

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

In re:)	Chapter 11
)	
PROGRESSIVE ACUTE CARE, LLC, <i>et al.</i>)	Case No. 16-50740
)	
Debtors.)	Jointly Administered

**OBJECTION TO JOINT CHAPTER 11 PLAN OF
ORDERLY LIQUIDATION FOR PROGRESSIVE ACUTE CARE, LLC, ET AL.**

COMES NOW, SYSMEX AMERICA, INC. (“Sysmex”), a creditor and party in interest in the bankruptcy of PROGRESSIVE ACUTE CARE, LLC, et al. (the “Debtors”), and hereby files Sysmex’s Objection to Debtors’ Joint Chapter 11 Plan (the “Plan”) of Orderly Liquidation for Progressive Acute Care, LLC, et al. (collectively, the “Objection”) and in support thereof would respectively show the Court as follows:

BACKGROUND AND JURISDICTION

1. The Court has jurisdiction over the Bankruptcy Case and this Objection pursuant to 28 U.S.C. §§157 and 1334. The Objection constitutes a core proceeding pursuant to 28 U.S.C. §157(b)(2). Venue of the Bankruptcy Case and the Objection is properly brought in this District pursuant to 28 U.S.C. §§1408 and 1409.

2. On or about December 31, 2009 (Winn), August 4, 2011 (Dauterive), June 29, 2011 (Oakdale) and June 11, 2012 (Avoyelles), Sysmex provided to Debtors through four (4) separate Cost-Per-Reportable Agreements and related contracts and documents (collectively, the “Subject Agreements”) certain analyzers, equipment and reagents (collectively, the “Subject Equipment”). The Subject Agreements provide that the Debtors shall make certain monthly

payments to Sysmex as set forth in the Subject Agreements. Paragraph 17 of each Subject Agreement provides that Debtors shall be deemed to be in default when Debtors fail to pay when due any amount due under the Subject Agreements. Furthermore, Paragraph 12 of each of the Subject Agreements provides that Sysmex shall retain title to the Subject Equipment during the terms of the Subject Agreements. Paragraph 15 of each Subject Agreement provides that Debtors shall have the option to purchase the Subject Equipment at the expiration of the given term by paying to Sysmex the fair market value of the Subject Equipment. The Debtors have failed to pay Sysmex all amounts due under the Subject Agreements by failing to pay Sysmex certain pre-petition and post-petition amounts due under the Subject Agreements while continuing to operate the Subject Equipment pre- and post-petition and/or transferring possession thereof to third parties. In addition, Debtors have failed to explicitly assume the Subject Agreements or pay all associated cure amounts, despite having transferred possession of the Subject Equipment to the purchaser(s) of Debtors' assets (the "Purchaser") or other third parties and have failed to provide for protection in the Plan of Sysmex's interests in the Subject Equipment.

3. Although lengthy, the Debtors' Disclosure Statement and Plan are silent on how the Debtors plan to pay Sysmex's administrative claim, if any, and protect Sysmex's ownership interest in the Subject Equipment. The Debtors' failure to protect Sysmex's interests in the Subject Equipment, and potential inability to cure the outstanding balance due despite the assignment to the Purchaser of the Subject Equipment, renders the Plan unconfirmable under well-established precedent. In light of the foregoing and for the other reasons more fully set forth

below, Confirmation of Plan should be denied because the Plan is unconfirmable as a matter of law.

RELIEF REQUESTED

4. Sysmex respectfully requests that the Court deny confirmation of Plan because the Plan is unconfirmable.

5. A plan should not be approved if the Debtors' proposed Chapter 11 Plan cannot be confirmed in its present form. *See In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001); *see e.g. In re Monroe Well Service, Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D. N.Y. 1990) (stating that "court will not approve disclosure statement for an admittedly unconfirmable plan"); *In re Seasons Apts, Ltd. Pshp.*, 215 B.R. 953, 955 (Bankr. W.D. La. 1997); *In re Washington Associates*, 147 B.R. 827, 828-29 (E.D.N.Y. 1992); *In re S.E.T. Income Properties, III*, 83 B.R. 791, 792 (Banks. N.D. Okla. 1988).

6. Section 1123(a)(5) of the Bankruptcy Code provides that a Plan shall provide adequate means for its implementation. The absence of an adequate means of implementation demonstrates a lack of good faith under Section 1129(a)(3) thereby precluding confirmation of the Plan. *In Re: Walker*, 165 B.R. 994, 1003 (E.D. Va. 1994).

7. Furthermore, Section 1129(a) of the Bankruptcy Code provides that a Court shall confirm a Plan only if all of the requirements of Section 1129 are met including that the Plan

complies with the applicable provisions of the Bankruptcy Code; the Plan has been proposed in good faith and not by any means forbidden by law; and confirmation 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 by the Plan.

A. The Plan Fails to Satisfy 11 U.S.C. §1129(a)(7)

8. In light of the Purchaser's assumption of the Subject Agreements, it is clear the Debtors deem the Subject Agreements executory contracts. Nonetheless, the Plan fails to protect Sysmex's ownership interest in the Subject Equipment. 11 U.S.C. §1129(a)(7) provides as follows:

(7) With respect to each impaired class of claims or interests -

(A) each holder of a claim or interest of such class --

* * *

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applied to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Although clearly executory in nature, subject to assumption and cure, the Debtors have failed to cure the amounts due under the Subject Agreements. Furthermore, the Plan fails to disclose how Sysmex's interests in the Subject Equipment will be treated or protected. As such, the Plan fails to comply with §1129(a)(7). The Plan as currently drafted provides for no payments to Sysmex pursuant to the Subject Agreements nor does the Plan protect Sysmex's interests in the Subject Equipment. In the event of a Chapter 7 liquidation, Sysmex would be entitled to a return of the Subject Equipment pursuant to its ownership interest. Clearly, the Plan's failure to provide for payments to Sysmex in the full amount due or the return of the Subject Equipment is less than what Sysmex would receive in a Chapter 7 liquidation. Similarly, pursuant to 11 U.S.C. §1129(7)(B), the Plan provides to Sysmex value that is less than the value of Sysmex's ownership interest. Since the Plan provides for nothing to Sysmex, which is clearly less than what it would receive in a Chapter 7 liquidation, and less than the value of its interests, the Plan cannot be confirmed. 11 U.S.C. §1129(a)(7).

B. The Plan Fails To Provide For Timely Payment of Sysmex's Administrative Expense Claims

9. The Plan does not provide for the full payment of Sysmex's administrative claim. The Debtors and/or the Purchaser have been using the Subject Equipment on a post-petition basis and have neither paid Sysmex fully for such use nor has the Debtor provided in the Plan for the payment of said administrative expenses.

10. The Debtors' inability to satisfy Sysmex's administrative claim in full, in cash, renders the Plan unconfirmable under Sections 1129(a)(9) and (a)(11) of the Bankruptcy Code. Section 1129(a)(9)(A) allows a plan to be confirmed only if administrative claims of the kind specified in Section 507(a)(2) or 507(a)(3) of the Bankruptcy Code receive payment in full in

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cash on the effective date of the plan, unless the holders of an administrative claim agrees otherwise. *See e.g., In re Armstrong World Indus., Inc.*, 348 B.R. 136, 166 (Bankr. D. Del. 2006); *In re Forklift LP Corp.*, 363 B.R. 388, 397 (Bankr. D. Del. 2007). Section 507(a)(2) includes administrative claims allowed under Section 503(b), including claims for goods received by the debtors within 20 days of the commencement of a case under Section 503(b)(9) - such as Sysmex's 503(b)(9) Claim - and the "actual, necessary costs and expenses of preserving the estate" under Section 503(b)(1)(A) - such as Sysmex's administrative expense claim for Debtors' and Purchaser's full post-petition use of the Subject Equipment. Thus, without the ability to satisfy Sysmex's administrative expense claim and 503(b)(9) claim in full, in cash, the Plan is patently unconfirmable.

11. Further, "[f]easibility [of a plan of reorganization] is a mandatory requirement for confirmation [thereof]." *In re Made in Detroit, Inc.*, 299 B.R. 170, 175 (Bankr. E.D. Mich. 2003); *see also In re U.S. Truck Co., Inc.*, 800 F.2d 581, 588-89 (6th Cir. 1986); *In re The Christian Faith Assembly*, 402 B.R. 794, 800 (Bankr. N.D. Ohio 2009) ("Feasibility of a Chapter 11 plan is essential to confirmation"). A plan is feasible only if it "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." 11 U.S.C. §1129(a)(11). Section 1129(a)(1) "prevents confirmation of visionary schemes beyond the financial wherewithal of the debtor or, in other words, outside a reasonable probability of success." *In re Kent Terminal Corp.*, 166 B.R. 555, 560 (Bankr. S.D. N.Y. 1994) (citations and internal quotations omitted).

12. While a plan of reorganization does not need to guarantee success, it must provide reasonable assurance of success. Courts have identified a number of factors relevant to evaluation of the feasibility of a proposed plan of reorganization, including: (a) the adequacy of the reorganized debtor's capital structure; (b) the earning power of the business; (c) prevailing macroeconomic conditions; (d) the ability of management; (e) the probability of the continuation of the same management; (f) the availability of prospective credit, both capital and trade; and (g) any other matter bearing on the successful operation of the business to enable performance with the provisions of the plan. *See e.g., In re Temple Zion*, 125 B.R. 910, 915 (Bankr. E.D. Pa. 1991); accord *In re Leslie Fay*, 207 B.R. 764, 788 (Bankr. S.D. N.Y. 1997). The foregoing list is neither exhaustive nor exclusive. *See In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 763 (Bankr. S.D. N.Y. 1992).

13. Accordingly, in order for the Debtors to be able to confirm the Plan as a matter of law, the Debtors must be able to, at a minimum, (a) pay in full, in cash, on the Effective Date both Sysmex's 503(b)(9) Claim and its other administrative expense claims; (b) establish that after considering, among other things, payment in full of all allowed administrative expense claims on the Effective Date, the Plan is feasible; and (c) pay in full the cure amounts due relative to the assumption and assignment of the Subject Agreements.

14. The Plan contains information and projections regarding the Debtor's post-consummation cash and the assumed payments thereunder, which understate the likely liability of the Debtor's estates on account of cash payments required to be made on the Effective Date

under the Plan. Sysmex believes that the Debtor, based on its own cash estimates, does not have sufficient cash on hand to satisfy Sysmex's and other creditors' administrative expense claims.

RESERVATION OF RIGHTS

Sysmex expressly reserves any and all of its rights to supplement and amend this Objection, seek discovery with respect to same, and introduce evidence at any hearing relating to this Objection or to consider the Confirmation of Plan, and without in any way limiting any other rights that Sysmex may have.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Objection to Joint Chapter 11 Plan of Orderly Liquidation for Progressive Acute Care, LLC, et al., was served on the 20th of June, 2017, by the electronic case filing system for the United States Bankruptcy Court for the Western District of Louisiana to all parties required to be served, and by United States Mail to the following:

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