

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)**

In Re:

Paul A. Leitner-Wise,

Debtor.

**Case No. 15-11345
Chapter 13**

LWRC INTERNATIONAL, LLC'S OBJECTION TO DEBTOR'S AMENDED PLAN

LWRC International, LLC (“**LWRCI**”), by counsel, pursuant to Local R. Bankr. P. 3015-2-(E), hereby objects to the Amended Plan (Docket # 24) (the “**Plan**”) filed by Paul A. Leitner-Wise (the “**Debtor**”) in the above-captioned proceeding. In support of its objection, LWRCI states as follows:

BACKGROUND

1. The Debtor initiated this bankruptcy case by filing his Voluntary Petition (the “**Petition**”) under Chapter 13 of the United States Bankruptcy Code on April 20, 2015 (the “**Filing Date**”) as case number 15-11345 (the “**Third Bankruptcy**”). The Debtor previously filed a Chapter 13 bankruptcy on February 15, 2013 as case number 13-10713 (the “**First Bankruptcy**”). The Court dismissed the First Bankruptcy on March 7, 2014 because Mr. Wise failed to make plan payments. The Debtor then filed for Chapter 13 bankruptcy again on June 27, 2014 as case number 14-12420 (the “**Second Bankruptcy**”). The Court dismissed the Second Bankruptcy on August 19, 2014. Once again, Mr. Wise failed to make plan payments.

2. On May 19, 2015, debtor filed his third Chapter 13 Plan [Docket #20]. Debtor subsequently amended/modified this plan on May 26, 2015 [Docket #24] (the “**Plan**”). A hearing on confirmation of the Plan is set for July 8, 2015 at 9:30 am. (the “**Plan Hearing**”).

3. LWRCI received a copy of the Plan via mail on May 26th. For the first time in nearly two and one half years of bankruptcy filings, Mr. Wise sought relief against LWRCI pursuant to an alleged royalty contract that Mr. Wise did not claim in the First Bankruptcy, the Second Bankruptcy, or the first plan proposed in the Third Bankruptcy. Rather, Mr. Wise's latest plan modifies Sections 6(B) and 11 of the original Plan to include an unsubstantiated (and factually inaccurate) allegation that Debtor has a 'royalty contract' with LWRCI. Indeed, Debtor posits for the first time in years of Bankruptcy filings that LWRCI owes him \$1,200,000.00. Schedule B, items 21 and 35 and Schedule G also make reference to a royalty contract with the LWRCI having a value of \$5 million dollars.

4. LWRCI is unaware of any contract with the Debtor, whether for royalties or otherwise. Critically, LWRCI has no contracts with the Debtor of any kind.

5. Within days of receiving notice of Debtor's amended Plan, LWRCI moved to conduct a 2004 examination of the Debtor and for the production of related documents to investigate his new claims. [Docket # 28] The Debtor objected [Docket # 34]. The Debtor has not provided documents. He has not provided a copy of the "Royalty Contract" to the Court or to LWRCI. He has not agreed to sit for a deposition.

6. On June 16, 2015, the Chapter 13 Trustee moved to dismiss Debtor's case with prejudice. According to the Trustee, Debtor has repeatedly failed to disclose certain material assets and committed other improper acts. ("**Motion to Dismiss**"). The Hearing on the Trustee's Motion to Dismiss is set for July 8, 2015. [Docket # 32] The Trustee has also filed an objection to the Debtor's Plan (the "**Trustee's Plan Objection**") [Docket # 31].

PLAN OBJECTION

A. Adoption of the Trustee's Plan Objection

7. LWRCI adopts every objection raised in the Trustee's Plan Objection as if restated fully herein.

B. Lack of Compliance with Other Sections of the Code Under 11 U.S.C. § 1325(a)(1)

8. LWRCI also objects to the Plan's assumption of the Debtor's alleged 'royalty contract' with LWRCI. LWRCI denies that any such 'royalty contract' exists. LWRCI further demands that Debtor prove the existence and terms of that contract, as well as the absence of Debtor's default. Finally LWRCI demands that Debtor prove his right to assume the alleged 'royalty contract.'

9. As stated above, LWRCI has no knowledge of any dealings between it and the Debtor. It has no evidence of any contract with the Debtor. As noted in Paragraph 5, above, LWRCI propounded discovery to obtain this information (if it exists). The Debtor refused even to provide a copy of the alleged contract.

10. "The debtor has the burden of persuasion that the contract is (1) subject to assumption and (2) all the requirements of § 365 have been met. Generally, courts then require the non-debtor party to prove any defaults, which then shifts the burden back to the debtor to prove adequate 'cure' of those defaults." *In re Diamond Mfg. Co.*, 164 B.R. 189, 199 (Bankr. S.D. Ga. 1994);¹ *Curing the Incurable Default and Other Challenges: Current Issues in*

¹ Debtor has the burden of proving the existence of the royalty contract and LWRCI's default. *See In re Diamond Mfg. Co., Inc.*, 164 B.R. 189, 200 (Bankr. S.D. Ga. 1994) ("Moreover, I find that, in situations comparable to the one at hand, the nonbankrupt party has superior knowledge and is therefore in a better position to assert defaults. In most cases, a chapter 7 trustee simply will not have the intimate knowledge of the debtor's performance or defaults under the contract or lease at issue that the nonbankrupt party would have . . . These factors warrant a burden on the nonbankruptcy party to assert defaults pre-assumption."); *see also In re RVP, Inc.*, 269 B.R. 851, 854 (Bankr. D. Idaho 2001) (holding

Executory Contracts and Leases, 062404 ABI-CLE 207, Andrew W. Caine and Samuel R. Maizel (June 24, 2004).

11. For a Debtor to assume an executory contract, the Court must determine there is a valid and enforceable contract in existence between the parties. *See In re III Enterprises, Inc.*, 163 B.R. 453, 459 (Bankr. E.D. Pa. 1994). As the *III Enterprises* case explained:

It is elementary to observe that, before the Debtor can assume or reject a contract, or, for that matter, before Pueblo can seek to enforce a contract, there must be a contract to assume, reject, or enforce. *In re CG Realty Investments, Inc.*, 79 B.R. 249, 253 (Bankr. E.D. Pa. 1987) (party to purported contract has no rights under § 365 if no enforceable contract existed between the interested parties); *In re W.F. Martin Co.*, 66 B.R. 409, 411-13 (Bankr. E.D. Tenn. 1986) (debtor found not empowered to assume a contract which did not legally exist); 2 COLLIER ON BANKRUPTCY, ¶ 365.02, at 365-16 (15th ed. 1993) (“for section 365 to apply, the contract or lease must be in existence”)

Id. Thus, Debtor must prove that the royalty contract is a valid, enforceable and existing contract between himself and LWRCI at an evidentiary hearing before it can be assumed.

12. Moreover, the royalty contract must be executory as to both the Debtor and LWRCI as of the Petition Date, meaning that obligations of both the Debtor and LWRCI were so unperformed that failure of either to complete performance would constitute a material breach of the agreement. *In RCI Tech v. Sunterra Corp., (In re Sunterra Corp.)*, 361 F.3d 257, 264 (4th Cir. 2004). Because LWRCI denies the existence of the royalty contract, it cannot be executory. Debtor must prove the executory nature of the royalty contract at an evidentiary hearing, before it can be assumed.

13. The Fourth Circuit follows the “hypothetical test” for executory contracts. Therefore, the Debtor must prove that the ‘royalty agreement’ can be assigned under applicable law. *See In RCI Tech v. Sunterra Corp., (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004).

that Debtor required to disclose any defaults prior assumption as part of compliance with 11 U.S.C. § 365(b), and failure to do so was grounds for reconsideration).

The hypothetical test provides that a debtor cannot assume an executory contract over the objection of the counter-party to the contract if applicable law would bar assignment to a hypothetical third party—even in situations where the debtor is not seeking to assign the contract to any third party. This is the case, even if the terms of the royalty contract allow assignment. *Id.* Thus, as LWRCI is objecting to the assumption, the Debtor must prove at an evidentiary hearing that the alleged royalty contract is capable of being assigned under applicable law.

14. Finally, “the debtor must cure or provide adequate assurance that it will promptly cure its default. Its default is the failure to pay the pre-petition claim in accordance with the contract. The debtor must also give assurances of future performance.” *In re United Am., Inc.*, 327 B.R. 776, 786 (Bankr. E.D. Va. 2005) (Mayer, J.) The normal burden of proof of asserting defaults under an executory contract would be on the non-debtor counter-party, but in this case, the equities of the case and actions of the Debtor should force the Debtor to have to prove absence of default and adequate assurances of future performance. Even if the burden of proof is on LWRCI, LWRCI asserts that it has received no benefit or rights under the royalty contract and therefore Debtor is in default for not providing any benefit to LWRCI. As Debtor is not proposing any cure of this default, the royalty contract cannot be assumed.

15. Simply put, the Debtor has not met his burden under the bankruptcy code and applicable case law to show that he may rely on a valid, binding royalty contract with LWRCI. Thus, the Plan does not comply with 11 U.S.C. § 365 for the assumption of the royalty contract the Plan cannot be confirmed under 11 U.S.C. § 1325(a)(1).

C. Lack of Good Faith Under 11 U.S.C. §§ 1325(a)(3) and (7)

16. The Debtor’s course of dealing with this Court suggests the absence of good faith. As mentioned above, for years, the Debtor has sought Bankruptcy protection from this Court

without once referencing an asset that, according to his most recent May 26 filing, is worth millions of dollars. In aggregate, Debtor's inability to abide by the payment terms of two previous plans, the sudden appearance of a royalty contract that (if it exists) would provide a panacea for Debtor's financial troubles, and Debtor's inability (or unwillingness) to provide that contract to the Court or to LWRCI, all evidence an apparent lack of good faith and candor by the Debtor. Either Debtor failed under oath to disclose the existence of an asset that, by his own schedules, is allegedly worth \$5 million dollars during two prior bankruptcies and the initial plan in this Bankruptcy. Or, alternatively, Debtor has offered false statements to the Court during this Bankruptcy (or within the last year LWRCI signed a royalty contract it has no memory of and Debtor refuses to produce).

17. LWRCI denies the existence of any royalty contract. This coupled with Debtor's efforts to obstruct LWRCI's discovery requests militates against this Court granting the Debtor's request for relief. Accordingly, the Plan is not confirmable under 11 U.S.C. §§ 1325(a)(3) and (7) for lack of good faith.

WHEREFORE, LWRCI respectfully objects to the Debtor's Plan and its attempted assumption of the royalty contract and asks this Court to deny such Plan, dismiss the Debtor's bankruptcy, and award such further relief as this Court deems just and proper.

Date: June 30, 2015

LWRC INTERNATIONAL, LLC
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June 2015, a true and correct copy of *LWRC INTERNATIONAL, LLC'S OBJECTION TO DEBTOR'S AMENDED PLAN* was filed using the Court's CM/ECF service, served electronically to Debtors' counsel, the Trustee, and served on all interested parties by ECF notification from the Court, and served by first-class United States mail, postage prepaid, to:

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