

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-90-7394

ST. THERESE CARE CENTER,
INC., a/k/a St. Therese
of Hopkins, a/k/a
St. Therese Southwest,

MEMORANDUM ORDER RE
RULE 3017 REQUEST BY
PIPER, JAFFRAY & HOPWOOD

Debtor.

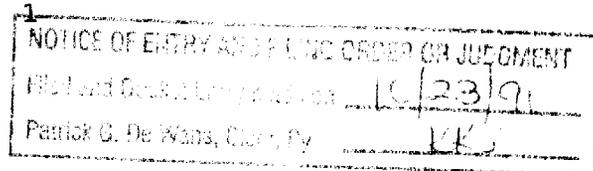
At Minneapolis, Minnesota, October 23, 1991.

The above entitled matter came on for hearing before the undersigned on the 16th day of September, 1991. Appearances were as follows: Ann Ladd for the Debtor, John McDonald for Merit Management, Inc., and Kathleen Sanberg for Piper, Jaffray & Hopwood.

FACTS AND POSITIONS OF THE PARTIES

This is a case in which two competing plans of reorganization are pending, one proposed by the debtor and one proposed by Merit Management, Inc. ("Merit"). The creditors include numerous holders of revenue bonds totalling \$15 million issued by the debtor for purposes of constructing the facility which is the debtor's major asset. Piper, Jaffray & Hopwood ("Piper"), a Minneapolis-based securities broker and dealer, is the record holder of a significant amount of the bonds, holding them in "street name" for approximately 315 individual bondholders. Thus, the identities of the beneficial owners of the bonds is not known to the debtor or to Merit.

At the hearing on approval of the two disclosure statements filed by the debtor and by Merit, Piper sought to have the court



make a determination under Bankruptcy Rule 3017(e) that Piper be the person to whom the disclosure statements and plans, ballots and other written materials required for voting on the plan be submitted; that Piper not be required to release the names and addresses of the bondholders to the debtor and Merit; and that the plan proponents be required to reimburse Piper for the costs of transmitting materials to the unidentified bondholders. Debtor and Merit both opposed Piper's attempt to continue to maintain the names of its customers in confidence and seek an order from this court requiring that Piper deliver a list of such true owners to them for purposes of oral solicitation of votes.

Merit and the debtor take the position that telephone solicitation of the beneficial holders is necessitated by the complexity of the competing plans. They assert that since these plans are extremely complicated in many aspects and propose different distribution schemes, direct solicitation is necessary to explain these differences to the bondholders. Merit and the debtor further argue that the integrity of the balloting process may be materially compromised if the names of the bondholders are not revealed. See In re Southland Corp., 124 B.R. 211 (Bankr. N.D. Tex. 1991), (the bankruptcy court ordered a re-vote because it was unclear whether ballots had been cast by the beneficial owners or by the record holder).

Piper asserts that it has a professional obligation to its clients to keep their names confidential. Piper is concerned that release of the names will lead to unwanted intrusion into the lives

of bondholders who, for their own reasons, may wish their identities to remain confidential. Piper further asserts that the list of clients' names is proprietary information which should not be released. However, Piper cites no applicable legal or statutory requirement that prohibits it from disclosing such names.

DISCUSSION

Resolution of this dispute requires an interpretation of Bankruptcy Rule 3017(e) which was newly added to the Bankruptcy Rules effective August 1, 1991. It provides:

(e) Transmission to Beneficial Holders of Securities. At the hearing held pursuant to subdivision (a) of this rule the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes and other securities and determine the adequacy of such procedures and enter such orders as the court deems appropriate.

Fed. R. Bankr. P. 3017(e). The committee notes to Rule 3017(e) provide:

Subdivision (e) is designed to ensure that appropriate measures are taken for the plan, disclosure statement, ballot and other materials which are required to be transmitted to creditors and equity security holders under this rule to reach the beneficial holders of securities held in nominee name. Such measures may include orders directing the trustee or debtor in possession to reimburse the nominee out of the funds of the estate for the expenses incurred by them in distributing materials to beneficial holders. In most cases, the plan proponent will not know the identities of the beneficial holders and therefore it will be necessary to rely on the nominal holders of the securities to distribute the plan materials to the beneficial owners.

I find nothing in Rule 3017(e) suggesting that Merit and the debtor are not entitled to directly solicit the beneficial holders. The Rule itself merely directs the court to consider procedures for transmitting disclosure information through record holders to the beneficial owners. It is an enabling provision designed in part to facilitate the transmission of information critical to a vote by the beneficial owners of claims. It does not constrict or limit the procedures which the court may use to accomplish that purpose. While the committee notes suggest that plan proponents will not normally know the identities of the beneficial owners and will therefore have to rely on the nominal holder to distribute materials, they do not by negative implication forbid the court from ordering that those names be disclosed for the purposes of solicitation.

It is quite clear from section 1125 of the Code that plan proponents can directly contact creditors to solicit votes. It is further clear from section 1126(a) of the Code that it is the holder of a claim or interest that may accept or reject a plan.¹ The voting process is designed to foster full information so that ballots may be cast intelligently by the holder of a claim or

¹ The issue of who is entitled to vote for or against a plan of reorganization is governed by sections 1126(a) and (b) of the Bankruptcy Code. Southland, 124 B.R. at 223. Several Bankruptcy Rules may also be applicable to a determination of who is entitled to receive notices and disclosure statements, to vote, and to receive a distribution. See Fed. R. Bankr. P. 2019; 3003(d); 3017(c), (d) and (e); 3018(a), (b) and (c); 3021; and 9010. None of these rules compel a conclusion that the names of beneficial owners of claims or interests entitled to vote for a plan must remain confidential from plan proponents.

interest or the authorized agent of the same. Disclosure of the identities of the holders of claims furthers that interest.

As did the court in In re Southland Corp., I give little weight to any superficial similarity between the chapter 11 voting process and the procedures typically used in a proxy solicitations and tender offers. See Southland, 124 B.R. at 221. Although record holders may vote shares pursuant to the instructions of the beneficial owners under the securities laws, that process is designed to facilitate the rapid trading and marketability of securities. The Bankruptcy Code, however, concerns itself with providing full disclosure to creditors so that those creditors can cast their ballots intelligently. The Bankruptcy Code and the federal securities laws are simply different sets of laws with different purposes. There is no suggestion in Rule 3017(e) or the Committee Notes that practices developed under the federal securities laws have binding application to the chapter 11 voting process. See Southland, 124 B.R. at 221.

In this case the beneficial owners of the bonds are few in number. The competing plans are very complex and it is likely that many of the bondholders will want or need clarification of the differences between the plans and distribution schemes. This is especially true since the suggestion by all parties is that many of the bondholders are not sophisticated investors.

While the confidentiality of the bondholders' identities may be a concern, securities are often held in street name merely out of convenience because it fosters easy trading and facilitates the

transfer of tender offer and proxy materials. However, I am not insensitive to the concerns of Piper. It could well be that some of these bondholders may have held their investments in street name not merely as a matter of convenience, but because they wish their identities to remain confidential and would wish that confidence kept even if it meant that they received less information regarding voting on the plans. Therefore, while I conclude that Merit and the debtor are entitled to a list of the names and phone numbers of beneficial holders, the solicitation process in this case should be carefully tailored to avoid release of the names of those investors who wish to remain confidential, and to restrict use of, and access to, the list of bondholders.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. All disclosure materials shall be delivered to Piper. Piper shall transmit such materials to the bondholders no later than 10 days after they are delivered to Piper for distribution;

2. Along with such disclosure materials Piper shall prepare and send to each bondholder:

a. a copy of this order;

b. a form which allows the bondholder to opt out of having his or her name released to the debtor and Merit;

c. a self-addressed, stamped envelope for return of the opt out form; and

d. notice that such bondholder's name shall be released to Merit and the debtor for purposes of solicitation unless the bondholder returns the opt out form within 15 days of the

date the disclosure materials, opt out form and notice were mailed;

3. Piper shall then have 5 days to turn over to Merit and the debtor a list of the names, addresses, and phone numbers of all bondholders who have not returned the opt out form within the 15 day period;

4. Merit and the debtor shall only use the information contained in the list for the purpose of soliciting ballots in favor of one of the competing plans of reorganization, and shall not in any event use the list for the purposes of soliciting the purchase of any bonds;

5. No information contained in the list shall be disseminated to any entity other than counsel for Merit or the debtor or any person working under such counsel's direct supervision for the purpose of soliciting ballots in favor of one of the competing plans, who themselves have agreed to keep such information confidential;

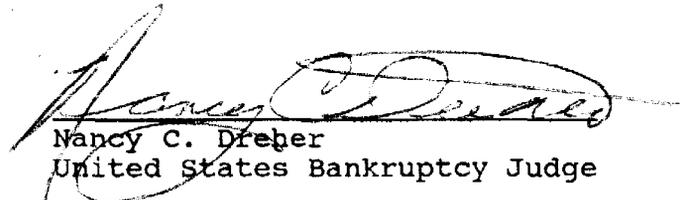
6. The original list of bondholders and all copies shall be returned to Piper when voting is completed;

7. Piper shall be entitled to an administrative expense claim for its costs in distributing the debtor's disclosure materials and compiling the list of bondholders, but Merit shall initially pay the costs for distribution of its materials;

8. The form of ballot shall be carefully tailored to allow for validation of any votes cast by persons other than the beneficial owners and Piper shall take part in the counting of

ballots to assure that the ballots are voted by parties entitled to do so; and

9. Counsel for the proponents of the plans and for Piper should confer, determine an appropriate date for a combined confirmation hearing in light of the schedule outlined above, and advise the court of their preferences for the same, at which time I will issue an order approving the amended plans and disclosure statements of each and set both down for concurrently held confirmation hearings.



Nancy C. Dreher
United States Bankruptcy Judge