. “Statutory Fees” is defined under § 3.141.

⁶ The Plan does state that “the Liquidating Trust and the Post-Effective Date Debtor shall
be relieved from the duty to make the reports and summaries required under Bankruptcy Rule
2015(a).” *See* Plan, at p. 107 of 116 (§ 20.9). To the extent the Debtor seeks to waive its
requirement to file quarterly financial reports, the UST objects to the request.

1 the Plan does state that the Liquidating Trust and Post-Effective Date Debtor shall
2 file and serve the status reports required by Local Bankruptcy Rule 3020-1(b),
3 which is a non-existent rule.⁷ *Id.*

4 III. OBJECTION

5 17. A debtor-in-possession may not solicit creditors to vote on a plan,
6 unless, at the time of such solicitation, the debtor-in-possession provides creditors
7 with a “written disclosure statement approved, after notice and a hearing, by the
8 court as containing *adequate information.*” See 11 U.S.C. § 1125(b) (emphasis
9 added); *In re Kelley*, 199 B.R. 698, 703 (B.A.P. 9th Cir. 1996).

10 18. “Adequate information” is defined as information that is in sufficient
11 detail to enable “a hypothetical investor” to make an informed judgment about the
12 Plan. See 11 U.S.C. § 1125(a); *In re Commercial Western Finance Corp.*, 761 F.2d
13 1329, 1331 n.1 (9th Cir. 1985).

14 A. The Disclosure Statement Does Not Provide Adequate Information about 15 the Liquidating Trust Agreement and the Identity and Affiliations of the 16 Liquidating Trustee, the Co-Liquidating Trustee, and the Post-Effective 17 Date Board of Directors Members.

18 19. The Plan Proponents should provide the form of the Liquidating Trust
19 Agreement to creditors with the Disclosure Statement – providing a form
20 Liquidating Trust Agreement, three days prior to the confirmation hearing, does not
21 provide adequate disclosure for creditors. See *In re Affordable Med Scrubs, LLC*,
22 2016 WL 3693978, at *2 (Bankr. N.D. Ohio July 5, 2016)(stating that “[p]roviding
23 ... a form of the Liquidating Trust Agreement in a plan supplement before a hearing
24 on confirmation as contemplated in the Disclosure Statement is inadequate”).

25 20. Additionally, the proponent of a plan must disclose the identity and
26 affiliations of “any individual proposed to serve, after confirmation of the plan, as
27 a director, officer, or voting trustee of the debtor, an affiliate of the debtor

28 ⁷ It appears that the Bankruptcy Court for the Central District of California’s Local
Bankruptcy Rule 3020-1(b) provides for post-confirmation requirements.

1 participating in a joint plan with the debtor, or a successor to the debtor under the
2 plan.” See 11 U.S.C. § 1129(a)(5)(A)(1); *In re Go-Go’s Greek Grille, LLC*, 617
3 B.R. 394, 396 (Bankr. M.D. Fla. 2020). Section 1129(a)(5) contains a “blend of
4 disclosure and substantive requirements.” See *In re Beyond.com Corp.*, 289 B.R.
5 138, 144 (Bankr.N.D.Cal. 2003).

6 21. Here, the combined Plan and Disclosure Statement does not disclose
7 the identities of the Liquidating Trustee, the Co-Liquidating Trustee, or the Post-
8 Effective Date Board of Director members. Rather, the Plan Proponents intend to
9 provide this information in a Plan Supplement to be filed by January 5, 2024 - 3
10 days before the proposed voting deadline of January 8, 2024. See ¶ 12, *supra*.
11 Moreover, neither the Plan nor the Disclosure Statement explain why a Liquidating
12 Trustee and a Co-Liquidating Trustee are needed to liquidate the Debtor’s
13 remaining assets and make distributions to creditors – a task one qualified
14 liquidating trustee should be able to accomplish.

15 22. The identity and affiliations of the Liquidating Trust’s management
16 are highly relevant to creditors’ consideration of the Plan and should be disclosed
17 in the Disclosure Statement. See, e.g., *In re Affordable Med Scrubs, LLC*, 2016 WL
18 3693978, at *2 (Bankr. N.D. Ohio July 5, 2016) (“A hypothetical investor cannot
19 make an informed judgment as to whether his interests would be better served by a
20 liquidation conducted by a Chapter 7 trustee ... rather than being conducted by the
21 Liquidating Trustee ... without information regarding the Liquidating Trustee's
22 experience and credentials and his relationship with FirstMerit.”).

23 **B. The Disclosure Statement Does Not Provide Adequate Information**
24 **about the Payment of Quarterly Fees.**

25 23. Fees assessed pursuant to 28 U.S.C. § 1930(a)(6) are not synonymous
26 with administrative expenses allowed pursuant to 11 U.S.C. § 503(b). See *In re*
27 *Endy*, 104 F.3d 1154, 1157 (9th Cir. 1997); *In re Juhl Enters.*, 921 F.2d 800, 803
28 (8th Cir. 1990).

1 24. The Plan and the Disclosure Statement do not address whether
2 Quarterly Fees would be payable if a case is reopened after entry of a final decree.
3 See Plan, at p. 107 of 116 (§ 20.9). The Plan and Disclosure Statement should be
4 amended to include payment if a case is reopened. *In re Barbetta, LLC*, 2014 WL
5 3638853, at *4 (Bankr. E.D.N.C. July 23, 2014) (quarterly fees are payable in
6 reopened cases).

7 **C. The Disclosure Statement Does Not Provide Adequate Information about**
8 **the Filing of Post-Confirmation Quarterly Reports.**

9 25. Section 1106(a)(7), Fed. R. Bankr. P. 2015(a)(5), and 28 C.F.R. § 58.8
10 require a debtor to file with the Court and serve on the UST, quarterly financial
11 reports to enable the Court and parties to monitor compliance with the plan of
12 reorganization. In addition, pursuant to 28 U.S.C. § 586(a)(3)(D), the UST is tasked
13 to take any appropriate action to ensure that all reports and fees required by the
14 debtor to be filed and paid are properly and timely filed.

15 26. Here, the Plan and Disclosure Statement do not address the filing of
16 post-confirmation quarterly reports. Consistent with section 1106(a)(7), Fed. R.
17 Bankr. P. 2015(a)(5), and 28 C.F.R. § 58.8, the Plan and Disclosure Statement
18 should be amended to provide for the filing of post-confirmation quarterly reports.

19 **D. Typographical Errors in the Solicitation Procedures Motion.**

20 27. The Solicitation Procedures Motion indicate that any Confirmation
21 Objection should be served on the Office of the United States Trustee, to the
22 attention of David Ortiz. It should be updated to Haeji Hong as Mr. Ortiz has
23 retired.

24 28. The Notices attached as exhibits to the Solicitation Procedures Motion
25 reference January 8, 2024 at 2:00 p.m. (Pacific Time) as Objection Deadline. It
26 should be 4:00 p.m., not 2:00 p.m.

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IV. RESERVATION OF RIGHTS

29. The UST reserves her right to make any and all objections to the confirmation of the Plan, including but not limited to, the Third-Party Releases, exculpation, injunctions, and nature of the Liquidating Trustee and Co-Liquidating Trustee’s obligations. The UST further reserves her right to supplement this Objection in the event that the Plan Proponents modify or otherwise supplement the Disclosure Statement and/or the Solicitation Procedures Motion.

V. CONCLUSION

30. Based on the foregoing, the UST respectfully requests that the Court (i) sustain the Objection and (ii) disapprove the Disclosure Statement and the Solicitation Procedures Motion, unless modified to address the concerns set forth in this Objection.

Respectfully submitted,
TIFFANY L. CARROLL
ACTING UNITED STATES TRUSTEE

Dated: November 28, 2023 By: /s/ Haeji Hong
Haeji Hong,
Attorney for the Acting United States
Trustee