§ 1129(a)
§ 1129(a)(1)
§ 1123(a)(4)
§ 1129(a)(7)
§ 1129(a)(8)
§ 1129(a)(11)
Exculpation clause

Roman Catholic Archbishop of Portland, Case No. 04-37154

04/13/2007 ELP Unpublished

Memorandum Opinion regarding confirmation of the Third Amended Joint Plan of Reorganization of the Archdiocese of Portland. The opinion discusses the requirements for confirmation, with focus on the issues raised by the objecting parties.

The court rejects the argument that the plan fails to comply with § 1123(a)(4), which requires that the plan provide the same treatment for each claim within a class. The objecting parties argued that other members of the class of which they are members have settled with the Archdiocese, so will be paid 100 percent of their allowed claims on confirmation, while they have not settled, so will be paid from a capped fund, which in their view may not be sufficient to pay their claims in full. The court explained that the plan provides for payment of the objecting parties' claims at 100 percent when the claims are liquidated. Based on the district court's estimation of the remaining unresolved claims, the capped fund provides sufficient funds to cover payment in full of the unresolved claims once they are allowed, by a factor of 38 to 1.

The court also rejects the objecting parties' argument that debtor has sufficient assets that it could provide for payment of their claims at 100 percent, without any cap on liability. Because the amount in the capped fund is more than adequate to pay the claims in full, the plan meets the requirement of the Code for treating claims within a class the same. The court also noted that the cap provides certainty and was an important consideration for the funding of the credit facility that will help fund the plan.

The opinion discusses the objection to the exculpation clause included in the plan. The court focused only on the portion of the clause to which there was an objection, and determined that the plan will be confirmed only if that portion of the exculpation clause is changed to exclude certain specific

conduct of debtor from the exculpation.

The opinion concludes that the plan meets the best interests test, because the plan provides for payment of 100 percent of the claims of the objecting creditors.

The court rejected the objecting parties' argument that claims within the same class as the objecting parties should have been moved to a different class once they settled and voted to accept the plan, which would result in the class having rejected the plan. There is nothing in the plan that requires a claim to remain unsettled to remain in the class, where the facts supported putting the claims together in one class at the time the class was created. Therefore, the settled claims stay in the class, with the result that the class accepted the plan.

The opinion also concludes that confirmation of the plan is not likely to be followed by liquidation or a need for further reorganization. Debtor provided evidence that it has sufficient assets and credit facilities to fund the plan.

Because all impaired classes accepted the plan, the court did not need to consider whether the plan met the requirements for cram down under § 1129(b).

**Below is an Opinion of the Court.**

ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

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| In Re: | Bankruptcy Case No. 04-37154-elp11 |
| ROMAN CATHOLIC ARCHBISHOP OF PORTLAND IN OREGON, AND SUCCESSORS, A CORPORATION SOLE, dba the ARCHDIOCESE OF PORTLAND IN OREGON, | MEMORANDUM OPINION RE CONFIRMATION OF THIRD AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION |
| Debtor. | |

This matter came before the court on April 10, 2007, for hearing on confirmation of the Third Amended and Restated Joint Plan of Reorganization, which was submitted jointly by debtor Roman Catholic Archbishop of Portland ("debtor"), the Tort Claimants Committee ("TCC"), the Future Claimants Representative ("FCR"), and the Parish and Parishioners Committee. By the time of the confirmation hearing, the only objecting parties were three claimants, two parents and their son, who all assert claims arising out of the same incident of the son's

expulsion from a parish school.[1] No holders of claims for child sexual abuse have timely objected. For the reasons that follow, I will overrule the objections to confirmation and confirm the plan that is before the court, with the one required modification relating to the exculpation clause that I will discuss below.

BACKGROUND

Debtor filed a petition for relief under Chapter 11[2] of the Bankruptcy Code on July 6, 2004, the first Roman Catholic diocese or archdiocese in this country to do so. The petition was filed to deal with the financial uncertainty arising from claims based on alleged child sexual abuse by Archdiocesan priests and the Archdiocese's alleged response to allegations of abuse. This case has progressed over the last two and a half years through two rounds of mediation of tort claims, the vast majority of which are claims for child sexual abuse, as well as litigation about what property should be included in the estate and the

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[1] Initially, two timely objections to confirmation were filed, one by Key Bank and the other on behalf of five claimants who, at the time the objection was filed, had unresolved tort claims against debtor. Key Bank withdrew its objection. Two of the claimants who filed the other objection have, since the objection was filed, settled their claims with debtor, leaving only three claimants objecting to the plan.

The court also received a letter from a parishioner, who raised concerns about whether a parking lot at St. Mary's Cathedral in Portland was to serve as collateral for the credit facility that will fund the plan in part. Debtor clarified at the confirmation hearing that the parking lot is not collateral for that credit facility. Therefore, I do not consider the parishioner's letter to be an objection to confirmation.

[2] All references are to the Bankruptcy Code, 11 U.S.C. § 101 et seq.

liability of insurance companies on insurance policies issued over the past 50 years.

Global mediations began in September 2006, and have continued until the eve of the confirmation hearing. As a result of these mediations, the insurance litigation has settled with an agreement by the various insurance companies to pay debtor a total of approximately $52 million. The overwhelming majority of the tort claims also settled and some were disallowed. Out of approximately 175 such claims, there are only three left unresolved. Those are the claims of the objecting parties. The FCR and debtor have agreed upon the creation of a Future Claims Trust for payment of possible future claims. The property of the estate litigation will be settled as a result of confirmation of the plan.

The mediation included negotiation of a plan of reorganization, which was agreed to and then submitted to the court jointly by debtor, the TCC, the FCR, and the Parish and Parishioners Committee, who are all of the major remaining constituencies in the case. That plan has been amended slightly over the last few months. It is the Third Amended and Restated Joint Plan of Reorganization (hereinafter "the plan") that is before the court for confirmation.[3]

Debtor called five witnesses at the confirmation hearing; the objecting parties did not call any. The court took judicial notice of

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[3] The Second Amended Joint Plan is the plan that was sent out for voting; the Third Amended and Restated Joint Plan made a few non-material modifications to the Second Amended Joint Plan, but the changes do not adversely affect any of the creditors. On motion of debtor, this court has deemed the votes accepting the Second Amended Joint Plan as accepting the Third Amended and Restated Joint Plan.

various documents that are contained in the bankruptcy and district court records pertaining to this case.[4] The parties presented their evidence and testimony very efficiently, and ably argued their positions with regard to confirmation. It was apparent to the court that the parties had worked cooperatively to make the confirmation process a smooth one.

LEGAL STANDARD

The court shall confirm a chapter 11 plan if the requirements of § 1129(a) are met. Even in the absence of an objection to confirmation, the court is required to satisfy itself that the requirements for confirmation have been met. In re Ambanc La Mesa Ltd. P'ship, 115 F.3d 650, 653 (9th Cir. 1997); In re Perez, 30 F.3d 1209, 1214 (9th Cir. 1994); 7 Lawrence P. King, Collier on Bankruptcy ¶ 1129.02[5] (15th ed. Rev. 2004)(court has mandatory, independent duty to review the plan and ensure that it complies with the requirements of § 1129).

DISCUSSION

The objecting tort claimants argue that the plan fails to comply with various provisions of the Bankruptcy Code. Because I must determine that all the requirements of § 1129(a) are met in order to confirm the plan, I will address each provision of § 1129(a) at least briefly, and will discuss the objections as necessary.

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[4] In response to the objecting parties' request for judicial notice at the hearing, debtor filed a Second Motion for Judicial Notice (Docket #5023), requesting judicial notice of certain documents contained in the district court record of the appeal of the property of the estate adversary proceeding. The objecting parties do not have any objection to the second motion, provided that judicial notice also include docket entries 9 and 47. Therefore, debtor's Second Motion for Judicial Notice is granted, with the addition of Docket #9 and 47.

1. § 1129(a)

A. § 1129(a)(1)

Section 1129(a)(1) requires that the plan comply with all applicable provisions of the Bankruptcy Code. "The legislative history suggests that the applicable provisions are those governing the plan's internal structure and drafting[,]" such as compliance with §§ 1122 and 1123, governing classification and contents of the plan. 7 Collier on Bankruptcy ¶ 1129.03[1].

The objecting parties make two arguments that challenge, directly or indirectly, the plan's compliance with the provisions of the Bankruptcy Code.

i. § 1123(a)(4)

First, they argue that the plan fails to comply with § 1123(a)(4), which requires that the plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest[.]" According to the objecting parties, the plan does not provide the same treatment for those who have not settled their claims as it does for those in the same class who have settled their claims.

The class at issue is class 7, which is the class of known tort claims that were unresolved at the time the plan proponents filed the Second Amended Joint Plan. The plan provides that, on the effective date of the plan, the reorganized debtor will pay in full any of those claims that have been allowed, and will establish a trust fund (the "Known Tort

Claims Trust") for payment of any remaining unresolved known tort claims. The unresolved known tort claims will be liquidated, by trial if necessary, and the trustee of the Known Tort Claims Trust will pay those claims in full from the trust fund as they are allowed. See Third Amended and Restated Joint Plan of Reorganization ¶ 5.4.3. The trust fund is capped at approximately $3.8 million.[5] The objecting parties argue that the plan does not treat members of the class the same, because claims in the class that have been settled will be paid in full, while claims that have not been settled as of the effective date will be paid from the capped fund, which they argue could prove to be insufficient to pay their claims in full on liquidation and allowance.[6]

There are 27 claims in class 7. At the time debtor proposed the plan on which the creditors voted, all claims in this class were unresolved. Between the time the court approved the disclosure statement and the time of the confirmation hearing, all but three claims were liquidated, most through settlement.

The plan does not treat the members of the class differently. Paragraph 5.4.1 provides that all claims in the class will be paid in full, either as agreed in a settlement agreement or as liquidated. All

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[5] This amount might be augmented by an additional $500,000, depending on the outcome of the appeal of the state court dismissal of the claim filed by Claimant #143. Because that additional amount is uncertain, I will analyze the argument using the certain $3.8 million.

[6] The plan also provides for the creation of a Future Claims Trust of approximately $20 million, which will be available to pay claims of future claimants who may come forward and assert claims that fit within the plan's definition of "future claim." See Third Amended and Restated Joint Plan of Reorganization ¶ 1 at 9:17 - 10:2; ¶ 5.5.

members of the class had the opportunity to settle; some chose to do so and some chose not to do so. That does not mean that the class members are being treated differently.

The amount set aside to pay unresolved known tort claims is approximately $13.7 million. The amount to be deposited in the Known Tort Claims Trust is $3.8 million, which is the approximately $13.7 million, reduced by the amounts of settlements of claims in class 7, with the exception of the settlement of Claim #143. There are only the three unresolved known tort claims remaining. Thus, there is more than $1.2 million per unresolved known tort claim in the capped fund.

In order to determine whether this plan could be confirmed, the unresolved known tort claims were individually estimated by the district court. The district court estimated the value of the three unresolved known tort claims held by the objecting parties at $100,000 in total; $100,000 for one claim and $0 for the other two claims. Therefore, the amount that will be available under the plan to pay the three claims is more than sufficient to assure payment in full. In fact, it is more than adequate by a 38 to 1 ratio.

The purpose of estimation was to value the claims for purposes of confirmation, including the purpose of determining whether the cap on the fund was sufficient to pay the unresolved known tort claims in full, as the plan provides. The result of that estimation is a valuation of the unresolved known tort claims for confirmation purposes at an aggregate of $100,000.

The objecting creditors argue that they are being treated

differently from the other members of the class, because their claims may in fact be worth more than $100,000, and might include punitive damages, which together could exceed the $3.8 million in the fund. However, one of the very purposes of estimation was to provide a mechanism for this court to assess the adequacy of the fund to pay unresolved known tort claims. That estimated value is $100,000, with an estimated claim for punitive damages of $0, an amount significantly less than the amount contained in the fund.[7]

Because the fund set aside to pay unresolved known tort claims is more than sufficient to pay the objecting parties' claims in full, the objecting parties are not being treated differently from the other members of class 7 who have settled their claims and will be paid in full.

The objecting parties argue that the estimation procedures were inadequate to provide this court with sufficient information to evaluate the plan. I disagree. The tort claimants sought and received individualized estimation by a district court judge. Estimation

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[7] It is worth noting that, under United States Supreme Court precedent, punitive damages in an amount more than 9 times the amount of compensatory damages would rarely comport with due process. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-25 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process"). Thus, even if claimants were able to establish a claim for punitive damages, based on the estimation of their compensatory damages at $100,000, it is highly unlikely that they would get more than $900,000 in punitive damages, for a total of $1 million. Even under that scenario, the fund available to pay the objecting parties' claims is more than sufficient to pay even the possible punitive damages by a factor of nearly 4 to 1.

procedures are largely left to the discretion of the court. It is not for this court to second-guess the procedure by which the district judge conducted the estimations. The claimants were given a mini-trial before an advisory jury with regard to compensatory damages. It is hard to see what more could be required; it is, after all, an estimation, not a liquidation of the claim.

The objecting parties also argue that debtor has sufficient assets so that it could eliminate entirely the cap on payment to unresolved known tort claims. Whether debtor has the financial ability to eliminate the cap is not the issue; the issue is whether the plan that has been proposed meets the requirements of the Bankruptcy Code. The use of capped funds[8] was a result of intense negotiations among the various constituencies in this case, all of whom agreed to the cap. At the time the cap was negotiated, there were numerous unresolved known tort claims that were to share in the capped fund. The cap provided certainty to debtor, who faced unknown liability on those numerous unresolved claims. Further, the evidence at the confirmation hearing showed that debtor needed to be able to quantify its liabilities in order to obtain exit financing for the plan. The use of capped funds for the unresolved known tort claims and the future claims was an important consideration for the funding of the credit facility by Allied Irish Bank.

The $3.8 million that will be available to pay the three unresolved known tort claims is more than adequate by a factor of 38 to 1 to pay

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[8] The plan includes more than one capped fund. As discussed earlier, payment of future claims is to be made from a fund capped at approximately $20 million.

those claims in full. Whether debtor could in fact provide an unlimited fund to pay those claims is irrelevant in light of the huge cushion provided by the amount in the fund. It is worth noting that, at the time the cap was originally agreed to, the amount in the fund averaged approximately $500,000 per unresolved known tort claim, most of which were child sexual abuse claims. Now that most of those claims have been settled or otherwise resolved, the amount in the fund to pay the claims of the objecting parties, none of which involve child sexual abuse, averages more than $1.2 million per claim. Debtor is not required to eliminate the cap, which provides a generous cushion to the objecting parties.

ii. Exculpation Clause

The objecting parties also argue that the plan cannot be confirmed because the provision in the plan that forecloses claims for negligence and breach of fiduciary duty against plan proponents and their agents is inconsistent with the Code. They ask the court to follow Judge Dunn's decision in In re WCI Cable, Inc., 282 B.R. 457, 479-80 (Bankr. D. Or. 2002), in which he held that he would approve the exculpation clause in the WCI plan that was the subject of an objection only "if the exculpation exceptions are extended to cover negligence and breaches of fiduciary duty as well as gross negligence and willful misconduct . . . ." Id.

Paragraph 9.3 of the plan provides:

> None of the Released Parties will have or incur any liability to, or be subject to any right of action by, any holder of a Claim, any other party in interest, or any of their respective agents, employees, representatives, financial advisors, attorneys, or

> affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the Case, including the exercise of their respective business judgment and the performance of their respective fiduciary obligations, the pursuit of confirmation of the Plan, or the administration of the Plan, except liability for their willful misconduct or gross negligence, and in all respects, such parties will be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under the Plan or in the context of the Case.

(Emphasis supplied.) "Released Parties" includes the debtor, its parishes and schools, the TCC, the Parish and Parishioners Committee, the FCR, Hamilton Rabinovitz & Alschuler, and "all of their respective present or future members, managers, officers, directors, employees, or agents acting in such capacity." Third Amended and Restated Joint Plan of Reorganization ¶ 1 at 18:6-11.

At the confirmation hearing, the objecting parties clarified that they did not have any objection to the exculpation clause except for its application to one narrow issue: whether debtor provided the disclosure of confidential proof of claim information as required by the Order Expanding Parties to Whom Debtor May Disclose Confidential Proofs of Claim and Protective Order (Docket #2394).

As Judge Dunn noted in WCI Cable, agreed-upon "exculpation clauses can be included in chapter 11 plans as the products of negotiation among interested parties." 282 B.R. at 479. Because all of the numerous parties who negotiated this plan agreed to the exculpation clause, it is properly included in the plan, to the extent there has been consent by failure to object.

Thus, I will focus only on the aspect of the exculpation clause to

which there is an objection: the limitation of debtor's liability for allegedly failing to make certain disclosures as required by the order specified above. Although I agree with the plan proponents that the exculpation clause sets a particular standard for liability (willful misconduct or gross negligence) rather than a complete protection from liability, the party seeking to include an exculpation provision over an objection must demonstrate that the limitation on liability at issue is reasonable and not inconsistent with the Bankruptcy Code. See In re Friedman's, Inc., 356 B.R. 758, 762-64 (Bankr. S.D. Ga. 2005); WCI Cable, 282 B.R. at 479.

Debtor has not made such a showing here. Therefore, I conclude that the portion of ¶ 9.3 of the plan that releases debtor from liability with regard to its disclosure pursuant to the order that is Docket #2394 is not reasonable. I will confirm the plan only if the exculpation clause excludes from the exculpation provision the liability, if any, of debtor for conduct related to debtor's disclosure or lack of disclosure of information pursuant to the order that is Docket #2394. With that limited exception, the exculpation clause is approved.

B. § 1129(a)(2)

Section 1129(a)(2) requires that the plan proponents have complied with the Bankruptcy Code. I find that the plan proponents have complied with the applicable provisions of the Bankruptcy Code.

C. § 1129(a)(3)

Under § 1129(a)(3), a plan must be "proposed in good faith and not by any means forbidden by law." "Good faith" is not defined in the

Bankruptcy Code. "A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code." In re Sylmar Plaza, LP, 314 F.3d 1070, 1074 (9th Cir. 2002). Accord In re Madison Hotel Assoc., 749 F.2d 410, 425 (7th Cir. 1984)(good faith "is generally interpreted to mean that there exists 'a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code'"). It "requires a fundamental fairness in dealing with one's creditors." In re Jorgensen, 66 B.R. 104, 109 (9th Cir. BAP 1986). In making that determination, the court considers the totality of the circumstances. Sylmar Plaza, LP, 314 F.3d at 1074.

I find that the plan has been proposed in good faith and not by any means forbidden by law. The plan is the result of months of negotiation and mediation, and has the support of the vast majority of the affected parties. There is no argument or evidence of bad faith or that the plan was proposed by means forbidden by law.

D. § 1129(a)(4)

This subsection requires that payments for services or costs and expenses in connection with the case have either been approved or are subject to approval by the court. I find that the plan meets this requirement. It requires that professionals submit applications for fees and costs to the court for approval.

E. § 1129(a)(5)

I find that the plan proponents have disclosed the identity and affiliations of the individual who will serve as the sole director of the reorganized debtor, Archbishop Vlazny, and that his continuation in

office is consistent with the interests of creditors and with public policy.

F. § 1129(a)(6)

This requirement does not apply.

G. § 1129(a)(7)

With regard to each impaired class of claims, § 1129(a)(7) requires that the plan provide that each creditor in that class who has not accepted the plan "will receive at least as much in reorganization as it would in liquidation." 7 Collier on Bankruptcy ¶ 1129.03[7]. Thus, each creditor in an impaired class who does not vote to accept the plan must receive under the plan "property that has a present value equal to that participant's hypothetical chapter 7 distribution if the debtor were liquidated instead of reorganized on the plan's effective date." Id. at ¶ 1129.03[7][b]. This is commonly referred to as the best interests of creditors test. Ordinarily, proof that this requirement is met requires the plan proponent to perform a liquidation analysis so the court can determine what the nonconsenting impaired creditor would receive in a chapter 7. Id. at ¶ 1129.03[7][b][iii].

In this case, the plan provides that the rejecting impaired creditors will be paid in full. As I explained above, based on the estimation of the amount of the remaining unresolved known tort claims, the amount of money that will be available to pay the three unresolved known tort claims is more than sufficient by a factor of 38 to 1 to assure that full payment will be made. The most a creditor can receive in a liquidation is 100 percent, and the plan provides for payment of 100

percent. Thus, it is not necessary to engage in a liquidation analysis, because regardless of whether debtor is solvent or insolvent, the plan meets the best interests of creditors test.

H. § 1129(a)(8)

This provision requires that each class of claims either is unimpaired under the plan or has accepted the plan.

When debtor provided its original summary of votes, two impaired classes had rejected the plan: the class comprised of Key Bank and class 7, which is the class of unresolved known tort claims. Key Bank has since changed its vote to accept the plan.

Two of the rejecting votes in class 7 have also changed their votes to accept the plan. Based on those changed votes, the only rejecting votes are the votes of the objecting parties. Taking the new accepting votes into account, there is no dispute that class 7 is now an accepting class as provided in § 1126(d).

The objecting parties argue that the creditors who changed their votes after reaching settlements on their claims should no longer be included in class 7, because they are no longer unresolved known tort claims. They point to the definition in the plan of "unresolved," which means "a Disputed Claim that has not been Allowed or Disallowed for distribution purposes." Third Amended and Restated Joint Plan of Reorganization ¶ 1 at 21:18-19.

The problem with that argument is that class 7 consists of "Unresolved Known Tort Claims," which is defined as "those Tort Claims listed on Exhibit '3' attached to this Plan." Third Amended and Restated

Joint Plan of Reorganization ¶ 1 at 21:20-21. At the time the class was created, all of those claims were unresolved. There is no requirement in class 7 that a claim remain unresolved to continue to be a member of the class to which the claim was assigned, where the facts at the time the class was created supported assigning the claim to that class. The claimants who changed their votes after reaching settlement between the time the class was created and the confirmation hearing are listed on Exhibit 3 as unresolved known tort claims, and therefore are in class 7.

I disagree with the proposition, advanced by the objecting parties, that claims that were disputed or unliquidated at the time they were put together in a class must move to a different class once they are resolved and liquidated. The plan provides classifications of claims; there is no authority cited for the idea that claims placed in one class must automatically become claims of a different class if those claims are resolved during the confirmation process.

The claimants who changed their votes to accept the plan remain in class 7 with the objecting parties. Therefore, class 7 has accepted the plan. As a result, I find that all impaired classes have accepted the plan. The requirement of § 1129(a)(8) is met.

I. § 1129(a)(9)

This provision requires that the plan provide for payment in full of each of the types of claims listed in § 1129(a)(9) on the effective date of the plan, if any such claims exist. This plan does that. Therefore, I find that the plan meets the requirements of § 1129(a)(9).

J. § 1129(a)(10)

If a plan proposes to impair a class of claims, the plan cannot be confirmed unless at least one class of impaired claims accepts the plan. § 1129(a)(10). More than one impaired class has accepted the plan. Therefore, this requirement is met.

K. § 1129(a)(11)

Section 1129(a)(11) requires that "[c]onfirmation of the plan 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." "Feasibility has been defined as whether the things which are to be done after confirmation can be done as a practical matter under the facts." In re Jorgensen, 66 B.R. 104, 108 (9th Cir. BAP 1986). The purpose of this requirement is "to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985) (quoting 5 Collier on Bankruptcy ¶ 1129.02[11] (15th ed. 1984)). "Success need not be guaranteed." In re Monnier Bros., 755 F.2d 1336, 1341 (8th Cir. 1985).

Debtor has provided evidence that it has sufficient assets and credit facilities to fund the plan. Debtor established that it will receive $52 million in insurance proceeds, that it has access to $40 million from Allied Irish Bank, and that it has additional unrestricted assets on which it can draw if necessary. These assets are more than

sufficient to pay all of the obligations provided for in the plan, including the trusts that will provide a source of payment for unresolved known tort claims and future claims. Therefore, I find debtor has proved that the plan is feasible and is unlikely to be followed by another reorganization or liquidation.

L. § 1129(a)(12)

The plan provides for payment on the effective date of all fees payable under 28 U.S.C. § 1930. Therefore, the plan complies with § 1129(a)(12), which requires that all fees payable under 28 U.S.C. § 1930 have already been paid or will be paid on the effective date of the plan.

M. § 1129(a)(13)

This provision requires that the plan provide for the continuation of retiree benefits at levels that comply with § 1114 for the time the debtor has obligated itself to provide such benefits. I find that this plan provides for the continuation after the effective date of retiree benefits at levels that comply with § 1114, and so meets the requirements of § 1129(a)(13).

N. §§ 1129(a)(14) and 1129(a)(15)

Neither of these provisions of BAPCPA[9] applies to this case, which was commenced before the effective date of BAPCPA. 7 Collier on Bankruptcy ¶ 1129.03[14] n.232 and ¶ 1129.03[15] n.238 (15th ed. Rev. 2005).

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[9] These provisions were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, known as BAPCPA.

O. § 1129(a)(16)

This provision requires that any transfers of property by a non-profit corporation or certain kinds of trust are made in compliance with applicable nonbankruptcy law governing those transfers. There are no provisions in ORS chapter 65, which governs non-profit corporations, that would prevent the transfers of property that are included in this plan. Therefore, the plan complies with this requirement.

2. § 1129(b)

The objecting parties argue that the plan fails to comply with the provisions of § 1129(b). Section 1129(b) provides an alternative to compliance with § 1129(a)(8) with respect to a non-accepting impaired class. As I explained above, all impaired classes have accepted this plan. In fact, they have voted overwhelmingly in favor of it. Therefore, the plan does not need to meet the additional requirements of § 1129(b) with respect to any impaired class. Because § 1129(b) does not apply, the absolute priority rule is not implicated.

Even if class 7 had not accepted the plan, I would find that the plan meets the requirements of § 1129(b) with respect to that class, because the plan provides for payment of the claims in that class in full. It does not discriminate unfairly and is fair and equitable with respect to that class.

CONCLUSION

After several years of pre-bankruptcy litigation, more than two years of post-bankruptcy litigation, and months of intensive mediations, all of the major constituencies who had an interest in this case agreed

on the plan that is before the court for confirmation. It was accepted overwhelmingly by the creditors. All of the known child sexual abuse claims that precipitated the filing of the bankruptcy petition have either been disallowed or are settled and will be paid in full on the effective date of the plan. A trust will provide approximately $20 million to assure payment of tort claims asserted in the future that arise from certain prepetition conduct.

Debtor and the plan proponents have provided evidence that the plan meets all of the requirements of the Bankruptcy Code for confirmation, with the exception of the one change that must be made to the exculpation clause. Therefore, I conclude that, if the exculpation clause in the plan is modified to exclude the liability, if any, of debtor for its actions in making disclosures pursuant to the particular court order referenced above in my discussion, I will confirm the plan. The change in the plan can be made in the confirmation order, which counsel for debtor should submit. I overrule the objecting parties' other objections to the plan.

Counsel for debtor is directed to serve copies of this Memorandum Opinion on all of the plan proponents, the objecting parties, and anyone on the special notice list who is not an ECF Participant.

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cc: Thomas Stilley
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