

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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| <i>In re</i> | : | Chapter 11 |
| | : | |
| RAIT FUNDING, LLC ¹ , <i>et al</i> , | : | Case No: 19-11915 (BLS) |
| | : | |
| | : | Jointly Administered |
| | : | |
| Debtors. | : | Hearing Date: December 5, 2019 at 10:00 a.m. |
| | : | Objections Due: December 2, 2019 at 4:00 p.m. |

**UNITED STATES TRUSTEE’S OBJECTION TO THE DEBTORS’ MOTION
FOR ENTRY OF AN ORDER WAIVING THE BANKRUPTCY RULE 2015.3
REPORTING REQUIREMENT FOR CAUSE (D.I. 85)**

Andrew R. Vara, Acting United States Trustee for Region Three (the “U.S. Trustee”), through his counsel, objects to the Debtors’ Motion for Entry of an Order Waiving the Bankruptcy Rule 2015.3 Reporting Requirement for Cause (D.I. 85) (the “Motion”). In support of his objection the undersigned counsel respectfully states as follows:

JURISDICTION

1. Pursuant to (i) 28 U.S.C. § 1334; (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and resolve this objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that 11 U.S.C. § 307 gives the U.S. Trustee “public interest standing”); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a “watchdog”).

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are as follows: Elk Petroleum, Inc. (8606), Elk Petroleum Aneth, LLC (4449), Resolute Aneth, LLC (0729), and Elk Operating Services, LLC (3197). The address of the Debtors’ headquarters is: 1700 Lincoln, Suite 2550, Denver, CO 80203.

3. The U.S. Trustee has standing to be heard on the Motion pursuant to 11 U.S.C. § 307.

FACTUAL AND PROCEDURAL HISTORY

4. On August 30, 2019, the Debtors' filed their Chapter 11 petitions.

5. In support of the first-day requested relief, the Debtors filed the Declaration of John J. Reyle in Support of Debtors' Chapter 11 Petitions and Requests for First-Day Relief (D.I. 7) (the "Reyle Declaration").

6. On September 17, 2019, the U.S. Trustee appointed an Official Committee of Unsecured Creditors.

7. On September 27, 2019, the Debtors filed the Motion. As set forth in the Motion, the Debtors state that cause exists to waive the Rule 2015.3 reporting requirement because its underlying purpose will be fulfilled during the administration of these cases without need for Rule 2015.3 Reports, and the preparation of such reports would serve only to increase the administrative expenses to the Debtors' estates without any concomitant benefit to creditors. Motion at ¶ 10.

8. However, in these cases the Debtors have to date filed (i) a motion to sell substantially all of the Debtors' assets (D.I. 53) and (ii) a Chapter 11 Plan of Reorganization and a Disclosure Statement (D.I. 139, 140).

LAW AND ANALYSIS

9. In a chapter 11 case, the trustee or debtor in possession is required to file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official

Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.

10. Subsection (d) provides that:

The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.

Fed. R. Bankr. P. 2015.3(d).²

11. Official Form 26 (B-26) requires that a Debtor provide information such as:

- A statement of the entity's value and the value of the estate's interest in the entity, including a description of the basis for the valuation, the date of the valuation and the valuation method used which valuation should be no more than two years old;
- Financial Statements including (i) a balance sheet dated as of the end of the most recent six-month period of the current fiscal year and as of the end of the preceding fiscal year including the source of the information; (ii) a statement of income (loss) for the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and the prior fiscal year; (iii) a statement of changes in cash flows for the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and the prior fiscal year; (iv) statement of changes in shareholders/partners equity (deficit) for the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and the prior fiscal year; (v) a description of the nature and extent of the estate's interest in each entity and (vi) a description of the business

² Section 419(a) of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA") provided for certain financial forms to be prescribed for chapter 11 debtors in possession and chapter 11 trustees to periodically report certain information concerning the value, operations, and profitability of any entity in which the chapter 11 debtor holds a "substantial or controlling interest." Section 419 was intended to provide more complete information concerning estate assets and to assist parties in interest to ascertain if the entity, in which the debtor holds a substantial or controlling interest, may be used for the payment of allowed claims against the debtor. 9 *Collier on Bankruptcy* ¶ 2015.3.01 (16th ed. 2009).

conducted and intended to be conducted by the entity, focusing on the entity's dominant business segment(s).

12. In these cases there are seven debtors, namely RAIT Funding, LLC; RAIT Financial Trust; RAIT General, Inc.; RAIT Limited, Inc.; Taberna Realty Finance Trust; RAIT JV TRS LLC and RAIT JV TRS Sub, LLC. Reyle Declaration at ¶¶ 8-12.

13. Of those seven debtors (as set forth in the Debtors' organizational chart), (i) Debtor Taberna has two active and seven inactive, wholly and directly owned non-debtor subsidiaries; (ii) Debtor RAIT Funding has one active and four inactive, wholly and directly owned non-debtor subsidiaries; (iii) Debtor RAIT JV TRS Sub has one active and two inactive, wholly and directly owned non-debtor subsidiaries (not including RAIT Funding's subsidiaries); and (iv) non-debtor RAIT Partnership has approximately 25 active wholly and directly owned non-debtor subsidiaries and 35 indirectly owned non-debtor subsidiaries. *Id.*, see also Exhibit 1 to the Reyle Declaration.

14. The only entity that publicly reports is debtor RAIT Financial Trust. Although such public reporting allegedly accounts for the other debtor and non-debtor entities on a consolidated, corporate enterprise basis, it is not apparent that such public reporting and consolidated financial statements provides or conveys the same information required to be disclosed and reported under Rule 2015.3(a).

15. In fact, the Rule 2015.3 information may be useful, if not necessary, to determine, *inter alia*, the *bona fides* of the proposed section 363 sale³ (D.I. 53) and the propriety and

³ A pre-confirmation sale of assets not in the debtor's ordinary course of business requires proof that (1) there is a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the buyer has acted in good faith." *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991); *In re Exaeris Inc.*, 380 B.R. 741 (Bankr. D. Del. 2008); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987). The factors to

feasibility of the Plan⁴ (D.I. 139). In other words, the Debtors should comply with Rule 2015.3 and have not shown why they cannot and should not comply.

16. The U.S. Trustee reserves any and all rights, remedies and obligations to, among other things, complement, supplement, augment, alter or modify this objection, file an appropriate motion, or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

determine the adequacy of a business justification in support of a sale include: (a) whether the proceeds from the sale will approximate the appraised value of the property; (b) the amount of elapsed time since the bankruptcy filing; and (c) the effect of the proposed sale upon the debtor's ability to reorganize. *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 154 (D. Del. 1999).

⁴ The Debtors must show that the Plan can achieve the Debtors' objectives and promises to creditors. Section 1129(a)(11) of the Bankruptcy Code provides that a plan shall be confirmed only if confirmation "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 under the plan, unless such liquidation or reorganization is proposed in the plan." See, 11 U.S.C. § 1129(a)(11). Feasibility means that a plan must be "reasonably likely to succeed on its own terms without a need for further reorganization on the debtor's part." *In re American Capital Equipment, LLC*, 688 F.3d 145, 156 (3d Cir. 2012) (citations, brackets omitted). "The debtor has the burden of proving that a disclosure statement is adequate, including showing that the plan is confirmable or that defects might be cured or involve material facts in dispute." *Id.* at 155. A plan proponent must show feasibility by a preponderance of the evidence. See *In re W.R. Grace & Co.*, 475 B.R. 34, 114 (D. Del. 2012) (citing cases). A "debtor's own unsupported sincerity and belief that its plan is feasible is insufficient to satisfy the inquiry." *Id.* at 115. When considering a plan, the Court has "an affirmative obligation to scrutinize the plan and determine whether it is feasible." *In re Young Broadcasting Inc.*, 430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010) (citing cases). The Court has this duty "regardless of whether there is any objection raised by a party in interest." *In re Mid-State Raceway, Inc.*, 2006 WL 4050809 at *19 (Bankr. N.D.N.Y. Feb. 10, 2006). Courts must determine a plan's feasibility even if the plan has received overwhelming creditor support. See *In re Las Vegas Monorail Co.*, 462 B.R. 795, 803-04 (Bankr. D. Nev. 2011).

WHEREFORE, the U.S. Trustee respectfully requests that this Court grant relief consistent with this Objection and/or granting such other relief as this Court deems fair, just and appropriate.

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
REGION THREE

Dated: November 27, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, I caused to be served a copy of the United States Trustee's Objection to the Debtors' Motion for Entry of an Order Waiving the Bankruptcy Rule 2015.3 Reporting Requirement for Cause (D.I. 85) *via* email, CM/ECF, and/or regular mail to the following parties and persons:

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¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are as follows: RAIT Funding, LLC, a Delaware limited liability company (9983); RAIT Financial Trust, a Maryland real estate investment trust (9819); RAIT General, Inc., a Maryland corporation (9987); RAIT Limited, Inc., a Maryland corporation (9773); Taberna Realty Finance Trust, a Maryland real estate investment trust (3577); RAIT JV TRS, LLC, a Delaware limited liability company (3190); and RAIT JV TRS Sub, LLC, a Delaware limited liability company (4870). The mailing address for all Debtors is Two Logan Square, 100 N. 18th Street, 23rd Floor, Philadelphia, Pennsylvania 19103 (Attn: John J. Reyle).

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