

DEC 21 2009

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-09-1183-DHPa  
 )  
 SANITEC INDUSTRIES, INC., ) Bk. No. SV 07-12307-MT  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 MICRO-WASTE CORPORATION, )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 SANITEC INDUSTRIES, INC.; )  
 UNITED STATES TRUSTEE, )  
 WOODLAND HILLS; OFFICIAL )  
 COMMITTEE OF UNSECURED )  
 CREDITORS, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Argued and Submitted on November 19, 2009  
at Pasadena, California

Filed - December 21, 2009

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

Before: DUNN, HOLLOWELL and PAPPAS, Bankruptcy Judges.

Micro-Waste Corporation ("MWC") appeals the bankruptcy  
court's order confirming the chapter 11 plan of the debtor,

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Sanitec Industries, Inc.<sup>2</sup> MWC appeals on the grounds that:  
2 (1) the plan does not provide the appropriate rate of interest on  
3 unsecured claims for purposes of the "best interest of creditors"  
4 test under § 1129(a)(7); (2) the plan contains an overly broad  
5 exculpation provision that shields the debtor against liability  
6 for its negligence postpetition; and (3) the debtor solicited  
7 acceptances of the chapter 11 plan using a disclosure statement  
8 that included a liquidation analysis that was false and  
9 misleading. For the reasons set forth below, we AFFIRM.

10  
11 **I. FACTS**

12 A. The early stages of the debtor's bankruptcy

13 The debtor operated a business manufacturing and selling  
14 medical waste disinfection units ("manufacturing business"). The  
15 debtor owned a patent, trademarks and other intellectual property  
16 relating to the medical waste disinfection units. The debtor  
17 also operated, through subsidiaries,<sup>3</sup> a medical waste processing  
18 business ("waste processing business").

19 On July 30, 2004, the debtor commenced an action against MWC  
20 in the United States District Court for the Southern District of  
21 Texas alleging that MWC infringed the debtor's patent and  
22 trademarks by fraudulently obtaining a license for them. MWC  
23 initiated a counterclaim alleging, among other things, that the

24 \_\_\_\_\_  
25 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 <sup>3</sup> The debtor owns the following subsidiaries: Sanitec USA,  
28 Inc., North State Specialty Waste, Inc., Sanitec Safewaste, LLC,  
and Sanitec Indiana, Inc.

1 patent was not valid. After trial, the district court found that  
2 both the patent and license were valid and awarded MWC \$665,050  
3 in damages,<sup>4</sup> plus interest at a rate of 5.05% per annum  
4 ("district court judgment"). The federal circuit court later  
5 affirmed the district court on appeal.<sup>5</sup>

6 MWC attempted to execute on the district court judgment.  
7 The debtor consequently filed for chapter 11 relief on  
8 July 5, 2007.

9 On August 28, 2008, the debtor and its subsidiaries sold the  
10 waste processing business, along with substantially all of the  
11 subsidiaries' assets ("sale"),<sup>6</sup> to Stericycle, Inc.  
12 ("Stericycle"), for \$18,050,000 ("purchase price"). Stericycle  
13 agreed to pay \$5,294,818 in cash at closing and the balance of  
14 the purchase price pursuant to two promissory notes ("Notes") in  
15 the amounts of \$6,175,000 ("Note A") and \$6,625,000 ("Note B")  
16 respectively. The Notes were payable in ten annual installments  
17 ("annual note payments") with interest at 3% per annum. The  
18 Notes were fully secured by two letters of credit.

19 In connection with the sale, the debtor entered into a  
20 transition services agreement ("TSA") with Stericycle. Under the  
21 TSA, the debtor agreed to continue operating the waste processing  
22 business during the transfer of the waste processing business to  
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24 <sup>4</sup> The damages award consisted of \$584,550 in fees and  
25 \$80,500 in costs, plus interest thereon.

26 <sup>5</sup> The debtor did not appeal the federal circuit court's  
27 decision.

28 <sup>6</sup> The sale only involved the assets of Sanitec USA, Inc.,  
Sanitec Safewaste, LLC and North State Specialty Waste, Inc.

1 Stericycle. The TSA was to terminate on the earlier of September  
2 30, 2008 or five business days after Stericycle obtained the  
3 necessary permits and informed the debtor it was prepared to  
4 assume operations of the waste processing business ("transition  
5 period").

6 Concurrently with the sale, the debtor and the official  
7 committee of unsecured creditors ("committee") entered into a  
8 stipulation ("stipulation") which allowed the debtor to use some  
9 of the sale proceeds to fund the operation of its manufacturing  
10 business and to fund its chapter 11 reorganization plan, among  
11 other things. In exchange, the debtor granted the committee a  
12 first-priority security interest in its remaining assets,  
13 including the Notes, for the benefit of unsecured creditors.<sup>7</sup>

14 On October 1, 2007, MWC filed a general unsecured claim in  
15 the amount of \$1,705,882.90, based on the amount of the district  
16 court judgment and additional fees and costs. MWC later amended  
17 its proof of claim to reduce its general unsecured claim to  
18 \$1,427,262.46. The bankruptcy court temporarily allowed MWC's  
19 claim in the amount of \$676,643.73 for purposes of voting on the  
20 debtor's plan.

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24 <sup>7</sup> Under the stipulation, the debtor agreed to assign Note B  
25 and its accompanying letter of credit to Broadway Advisors, LLC  
26 ("Broadway"), the disbursing agent on behalf of the committee.  
27 The debtor also agreed to deliver Note A and its accompanying  
28 letter of credit, along with an assignment of Note A and the  
letter of credit ("assignment"), to the committee; under the  
assignment, in the event of a default by the debtor, the  
committee could foreclose upon and exercise its rights to  
transfer Note A and the letter of credit to Broadway.

1 B. The debtor's multiple proposed plans and disclosure  
2 statements

3 The debtor filed a total of five chapter 11 plans and  
4 disclosure statements.<sup>8</sup> The provisions of the chapter 11 plans  
5 and disclosure statements have not varied much. In nearly all of  
6 the chapter 11 plans and disclosure statements, the debtor  
7 proposed payment of general unsecured creditors' claims in full  
8 over time.

9 The debtor proposed to use the annual note payments to fund  
10 the operations of its manufacturing business and to make payments

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11 <sup>8</sup> On October 31, 2007, the debtor filed its first chapter 11  
12 plan ("October 2007 plan") and disclosure statement ("October  
13 2007 disclosure statement") (collectively, "October 2007 plan and  
14 disclosure statement") (main case docket nos. 62 and 63). On  
15 September 26, 2008, the debtor filed its first amended chapter 11  
16 plan, dated September 26, 2008 ("September 2008 plan") and  
17 disclosure statement ("September 2008 disclosure  
18 statement") (collectively, "September 2008 plan and disclosure  
19 statement") (main case docket nos. 207 and 209). On  
20 November 24, 2008, the debtor filed its revised first amended  
21 chapter 11 plan, dated November 24, 2008 ("November 2008 plan")  
22 and disclosure statement ("November 2008 disclosure  
23 statement") (collectively, "November 2008 plan and disclosure  
24 statement") (main case docket nos. 267 and 265). On January 7,  
25 2009, the debtor filed its further revised first amended  
26 chapter 11 plan, dated November 24, 2008 ("Initial January 2009  
27 plan") and disclosure statement ("Initial January 2009 disclosure  
28 statement") (collectively, "Initial January 2009 plan and  
disclosure statement") (main case docket nos. 295 and 296). On  
January 20, 2009, the debtor filed its ultimate revised first  
amended chapter 11 plan, dated November 24, 2008 ("Final  
January 2009 plan") and disclosure statement ("Final January 2009  
disclosure statement") (collectively, "Final January 2009 plan and  
disclosure statement") (main case docket nos. 302 and 303).

The two chapter 11 plans and disclosure statements at issue  
before us in this appeal are the Initial January 2009 plan and  
disclosure statement and the Final January 2009 plan and  
disclosure statement.

1 to creditors.<sup>9</sup> Specifically, the debtor proposed to pay the  
2 first \$1,000,000 of the annual note payments to creditors, the  
3 next \$130,000 to the debtor, the next \$130,000 to creditors, and  
4 the balance of the annual note payments to the debtor.<sup>10</sup> The  
5 debtor also proposed to fund the plan with excess cash<sup>11</sup> from the  
6 operations of its manufacturing business and waste processing  
7 business through its remaining subsidiary, Sanitec Indiana, Inc.  
8 (collectively, "manufacturing and processing businesses").<sup>12</sup> The  
9 debtor proposed to use revenue from its manufacturing and  
10 processing businesses to fund any deficiency resulting from  
11 Stericycle's failure to make any annual note payment or if the  
12 annual note payments, plus the debtor's excess cash, totaled less  
13 than \$800,000.

14 Nearly all of the chapter 11 plans and disclosure statements  
15 shared three aspects to which MWC objected repeatedly: the rate  
16 of interest to be paid to general unsecured creditors on their  
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18 <sup>9</sup> However, the October 2007 plan and disclosure statement  
19 proposed to fund the plan through future sales of the debtor's  
20 products, licenses of its intellectual property, repayments of  
21 various loans made to the debtor's subsidiaries, loans to the  
22 debtor and equity investments in the debtor.

23 <sup>10</sup> The September 2008 plan and disclosure statement did not  
24 disclose the amounts to be paid by Stericycle under the sale or  
25 the amounts of the annual note payments to be allotted to the  
26 creditors and to the debtor, respectively.

27 <sup>11</sup> The debtor defined "excess cash" as 20% of the cash in  
28 excess of \$1,000,000 held by the debtor thirty days prior to a  
given annual distribution date.

<sup>12</sup> The debtor first proposed to use proceeds from the  
operations of its manufacturing and processing businesses in its  
November 2008 plan and disclosure statement.

1 claims,<sup>13</sup> the liquidation analysis,<sup>14</sup> and the scope of the  
2 exculpation clause.<sup>15</sup>

3 The rate of interest to be paid to general unsecured  
4 creditors on their claims varied from plan to plan. In the  
5 November 2008 plan and disclosure statement, the debtor proposed  
6 interest at 3% per annum, starting on the effective date. In the  
7 Initial January 2009 plan and disclosure statement and Final  
8 January 2009 plan and disclosure statement, the debtor reduced  
9 the interest rate to 1.5% per annum.

10 The debtor included a liquidation analysis in its October  
11 2008 disclosure statement, but did not include a liquidation  
12 analysis in the next three disclosure statements. The debtor  
13 finally included a liquidation analysis as an exhibit (Exhibit 6)  
14 in its Final January 2009 disclosure statement.

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17 <sup>13</sup> Only the September 2008 plan did not provide for payment  
18 of interest on general unsecured claims.

19 <sup>14</sup> MWC initially objected to the September 2008 disclosure  
20 statement, the November 2008 disclosure statement and the Initial  
21 January 2009 disclosure statement on the ground that they did not  
22 include a liquidation analysis. As we explain more fully later,  
23 when the debtor finally included a liquidation analysis in the  
24 Final January 2009 disclosure statement, MWC objected to the  
25 Final January 2009 disclosure statement on the ground that the  
26 liquidation analysis was inaccurate and misleading.

27 <sup>15</sup> Unlike the plans and disclosure statements following it,  
28 the October 2007 plan and disclosure statement simply stated  
that, "upon substantial consummation of the Plan, Debtor shall be  
discharged of liability for payment of debts incurred before  
confirmation of the Plan, to the extent specified in 11 U.S.C.  
§ 1141. However, any liability imposed by the Plan will not be  
discharged."

1 The exculpation clause remained the same in nearly all of  
2 the debtor's plans and the disclosure statements.<sup>16</sup> The  
3 exculpation clause provided:

4 As of the Effective Date, the Debtor shall neither have  
5 nor incur any liability for, and is expressly  
6 exculpated and released from, any claims (including,  
7 without limitation, any claims whether known or  
8 unknown, foreseen or unforeseen, then existing or  
9 thereafter arising, in law, equity or otherwise) for  
10 any actions taken or omitted to be taken under or in  
11 connection with, related to, effecting, or arising out  
12 of the following: (1) the negotiation, documentation,  
13 preparation, dissemination, implementation,  
14 administration, confirmation, or consummation of the  
15 Plan and the Disclosure Statement; (2) the negotiation,  
16 documentation, preparation and consummation of the  
17 Stipulation and the transactions giving rise to the  
18 Security Interest; or (4) the liquidation of any  
19 Litigation<sup>17</sup> or the distribution of property to be  
20 distributed under the Plan; except only for actions or  
21 omissions to act to the extent determined by a court of  
22 competent jurisdiction (in a Final Order) to be by  
23 reason of such party's gross negligence, willful  
24 misconduct, or fraud. It being expressly understood

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16 <sup>16</sup> The September 2008 plan and disclosure statement included  
17 an exculpation clause that released the debtor, its officers,  
18 directors, employees, agents, representatives, shareholders and  
19 professionals from liability for any claims for actions taken or  
20 not taken in connection with the plan and disclosure statement,  
21 the sale and the stipulation, the liquidation of any litigation  
22 claims or the distribution of any property under the plan, except  
23 for actions or omissions resulting from gross negligence, willful  
24 misconduct or fraud. The debtor later removed all references to  
25 the release or discharge of any non-debtor person or entity from  
26 the exculpation clause.

23 <sup>17</sup> The Final January 2009 plan defines "Litigation" as:

24 [T]he interest of the Debtor and/or the Estate in any and  
25 all claims, rights and causes of action that may exist under  
26 bankruptcy or non-bankruptcy law, whether arising prior to or  
27 after the Petition Date, for which a court or administrative  
28 action has been or may be commenced by the Debtor or other  
authorized Estate representative, whether asserted or unasserted,  
and the proceeds thereof, including, but not limited to, all  
Avoidance Actions and Claim Objections.

1 that any act or omission with the approval of the  
2 Bankruptcy Court will be conclusively deemed not to  
3 constitute gross negligence, willful misconduct, or  
4 fraud unless the approval of the Bankruptcy Court was  
5 obtained by fraud or misrepresentation.

6 C. Approval of the debtor's disclosure statement

7 Shortly before the January 12, 2009 hearing on the  
8 November 2008 disclosure statement, the debtor filed the Initial  
9 January 2009 plan and disclosure statement. At the hearing, the  
10 bankruptcy court approved the Initial January 2009 disclosure  
11 statement, subject to the debtor amending it. Among the  
12 amendments, the debtor was required to include a liquidation  
13 analysis setting forth the estimated values of its assets,  
14 explanations as to those values and the estimated distribution to  
15 creditors. The bankruptcy court further required the debtor to  
16 serve the plan, the disclosure statement and a ballot on all  
17 creditors entitled to vote on the plan by January 20, 2009.

18 A week later, the debtor filed the Final January 2009 plan  
19 and disclosure statement. On the same day, the debtor served on  
20 creditors the Final January 2009 plan and disclosure statement,  
21 along with a ballot and a notice of the plan confirmation  
22 hearing.

23 As noted earlier, the debtor included a liquidation analysis  
24 in the Final January 2009 disclosure statement. In the  
25 liquidation analysis, the debtor listed assets with an estimated  
26 total liquidation value of \$6,923,696.09. The debtor estimated  
27 the liquidation value of Note A at \$3,087,500 and Note B at  
28 \$3,312,500. The debtor explained that it reduced the principal  
balance of the Notes by 50% to account for claims by Stericycle

1 against the debtor for the breach of the TSA that would occur if  
2 the debtor were to liquidate. The debtor also explained that the  
3 estimated liquidation values of the notes were subject to further  
4 reduction based on the risk associated with Stericycle's ability  
5 to make the annual note payments and other claims Stericycle may  
6 assert against the debtor in connection with the sale. The  
7 debtor noted that it also based the liquidation value of the  
8 Notes on the assumption that there would be a willing buyer of  
9 the Notes, that Broadway, as the secured party, would consent to  
10 the sale, and that the buyer would demand a "steep discount"  
11 because of the 10-year repayment period and the 3% interest.

12 The debtor estimated a total of \$1,585,600 in administrative  
13 expenses, priority tax and secured claims and a total of  
14 \$8,600,000 in unsecured claims. After paying the administrative  
15 expenses, priority tax and secured claims, the debtor estimated  
16 it would have \$5,338,096.09 remaining in liquidation to pay  
17 unsecured claims, which would result in a 62.07% payout on  
18 unsecured claims.

19 Three days after filing the Final January 2009 plan and  
20 disclosure statement, the debtor filed a proposed order  
21 ("proposed order") approving the Final January 2009 disclosure  
22 statement. MWC did not object to the proposed order.

23 On February 3, 2009, the bankruptcy court entered the order  
24 approving the Final January 2009 disclosure statement ("approval  
25 order"). Under the approval order, the bankruptcy court  
26 determined that the Final January 2009 disclosure statement  
27 contained adequate information under § 1125(b). The bankruptcy  
28 court scheduled the plan confirmation hearing and set various

1 deadlines, including a deadline of February 20, 2009 for the  
2 debtor to file its brief in support of plan confirmation.

3  
4 D. Confirmation of the debtor's plan

5 On February 9, 2009, before the debtor filed its motion for  
6 confirmation ("confirmation motion") of the Final January 2009  
7 plan, MWC filed its opposition to confirmation of the Final  
8 January 2009 plan ("opposition").<sup>18</sup> MWC served the opposition on  
9 all creditors.<sup>19</sup>

10 In the opposition, MWC called upon creditors to reject the  
11 Final January 2009 plan. MWC contended that the debtor's  
12 liquidation analysis was "grossly inaccurate and misleading."  
13 MWC accused the debtor of intentionally depressing the value of  
14 its assets "to create the appearance" that creditors would be  
15 better off voting in favor of the Final January 2009 plan in  
16 order to continue operating its manufacturing and processing  
17 businesses.

18 Specifically, MWC claimed that the debtor exaggerated the  
19 amount of chapter 7 administrative expenses and the amounts of  
20 unsecured claims. MWC further claimed that the debtor unduly  
21 deflated the value of the Notes, while its justifications for its  
22 valuations were "nonsensical." MWC asserted that the debtor  
23 misrepresented the effect of a chapter 7 liquidation on the TSA.  
24 First, MWC noted, the TSA was not a long-term arrangement as it

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26 <sup>18</sup> MWC repeated the arguments it made in the opposition in  
27 its briefs before us.

28 <sup>19</sup> At oral argument, counsel for MWC confirmed that MWC  
served its opposition on all creditors.

1 was set to terminate on the earlier of September 30, 2008 or five  
2 business days after Stericycle obtained the necessary permits to  
3 operate the waste processing business. In fact, MWC claimed, the  
4 TSA already had terminated as the September 30, 2008 deadline had  
5 passed by the time that the Final January 2009 disclosure  
6 statement was approved. Additionally, it would not take long for  
7 Stericycle, as one of the world's largest medical waste  
8 processing companies, to obtain the required permits and prepare  
9 to assume operations of the waste processing business.

10 Second, MWC asserted that there was little or no risk that  
11 the immediate liquidation of the debtor would cause a breach of  
12 the TSA in a way that would create a substantial setoff claim  
13 against the annual note payments. Stericycle already had been  
14 operating two of the debtor's waste processing facilities and had  
15 shut down other waste processing facilities. Accordingly, MWC  
16 claimed, there was little risk of the debtor breaching the TSA  
17 for failing to continue operating the waste processing business.

18 Finally with respect to the TSA, MWC claimed, given that the  
19 debtor, as debtor-in-possession (or trustee), had fiduciary  
20 duties to the estate and its creditors, it would not breach the  
21 TSA; the debtor or the trustee simply would wait for Stericycle  
22 to obtain the permits.

23 MWC also contended that the debtor exaggerated the risk  
24 associated with Stericycle's potential failure to make the annual  
25 note payments. Two letters of credit backed the Notes. Even if  
26 a risk of non-payment existed, MWC continued, it would exist  
27 under the Final January 2009 plan as much as it would in a  
28 chapter 7 liquidation.

1 MWC contested the debtor's assertion that certain risks  
2 necessitated reducing the Notes' value in its liquidation  
3 analysis. Aside from the TSA, the debtor had no known ongoing  
4 obligations to Stericycle under the sale that, if breached, would  
5 lead to additional claims.

6 MWC further argued that a chapter 7 liquidation of the  
7 debtor did not mean that the Notes would have to be sold. A  
8 trustee or other liquidating agent simply could wait for the  
9 annual note payments to be made and then use the entire amount of  
10 the annual note payments to pay creditors.

11 MWC contended that the Final January 2009 plan proposed to  
12 allow the debtor to use a substantial portion of the annual note  
13 payments that otherwise could be used to pay unsecured creditors  
14 more quickly. In the first four years of the Final January 2009  
15 plan, MWC claimed, the debtor stood to receive \$2,077,500 that  
16 creditors could otherwise receive in a chapter 7 liquidation.  
17 Even though the debtor proposed to supplement the annual note  
18 payments by providing its excess cash, MWC complained that it was  
19 unlikely the debtor would provide any excess cash, as the  
20 debtor's manufacturing and processing businesses were speculative  
21 and the debtor proposed to retain 80% of all cash over  
22 \$1,000,000.

23 Moreover, MWC argued, the Final January 2009 plan could not  
24 be confirmed because it did not satisfy the "best interest of  
25 creditors" test. In a chapter 7 liquidation, creditors would be  
26 entitled to receive interest on their claims from the petition  
27 date under § 726(a)(5), not from the effective date as the debtor  
28 proposed in the Final January 2009 plan.

1 Also, MWC pointed out, the debtor proposed to pay only 1.5%  
2 interest per annum on creditors' claims, even though the  
3 applicable interest rate was the federal judgment interest rate  
4 of 5.02% in effect as of the petition date. Citing  
5 In re Cardelucci, 285 F.3d 1231, 1234 (9th Cir. 2002), MWC  
6 asserted that interest at the legal rate under § 726(a)(5) meant  
7 the federal judgment interest rate under 29 U.S.C. § 1961.  
8 Because interest must be paid from the petition date, the federal  
9 judgment interest rate in effect as of the petition date would be  
10 the appropriate rate.

11 MWC additionally contended that the exculpation clause in  
12 the Final January 2009 plan improperly sought to insulate the  
13 debtor from liability for postpetition conduct. Although the  
14 Final January 2009 plan allowed creditors to seek revocation of  
15 the confirmation order if it had been procured by fraud, the  
16 exculpation clause could be read as precluding claims for the  
17 debtor's postpetition negligence.

18 On February 20, 2009, the debtor filed its confirmation  
19 motion. In its confirmation motion, the debtor proposed  
20 modifying the Final January 2009 plan to provide for an interest  
21 rate of 2.42% per annum from the petition date to the effective  
22 date,<sup>20</sup> and an interest rate of 2% from the effective date onward  
23 (collectively, "compromise interest rate"). The debtor explained  
24 that it reached the compromise interest rate after negotiating  
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28 <sup>20</sup> The debtor noted that the 2.42% interest rate constituted  
the mean week-ending federal post-judgment interest rate since  
the petition date under 28 U.S.C. § 1961.

1 with the committee in order to avoid further litigation regarding  
2 plan confirmation.

3 The debtor reported that all impaired classes voted to  
4 accept the Final January 2009 plan. Class 4, which consisted of  
5 general unsecured claims not otherwise classified, was the only  
6 impaired class that did not vote unanimously to accept the Final  
7 January 2009 plan. Within class 4, only two creditors voted to  
8 reject the Final January 2009 plan, one of which was MWC.

9 On March 16, 2009, the debtor filed a motion to approve non-  
10 material modifications to the Final January 2009 plan ("motion to  
11 modify") seeking, among other things, to incorporate the  
12 compromise interest rate.

13 The bankruptcy court granted the debtor's motion to modify  
14 at a hearing on April 7, 2009, deciding that the debtor's  
15 proposal to modify the interest rate payment on general unsecured  
16 claims in the Final January 2009 plan was permissible and non-  
17 material. The bankruptcy court determined that the compromise  
18 interest rate did not adversely affect creditors; rather, the  
19 compromise interest rate benefitted them. The bankruptcy court  
20 found that the compromise interest rate was "more than the  
21 creditors would get otherwise under the liquidation analysis.  
22 And [it was] certainly an improvement over what the creditors  
23 thought they were responding to in the [Final January 2009]  
24 disclosure statement." Tr. of April 7, 2009 Hr'g, 21:5-9.

25 At the confirmation hearing on April 13, 2009, counsel for  
26 the debtor informed the bankruptcy court that, for reasons  
27 unknown, Stericycle had not determined that the transition period  
28 had ended. Stericycle had discretion, however, in determining

1 when the TSA was completed. Counsel for the debtor believed,  
2 however, that, even if the debtor defaulted under the TSA,  
3 Stericycle would not have a sizeable setoff claim against it,  
4 given that several months had passed; what might have been a  
5 serious concern at the time of the filing of the disclosure  
6 statement was no longer as serious a concern as "a lot less work,  
7 a lot less of the [Stericycle transfer], had occurred at that  
8 point in time." Tr. of April 13, 2009 Hr'g, 20:23-24.

9 Counsel for the debtor also stated that "probably  
10 liquidation at this time would still result in payment to  
11 creditors, [though it would] not be any quicker, because payments  
12 [would] still have to occur . . . ." Tr. of April 13, 2009 Hr'g,  
13 21:2-5.

14 The bankruptcy court questioned whether it needed to  
15 evaluate the liquidation values set forth in the liquidation  
16 analysis in order to determine the appropriate interest rate for  
17 purposes of the "best interest of creditors" test.

18 Counsel for the debtor answered that the finding that the  
19 bankruptcy court had to make regarding the appropriate interest  
20 rate "[didn't] have anything to do with the liquidation value of  
21 the assets." Tr. of April 13, 2009 Hr'g, 24:5-6.

22 Instead, counsel for the debtor continued,

23 I think it has to do with an appropriate and fair  
24 interest rate, because the issue is only whether the  
25 Debtor's plan proposes to pay creditors at least as  
26 much as they would receive in liquidation.

27 So, if we just take and, you know, put aside any  
28 analysis, if we just look at - if the Debtor says, you  
know, for purposes of this argument, our creditors are  
going to receive 100-percent payment in liquidation,  
what the Debtor's plan has to do is provide for 100-  
percent payment plus a fair and appropriate interest  
rate, and that's the argument, your Honor, is that we  
don't need to look at the underlying numbers, because

1 the underlying numbers are only important if the  
liquidation value is under 100 percent.

2 Once the liquidation value is 100 percent, then  
3 the Debtor has no choice but to pay a fair amount of  
interest . . . .

4 Tr. of April 13, 2009 Hr'g, 24:6-21.

5 The bankruptcy court ultimately determined that the  
6 compromise interest rate was appropriate. In coming to its  
7 determination, the bankruptcy court explained:

8 The test is whether or not the creditors are  
9 receiving as much as they would receive in a  
liquidation, and here there's a real doubt whether, if  
10 there were a liquidation, it would come out the same,  
even though it's close, and at this point, the  
liquidation should give as much.

11 It is not clear that there wouldn't be a discount,  
12 and the litigation costs have to be taken into  
consideration, and, given that the payment over time is  
13 with interest, I think the compromise struck by the  
committee is appropriate . . . and gives the creditors  
14 as much as they otherwise would receive. So I'm going  
to go with that.

15 Tr. of April 13, 2009 Hr'g, 41:4-19.

16 Counsel for MWC claimed that counsel for the debtor had  
17 "acknowledged [at the hearing] that creditors would be paid in  
18 full in a liquidation." Tr. of April 13, 2009 Hr'g, 45:18-19.  
19 Counsel for MWC further contended that, if creditors "knew there  
20 [sic] were going to get paid in a liquidation in full, and that  
21 the liquidation analysis has changed materially, they might  
22 [have] cast their ballot[s] differently on the plan." Tr. of  
23 April 13, 2009 Hr'g, 45:21-24. Counsel for MWC therefore  
24 requested that the bankruptcy court decline to confirm the Final  
25 January 2009 plan and "require a re-solicitation of creditors[']  
26 [votes] based upon very significant material information which is  
27 now different." Tr. of April 13, 2009 Hr'g, 46:1-3.

1 Counsel for MWC further contended that the "best interest of  
2 creditors" test was not satisfied because, even though it  
3 provided for payment of claims in full, the Final January 2009  
4 plan did not pay creditors quickly. Counsel for MWC argued that,  
5 in order for the "best interest of creditors" test to be met,  
6 creditors must not only be paid a sufficient amount, but they  
7 also must be paid within a reasonable time. If creditors could  
8 be paid more quickly in a chapter 7 liquidation than in a  
9 chapter 11 reorganization, counsel for MWC claimed, then the  
10 chapter 11 plan should not be confirmed.

11 Counsel for MWC also argued that the exculpation clause  
12 should not extend to any claims MWC may have arising out of a  
13 pending adversary proceeding. Counsel for MWC acknowledged that,  
14 although the debtor was entitled to a discharge for postpetition  
15 conduct under § 1141(d), that discharge should not apply to  
16 claims arising out of the pending adversary proceeding, given  
17 that the adversary proceeding was ongoing, and no determination  
18 had been made as to the amounts of claims stated therein.  
19 Counsel for MWC asked that the bankruptcy court limit the  
20 exculpation clause to provide that the discharge did not extend  
21 to issues that MWC had pending against the debtor in the  
22 adversary proceeding.

23 After hearing the arguments advanced by the parties, the  
24 bankruptcy court made findings on the record. It ultimately  
25 determined that all the requirements for plan confirmation had  
26 been met and granted the debtor's confirmation motion.

27 Among its oral findings, the bankruptcy court found that  
28 service of the Final January 2009 plan was adequate. With

1 respect to the exculpation clause, the bankruptcy court  
2 determined that it was neither too broad nor overreaching. It  
3 found that the exculpation clause tracked the releases and  
4 exculpations provided for under the Bankruptcy Code. As to  
5 whether it extended to the issues MWC had pending against the  
6 debtor in the adversary proceeding, the bankruptcy court  
7 concluded that the exculpation clause did not "obviate[] them."  
8 Tr. of April 13, 2009 Hr'g, 94:8. The bankruptcy court decided  
9 that it would deal with such issues in the course of the  
10 adversary proceeding.

11 As to the liquidation analysis, the bankruptcy court noted  
12 that the assets already had been liquidated. The bankruptcy  
13 court explained that the completion of the Stericycle transfer  
14 required the debtor to continue operations for a period; without  
15 the TSA, there would be "no clear recovery at this time  
16 immediately for the estate, and there [was] a good recovery under  
17 the plan, and the Debtor [was] allowed to reorganize under  
18 Chapter 11." Tr. of April 13, 2009 Hr'g, 94:22-25.

19 The bankruptcy court further found that the interest rate  
20 proposed by the debtor was favorable. The bankruptcy court  
21 determined that the timing as to when creditors received payment  
22 did not preclude confirmation. The bankruptcy court concluded  
23 that the amounts and the interest paid were sufficient under the  
24 Code.

25 The bankruptcy court further determined that there were no  
26 changes in circumstances that required the re-solicitation of  
27 ballots. It noted that the chapter 11 case involved an operating  
28 debtor, and the market and business were subject to change. The

1 bankruptcy court pointed out that there were often business  
2 developments during the time between approval of the disclosure  
3 statement and voting on the plan. It concluded that "there [was]  
4 no reason to go back and [re-solicit] [votes]" because no  
5 creditor appeared asking to change its vote in light of these  
6 changed circumstances. Tr. of April 13, 2009 Hr'g, 96:16-18.

7 The bankruptcy court found that the "best interest of  
8 creditors" test under § 1129(a)(7) was satisfied as each member  
9 of the impaired classes accepted the plan or that each class  
10 member would receive at least as much through the chapter 11 plan  
11 as in a chapter 7 liquidation, taking into consideration the  
12 payments to creditors over time under the plan.

13 On May 12, 2009, the bankruptcy court entered its findings  
14 of fact, conclusions of law and order confirming the Final  
15 January 2009 plan ("confirmation order").

16 MWC appeals the confirmation order.

## 17 18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C.  
20 §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C.  
21 § 158.

## 22 23 **III. ISSUES**

24 (1) Did the bankruptcy court err in determining that the  
25 compromise interest rate was appropriate for purposes of  
26 satisfying the "best interest of creditors" test under  
27 § 1129(a)(7)?  
28

1 (2) Did the bankruptcy court err in determining that the  
2 exculpation provision was reasonable and in compliance with  
3 applicable provisions of the Bankruptcy Code for purposes of  
4 § 1129(a)(1)?

5 (3) Did the bankruptcy court err in determining that the  
6 debtor complied with § 1129(a)(2) when it solicited acceptances  
7 of the Final January 2009 plan using a disclosure statement  
8 earlier approved by the bankruptcy court as containing "adequate  
9 information" within the meaning of § 1125(b)?

## 10 11 VI. STANDARDS OF REVIEW

12 We review the bankruptcy court's decision to confirm a  
13 chapter 11 reorganization plan for an abuse of discretion.  
14 Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177,  
15 184 (9th Cir. BAP 2003). We apply a two-part test to determine  
16 whether the bankruptcy court abused its discretion. United  
17 States v. Hinkson, 585 F.3d 1247 (9th Cir. 2009)(en banc). We  
18 first determine de novo whether the bankruptcy court "identified  
19 the correct legal rule to apply to the relief requested." Id. at  
20 1251. If it did, we then determine "whether [the bankruptcy  
21 court's] application of the correct legal standard was  
22 (1) 'illogical,' (2) 'implausible,' or (3) without 'support in  
23 inferences that may be drawn from the facts in the record.'" Id.  
24 If any of these three determinations applies, we may be left with  
25 a definite and firm conviction that the bankruptcy court abused  
26 its discretion in making a clearly erroneous factual finding.  
27 Id.

1 "Of course, a determination that a plan meets the requisite  
2 confirmation standards necessarily requires a bankruptcy court to  
3 make certain factual findings and interpret the law." Brotby,  
4 303 B.R. at 184. "[W]hile compliance with the disclosure  
5 requirements of § 1125 may be a mixed question of law and fact  
6 [which we review de novo], to the extent factual issues are  
7 appealed . . . the proper standard of review is clear error."

8 Id.

9 The bankruptcy court's determination as to whether the  
10 chapter 11 reorganization plan satisfied the "best interest of  
11 creditors" test under § 1129(a)(7) is a factual determination  
12 that we review for clear error. United States v. Arnold & Baker  
13 Farms (In re Arnold & Baker Farms), 177 B.R. 648, 653 (9th Cir.  
14 BAP 1994). A factual finding is clearly erroneous if, after  
15 reviewing the record, we have a definite and firm conviction that  
16 a mistake has been committed. Id.

17 We may affirm on any basis supported by the record, even if  
18 the bankruptcy court did not rely on that basis. See United  
19 States v. Washington, 969 F.2d 752, 755 (9th Cir. 1992).

## 20 21 **V. DISCUSSION**

### 22 A. This appeal is not moot

23 For reasons unclear to this Panel, MWC argued the question  
24 of mootness in this appeal. At the outset, we note that the  
25 party arguing for dismissal based on mootness, "bears the heavy  
26 burden of establishing that we cannot provide any effective  
27 relief" to MWC. United States v. Gould (In re Gould),  
28 401 B.R. 415, 421 (9th Cir. BAP 2009), citing Suter v. Goedert,

1 504 F.3d 982, 986 (9th Cir. 2007). The debtor has neither raised  
2 that argument nor met that burden.

3 An appeal may be vulnerable to dismissal as constitutionally  
4 or equitably moot. Gould, 401 B.R. at 421. A case is  
5 constitutionally moot "when events occur during the pendency of  
6 the appeal that make it impossible for the appellate court to  
7 grant effective relief." Id. A case is equitably moot when the  
8 appellant fails diligently to pursue his or her available  
9 remedies to obtain a stay of the bankruptcy court's objectionable  
10 order, which allows for such a change of circumstances as to  
11 render it inequitable to consider the merits of the appeal. Id.

12 There is nothing in the record before us indicating that a  
13 distribution has been made to creditors under the Final  
14 January 2009 plan or that any comprehensive change in  
15 circumstances has occurred since the bankruptcy court issued the  
16 confirmation order. Constitutional mootness clearly does not  
17 apply here, and we question whether equitable mootness would have  
18 any application either. See Focus Media, Inc. v. NBC  
19 (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2004)  
20 (determining that equitable mootness applies when case involves  
21 transactions that have occurred and that are too complex or  
22 difficult to unwind). See also Ederel Sport, Inc. v. Gotcha  
23 Int'l LP (In re Gotcha Int'l LP), 311 B.R. 250, 254 (9th Cir. BAP  
24 2004)(determining appeal is moot if no stay of plan confirmation  
25 order is obtained and plan is substantially consummated so that  
26 effective relief is no longer available).

1 B. Compromise interest rate satisfies "best interest of  
2 creditors" test under § 1129(a)(7)

3 MWC argues that the bankruptcy court erred in concluding  
4 that the Final January 2009 plan satisfied the "best interest of  
5 creditors" test under § 1129(a)(7) by determining that the  
6 compromise interest rate was an appropriate rate of interest.  
7 Citing Cardelucci, 285 F.3d at 1234, MWC asserts that interest at  
8 the "legal rate" under § 726(a)(5) means the federal judgment  
9 interest rate under 28 U.S.C. § 1961. Because § 726(a)(5)  
10 provides that interest must be paid from the petition date, MWC  
11 continues, the appropriate rate of interest is 5.02%, the federal  
12 judgment interest rate in effect as of the petition date in this  
13 case.

14 MWC notes that the debtor may have been able to justify the  
15 compromise interest rate had it not represented at the  
16 confirmation hearing that unsecured creditors would receive  
17 payment in full on their claims in a chapter 7 liquidation. The  
18 bankruptcy court disregarded the debtor's admission, however, in  
19 finding the compromise interest rate to be appropriate.

20 Contrary to MWC's assertion, counsel for the debtor did not  
21 acknowledge at the confirmation hearing that unsecured creditors  
22 would be paid in full in a chapter 7 liquidation. MWC  
23 misconstrues the statements counsel for the debtor made at the  
24 confirmation hearing. Counsel for the debtor merely stated that  
25 "probably liquidation at this time would still result in payment  
26 to creditors."  
27  
28

1 MWC quotes the following language as further evidence that  
2 the debtor acknowledged that unsecured creditors would receive  
3 payment in full on their claims in a chapter 7 liquidation:

4 So, if we just [took] and, you know, put aside any  
5 analysis, if we just look[ed] at - if the Debtor  
6 [said], you know, for purposes of this argument, our  
7 creditors are going to receive 100-percent payment in  
8 liquidation, what the debtor's plan has to do is  
9 provide for 100-percent payment plus a fair and  
10 appropriate interest rate . . . . (Emphasis added.)

11 Tr. of April 13, 2009 Hr'g, 24:10-15.

12 MWC again misinterprets the comments made by counsel for the  
13 debtor at the confirmation hearing. Counsel for the debtor did  
14 not acknowledge that creditors would receive payment in full on  
15 their claims should the debtor proceed with a chapter 7  
16 liquidation. Rather, he simply contended, for the sake of  
17 argument, that, if the debtor's plan acknowledged a 100% payment  
18 of unsecured creditors' claims in a liquidation, the plan also  
19 must provide an appropriate and fair interest rate. Based on our  
20 review of the statements of the debtor's counsel in the record  
21 before us, we do not accept MWC's interpretation.

22 More importantly, we conclude that the bankruptcy court did  
23 not err in approving the compromise interest rate for purposes of  
24 the "best interest of creditors" test under § 1129(a)(7). Under  
25 § 1129(a)(7),<sup>21</sup> a plan must satisfy the "best interest of  
26

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27 <sup>21</sup> Section 1129(a)(7) provides, in relevant part:

28 With respect to each impaired class of claims or interests -

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

(i) has accepted the plan; or

(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 . . . . (Emphasis added.)

1 creditors" test in order to be confirmed. See Mut. Life Ins.  
2 Co. of N.Y. v. Patrician St. Joseph Partners Ltd. P'ship  
3 (In re Patrician St. Joseph Partners Ltd. P'ship), 169 B.R. 669,  
4 680 (D. Ariz. 1994). That is, the plan must "provide non-  
5 consenting impaired creditors with at least as much as they would  
6 receive if the debtor was liquidated in chapter 7." In re Coram  
7 Healthcare Corp., 315 B.R. 321, 346 (Bankr. D. Del. 2004). Under  
8 § 726(a)(5), which dictates the order for distribution of  
9 property liquidated in a chapter 7 case, "[w]here a debtor in  
10 bankruptcy is solvent, an unsecured creditor is entitled to  
11 'payment of interest at the legal rate from the date of the  
12 filing of the petition'" before the debtor receives any  
13 distribution. Cardelucci, 285 F.3d at 1234 (emphasis added).  
14 See also Bequelin v. Volcano Vision, Inc. (In re Bequelin),  
15 220 B.R. 94, 99 (9th Cir. BAP 1998).

16 MWC relies on Cardelucci in arguing that the federal  
17 judgment interest rate, not the compromise interest rate, is the  
18 appropriate legal rate of interest. But the crucial point in  
19 Cardelucci that MWC overlooks is that Cardelucci holds that  
20 unsecured creditors only are entitled to interest at the federal  
21 judgment interest rate when the debtor is solvent. Here, the  
22 bankruptcy court was not asked to make and never made a finding  
23 that the debtor was solvent as of the petition date. In fact,  
24 the bankruptcy court repeatedly expressed doubts as to whether  
25 unsecured creditors would receive as much in a chapter 7  
26 liquidation as they would under the chapter 11 plan proposed by  
27 the debtor.

28

1 At the April 7, 2009 hearing, the bankruptcy court stated:

2 [There was] a legitimate basis to believe that the  
3 Debtor's estimate that in a hypothetical liquidation,  
4 creditors would not be paid in full due to the assets  
5 being depressed because of liquidation, potential  
6 claims against the Debtor which could result from this  
7 termination, the nature of the current business climate  
8 . . . . So [it was] not clear in the best interest [of  
9 creditors] test whether creditors would be getting  
10 interest anyway if there had been a liquidation or any  
11 more than they would get [under] the plan.

12 Tr. of April 7, 2009 Hr'g, 20:14-23.

13 The bankruptcy court went on to note that the compromise  
14 interest rate was "more than the creditors would get otherwise  
15 under the liquidation analysis. And it [was] certainly an  
16 improvement over what the creditors thought they were responding  
17 to in the disclosure statement." Tr. of April 7, 2009 Hr'g,  
18 21:5-7. The bankruptcy court concluded that the compromise  
19 interest rate "did not adversely affect the creditors [but] [i]n  
20 fact, it benefit[ted] them." Tr. of April 7, 2009 Hr'g,  
21 21:10-11.

22 The bankruptcy court did not change its position at the  
23 confirmation hearing, even after the debtor informed it that  
24 Stericycle would not have a sizeable setoff claim against the  
25 debtor. The bankruptcy court stated:

26 [There was] a real doubt whether, if there were a  
27 liquidation, it would come out the same, even though  
28 it's close, and at this point, the liquidation should  
29 give as much.

30 It [was] not clear that there wouldn't be a  
31 discount, and the litigation costs have to be taken  
32 into consideration, and, given that the payment over  
33 time is with interest, . . . the compromise struck by  
34 the committee [was] appropriate, . . . and gives the  
35 creditors as much as they otherwise would receive.

36 Tr. of April 13, 2009 Hr'g, 41:6-14.

1 The bankruptcy court concluded that:

2 As far as the liquidation analysis, the corporate  
3 assets really [were] already liquidated here. Whether  
4 or not at this point all the parties agree, the  
5 completion of the APA [Stericycle] require[d] the  
6 Debtor to continue operations for a period, and without  
7 this APA, there's no clear recovery at this time  
8 immediately for the estate, and there's a good recovery  
9 under the plan, and the Debtor is allowed to reorganize  
10 under Chapter 11. The interest rate proposed by the  
11 Debtor [was] favorable, and . . . the timing of when  
12 they're paid [did not] preclude[] confirmation. The  
13 amount paid and the interest rate paid [were]  
14 sufficient under the Code, and that's all that's needed  
15 under the liquidation analysis.

16 Tr. of April 13, 2009 Hr'g, 94:18-25, 95:1-5.

17 Because the bankruptcy court did not find that the debtor  
18 was solvent on the petition date, Cardelucci is not directly  
19 applicable to its determination as to whether the compromise  
20 interest rate was the appropriate rate of interest for purposes  
21 of the "best interest of creditors" test under § 1129(a)(7). The  
22 bankruptcy court applied the correct legal standard, and its  
23 determination was not without support based on the facts before  
24 it. It thus had discretion to approve the compromise interest  
25 rate and confirmed the Final January 2009 plan based on the  
26 consent of the creditors voting in favor of the Final  
27 January 2009 plan.<sup>22</sup> MWC has not shown that the bankruptcy court  
28 abused its discretion in doing so.

29 C. Exculpation clause was not overly broad

30 MWC argues that the bankruptcy court erred in confirming the  
31 Final January 2009 plan because it contained an overly broad

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32 <sup>22</sup> We note that Class 4 creditors voted to accept the Final  
33 January 2009 plan when it initially provided for an interest rate  
34 lower than the compromise interest rate.

1 exculpation clause that shielded the debtor against liability for  
2 negligence in its postpetition conduct. Moreover, MWC contends,  
3 the exculpation clause did not restrict the debtor's liability as  
4 otherwise provided under applicable law.

5 An exculpation clause excusing a debtor and its officers,  
6 members, directors, and professionals from liability resulting  
7 from any act taken or not taken in connection with the chapter 11  
8 process is not per se against public policy or unreasonable. See  
9 In re Friedman's, Inc., 356 B.R. 758, 762 (Bankr. S.D. Ga. 2005).  
10 However, there are a number of decisions in the Ninth Circuit  
11 that do not favor exculpation clauses that limit liability for  
12 negligence. See, e.g., In re WCI Cable, Inc., 282 B.R. 457, 479  
13 (Bankr. D. Or. 2002), and decisions cited therein.

14 The bankruptcy court concluded that the exculpation clause  
15 was reasonable. It determined that the exculpation clause was  
16 neither overbroad nor overreaching; it did not exculpate any  
17 party other than the debtor and did not apply to gross  
18 negligence, willful misconduct or fraud. The bankruptcy court  
19 also found that it followed the releases and exculpations  
20 provided for in the Bankruptcy Code.

21 The bankruptcy court, in overruling MWC's objection to the  
22 exculpation clause, essentially deferred to a business judgment  
23 standard on the part of the debtor in its postpetition conduct.  
24 See Friedman's, Inc., 356 B.R. at 763-64 (adopting business  
25 judgment rule applied to directors that excuses them from  
26 negligence arising in corporate decision making in approving  
27 exculpation provision in chapter 11 plan that excuses debtor and  
28 its representatives from liability for negligence). Moreover,

1 excluding negligence from the debtor's potential liability for  
2 postpetition acts taken in connection with proposing a  
3 reorganization plan and getting the plan confirmed is not clearly  
4 inconsistent with the provisions of the Bankruptcy Code. The  
5 bankruptcy court did not err in applying the business judgment  
6 standard; its application of such a standard was neither  
7 illogical nor implausible, given the contentious nature of the  
8 proceedings before the bankruptcy court in this case. We thus  
9 conclude that the bankruptcy court did not abuse its discretion  
10 in overruling MWC's objections to the exculpation clause.<sup>23</sup>

11  
12 D. MWC's standing to contest the adequacy of the disclosure  
13 statement is questionable

14 The debtor asserts that MWC lacks standing to contest the  
15 adequacy of the disclosure statement in this appeal because it  
16 cannot demonstrate that it is a party aggrieved.

17 Generally, an appellant must show that he or she is directly  
18 and adversely affected pecuniarily (i.e., the party aggrieved) by  
19 the bankruptcy court's order to have standing to appeal it.  
20 Within the context of an appeal involving the adequacy of a  
21 disclosure statement, the debtor continues, to qualify as a party

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22  
23 <sup>23</sup> At the confirmation hearing, MWC argued that the  
24 exculpation clause should not extend to any claims MWC may have  
25 arising out of the adversary proceeding. We agree with the  
26 bankruptcy court that any claims arising out of the adversary  
27 proceeding should be addressed in the course of the adversary  
28 proceeding. The exculpation clause, in fact, provides that the  
debtor only is released from liability for claims in connection  
with its postpetition acts in liquidating claims asserted by the  
debtor. By its terms the exculpation clause does not appear to  
cover MWC's claims in the adversary proceeding.

1 aggrieved, the appellant must show that creditors would have  
2 voted differently on the plan if the disclosure statement had  
3 been "adequate." The appellant cannot claim creditors may have  
4 voted differently, however, if they actually were provided with  
5 the information the appellant claims was lacking in the  
6 disclosure statement.

7 Here, the debtor argues, MWC provided creditors with the  
8 information allegedly omitted from the disclosure statement in  
9 its opposition to the Final January 2009 plan. Moreover, even if  
10 debtor's counsel had stated at the confirmation hearing that  
11 circumstances had changed such that a chapter 7 liquidation would  
12 pay creditors' claims in full, the disclosure statement already  
13 disclosed that such a change could occur given the terms of the  
14 TSA. As such, the debtor concludes, MWC cannot show that  
15 creditors would have voted differently because they already had  
16 the information allegedly missing from the disclosure statement  
17 but still voted to accept the Final January 2009 plan.

18 The debtor relies on Everett v. Perez (In re Perez), 30 F.3d  
19 1209 (9th Cir. 1994), and In re PWS Holding Corp., 228 F.3d 224  
20 (3rd Cir. 2000), in making its argument. In Perez, the  
21 appellant, Frank Everett, appealed the bankruptcy court's order  
22 confirming the debtor's chapter 11 plan. Among his objections to  
23 the bankruptcy court's confirmation of the plan, Everett argued  
24 that the plan was defective because the debtor made inadequate  
25 disclosures, which "depriv[ed] creditors of information they  
26 needed to cast a meaningful vote." 30 F.3d at 1212.

27 Like MWC, Everett voted against the plan. Id. at 1217. The  
28 Ninth Circuit concluded, however, that, despite his vote

1 rejecting the plan, Everett had standing to contest the adequacy  
2 of the disclosure statement because he had been denied  
3 information he might have used to persuade other creditors to  
4 vote against the plan. Id. The Ninth Circuit stated that:

5 If other creditors were tricked - and voted for the  
6 plan only because they didn't know the facts - then  
7 Everett too has been injured because he was denied the  
8 information he might have used in persuading other  
9 creditors to vote against the plan. Everett can claim,  
10 therefore, he would have had a better shot at defeating  
11 the plan if [the debtor] had made full disclosure.

12 Id.

13 In PWS Holding Corp., the appellant, W.R. Huff Asset  
14 Management Co., LLC ("Huff") claimed that the plan proponents did  
15 not comply with the disclosure requirements of § 1125 by failing  
16 to provide adequate information regarding the release of  
17 preference claims. 228 F.3d at 248. Huff contended that the  
18 debtor did not disclose that it had not performed a thorough  
19 analysis of these claims before deciding not to pursue them. Id.  
20 Huff was aware of the alleged failing at the time, however, and  
21 informed creditors of it when it opposed the plan. Id. The  
22 Third Circuit determined that Huff lacked standing to raise the  
23 issue because it could not demonstrate that it was a person  
24 aggrieved by the debtor's failure to disclose. Id. The Third  
25 Circuit pointed out that Huff would not have acted any  
26 differently if the subject disclosures had been made. Id.  
27 Moreover, because Huff pointed out the alleged failure to  
28 disclose in its objections to the plan, it could not show that it  
was personally aggrieved because other creditors might have voted  
differently if they had the alleged missing information. Id.  
Citing Perez, the Third Circuit noted that a creditor objecting

1 to a plan for lack of disclosure that actually had the  
2 information might have standing if it could demonstrate that  
3 other creditors would have acted differently if they had the same  
4 information. Id.

5 Under Perez and PWS Holding Corp., MWC's standing to contest  
6 the adequacy of the disclosure statement is questionable. MWC  
7 claims that counsel for the debtor "admitted" at the confirmation  
8 hearing that unsecured creditors would receive payment in full on  
9 their claims in a chapter 7 liquidation. Had creditors known  
10 this information, MWC maintains, they may have voted to reject  
11 the Final January 2009 plan. But as we explained above, counsel  
12 for the debtor did not represent at the confirmation hearing that  
13 unsecured creditors would receive payment in full on their claims  
14 in a chapter 7 liquidation.

15  
16 E. The disclosure statement was adequate

17 However, even if MWC has standing to appeal the adequacy of  
18 the Final January 2009 disclosure statement, we conclude that the  
19 bankruptcy court did not err in confirming the Final January 2009  
20 plan for the following reasons. According to MWC, the Final  
21 January 2009 disclosure statement contained a liquidation  
22 analysis that led creditors to believe they would receive less on  
23 their claims in a chapter 7 liquidation than in a chapter 11  
24 reorganization, even though, as the debtor later allegedly  
25 admitted, a chapter 7 liquidation would have paid their claims in  
26 full. Had creditors earlier known this information, MWC  
27 contends, they would have voted to reject the Final January 2009  
28 plan. Because the debtor solicited votes for the Final

1 January 2009 plan with a disclosure statement that did not meet  
2 the adequate information requirements of § 1125, the debtor did  
3 not comply with § 1129(a)(2), precluding confirmation.

4 Based on the record before us, MWC cannot demonstrate that  
5 creditors would have changed their minds and voted to reject the  
6 Final January 2009 plan if the alleged misinformation in the  
7 Final January 2009 disclosure statement had been corrected.

8 The bankruptcy court has discretion in determining what  
9 constitutes adequate information. Brotby, 303 B.R. at 193  
10 (quoting In re Tex. Extrusion Corp., 844 F.2d 1142, 1157 (5th  
11 Cir. 1988)). Such a determination is subjective, to be made on a  
12 case-by-case basis. Brotby, 303 B.R. at 193 (quoting Tex.  
13 Extrusion Corp., 844 F.2d at 1157).

14 When determining the adequacy of information during the pre-  
15 solicitation phase, "the court is acting in a context in which  
16 information may be sketchy and preliminary." Brotby, 303 B.R. at  
17 194 (quoting In re Michelson, 141 B.R. 715, 718 (Bankr. E.D. Cal.  
18 1992)). The bankruptcy court does not conduct an independent  
19 investigation, but instead relies on its reading for "apparent  
20 completeness and intelligibility . . . ." Brotby, 303 B.R. at  
21 194 (quoting Michelson, 141 B.R. at 719). At plan confirmation,  
22 however, "[w]hat once appeared to be adequate information may  
23 have become plainly so inadequate and misleading as to cast doubt  
24 on the viability of the acceptance of the plan and to necessitate  
25 starting over." Brotby, 303 B.R. at 194 (quoting Michelson,  
26 141 B.R. at 719). "[T]he use of misleading or false information  
27 in a disclosure statement may be so serious as to invalidate the  
28 voting by creditors as to a plan, requiring a new round of voting

1 after necessary corrections to the disclosure statement are  
2 made." Brotby, 303 B.R. at 194.

3 Here, the bankruptcy court, in its discretion, determined  
4 that the liquidation analysis contained adequate information  
5 under the circumstances. The bankruptcy court was aware of MWC's  
6 objections to the liquidation analysis, but nonetheless concluded  
7 that the liquidation analysis contained adequate information in  
8 finding that the debtor satisfied the requirements under  
9 § 1129(a)(2). The bankruptcy court determined that "proper  
10 methods were made to convince creditors to vote for [the Final  
11 January 2009 plan]" and there was "adequate voting." Tr. of  
12 April 13, 2009 Hr'g, 94:13-14.

13 The bankruptcy court found that, though some of the  
14 assumptions underlying the liquidation analysis may have changed,  
15 such change was to be expected, given the dynamic nature of the  
16 market and business, and did not require re-solicitation of  
17 votes. The bankruptcy court stated:

18 I don't think the changes require any re-solicitation.  
19 This is an operating Debtor. The market and business  
20 change[.]. It's a dynamic process. There are often  
21 business developments between disclosure statement  
22 approval and the plan voting. They've been discussed.  
It's clear they were possible, and there's no reason to  
go back and resolicit because there's no one that's  
appeared and said with these changes I want to change  
my vote.

23 Tr. of April 13, 2009 Hr'g, 96:11-18.

24 More importantly, the bankruptcy court doubted that if a  
25 chapter 7 liquidation took place, unsecured creditors would  
26 receive more than in the chapter 11 plan that the debtor  
27 proposed. The bankruptcy court found that "there [was] a real  
28 doubt whether, if there were a liquidation, it would come out the

1 same, even though it's close, and at this point, the liquidation  
2 should give as much." Tr. of April 13, 2009 Hr'g, 41:6-9. It  
3 further determined that it was unclear that there would not be a  
4 discount as to the value of the Notes. The bankruptcy court  
5 determined that, under the TSA, the debtor was required to  
6 continue operations of the waste processing business. Without  
7 the Stericycle sale, it concluded, there was "no clear recovery  
8 at this time immediately for the estate, and there [was] a good  
9 recovery under the plan, and the Debtor [was] allowed to  
10 reorganize under Chapter 11." Tr. of April 13, 2009 Hr'g,  
11 94:22-25.

12 Even after MWC questioned the accuracy of the liquidation  
13 analysis in the opposition, as the bankruptcy court noted, no  
14 creditor expressed a desire to change its vote. At oral  
15 argument, counsel for MWC stated that MWC had served the  
16 opposition on all creditors. Consequently, all of the creditors  
17 were given notice of the alleged inaccuracies in the disclosure  
18 statement and could factor in that information in determining how  
19 to vote. By refusing or declining to answer MWC's call to reject  
20 the Final January 2009 plan, creditors indicated that they found  
21 the information in the disclosure statement adequate to support a  
22 vote in favor of the Final January 2009 plan. MWC thus cannot  
23 demonstrate that a more "accurate" liquidation analysis would  
24 have caused creditors to change their votes. Based on the facts  
25 before it, the bankruptcy court did not abuse its discretion in  
26 approving the disclosure statement and in declining to require a  
27 re-solicitation of ballots.

28

1 **VI. CONCLUSION**

2 Based on the foregoing analysis, we conclude that the  
3 bankruptcy court did not abuse its discretion in determining that  
4 the compromise interest rate was appropriate for the purposes of  
5 the "best interest of creditors" test. Nor did the bankruptcy  
6 court abuse its discretion in determining that the exculpation  
7 provision was not overly broad in excusing the debtor from  
8 liability for postpetition acts in connection with the Final  
9 January 2009 plan, except for gross negligence, willful  
10 misconduct or fraud. Finally, the bankruptcy court did not abuse  
11 its discretion in finding that the debtor complied with  
12 § 1129(a)(2) in soliciting acceptances of the Final January 2009  
13 plan. We therefore AFFIRM.

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