

Zack A. Clement, PLLC

FINANCIAL RESTRUCTURE FOR BUSINESSES AND GOVERNMENTS

Southern District of Texas Complex Chapter 11 Case Practice

Procedures for Complex Cases in the Southern District of Texas C 1-10 and O 38-40 permit a debtor to confirm a plan of reorganization in 90 to 120 days, even if trials are necessary about whether (i) there is *adequate protection* to obtain financing during the case, and (ii) a plan is *fair and equitable* and in the *best interests of creditors*.

Complex Cases filed in the Southern District of Texas are assigned 50% to Judge Jones and 50% to Judge Lopez. Each has substantial experience with trials concerning cash collateral use, DIP loans, sales, and plan confirmation. Each will schedule and conduct trials promptly and efficiently.

Under *SDTX Complex Case Procedure* O 38-39, the debtor can ask the court at either the Initial Finance Hearing or Permanent Finance Hearing to schedule a disclosure statement hearing to occur about 35 days later (complying fully with FRBP 2002b and 3017a concerning notice).

This encourages the debtor and the U.S. Trustee to create a timeline for prompt filing of schedules and an early bar date and first meeting of creditors. It encourages the U.S. Trustee to make a prompt appointment of a creditors committee if one is appropriate.

Under these *Procedures*, the court can use the (i) Initial Finance Hearing, or (ii) Permanent Finance Hearing, or (iii) disclosure statement hearing to assess what kind of issues are being presented for a possible plan confirmation trial. It can then schedule a confirmation hearing to permit due process for those issues based on reasonable discovery, not burdensome discovery used for delay.

Additionally, Local Rule 9013-2 provides clear standards for exchange of witness and exhibit lists a couple of days before a hearing, facilitating efficient trials. *See Local Bankruptcy Rules*.

SDTX Complex Case Procedures relating to financing and plan confirmation are copied below my signature block. These *Procedures*, local rules, and individual judge's procedures are posted on the SDTX website at www.txs.uscourts.gov.

I would be glad to talk with you about complex case practice in the Southern District of Texas.

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The Heart of SDTX Texas Complex Case Procedures

C. CASH COLLATERAL AND FINANCING ORDERS

5. On motion by the debtors, a hearing (the “Initial Financing Hearing”) will routinely be conducted as a first-day hearing to consider either cash collateral use and/or interim debtor-in-possession financing (the “Initial Financing”).
6. At the Initial Financing Hearing, the debtors must introduce a cash flow projection showing sources and uses of cash necessary for ongoing operations on a weekly basis for not less than the first 3 weeks of the case (a “First Budget”).
 - a. The First Budget must be filed with the Court and be served no later than noon on the first business day after the filing, or on the date of the filing if the Initial Financing Hearing is to occur before the second business day after the Petition Date.
 - b. The debtors must provide a copy of the First Budget in native file format upon request.
7. At the Initial Financing Hearing, the Court will consider the Initial Financing pursuant to 11 U.S.C. §§ 363, 364 and FED. R. BANKR. P. 4001, subject to the following:
 - a. The Court will set a hearing to consider permanent financing through use of cash collateral and/or debtor-in-possession financing in accordance with 11 U.S.C. §§ 363, 364 and FED. R. BANKR. P. 4001 (a “Permanent Financing Hearing”).
 - b. If further interim financing relief is appropriate prior to a Permanent Financing Hearing, notice of a Permanent Financing Hearing is adequate notice of a request for further interim relief.
 - c. At the Permanent Financing Hearing, the debtors must introduce a cash flow projection for sources and uses of cash for the period of cash collateral use or debtor-in-possession financing that is proposed (a “Permanent Financing Budget”).

- d. The Permanent Financing Budget must be filed on the Exchange Date provided in BANKR. LOC. R. 9013-2. The debtors must provide a copy of the Permanent Financing Budget in native file format upon request.
8. If a motion to approve financing under 11 U.S.C. §§ 363 or 364 seeks to include any of the following terms, the motion must list all such provisions in a separate section or chart and provide specific reasons why each such provision should be approved:
- a. Sale or plan confirmation milestones;
 - b. Cross-collateralization;
 - c. Roll ups (including (i) provisions deeming pre-petition debt to be post-petition debt; and (ii) provisions requiring the proceeds of post-petition loans to be used to repay pre-petition debt);
 - d. Liens on avoidance actions or proceeds of avoidance actions;
 - e. Default provisions and remedies that are self-executing or preclude court oversight, including: (i) provisions terminating the automatic stay without further order, (ii) provisions waiving rights to challenge lenders' ability to exercise post-default remedies; and (iii) provisions limiting required proof or altering the burden of proof at post-default hearings;
 - f. Releases of claims;
 - g. Limitations on the use of cash collateral or DIP proceeds (other than general "carve-outs") to pay approved fees and expenses of advisors to official committees or future trustees;
 - h. Non-consensual priming liens;
 - i. Any other provision that limits the ability of estate fiduciaries to fulfill their duties under the Bankruptcy Code and applicable law.

The inclusion of these types of provisions in an interim or emergency order will require an extraordinary showing.

9. Cash collateral and financing orders that contain a release of claims against lenders and other third parties by the debtors should provide that an official committee of unsecured creditors (the "Committee") has at least 60 days from the date of the Committee's formation to investigate claims against the lenders and to challenge the extent and validity of any liens or the appropriateness of such release, with such 60-day period subject to extension by agreement of the Committee and the lenders and other third parties, as the case may be, or by order of the Court.

D. DISFAVORED PROVISIONS

10. These provisions are disfavored in any motion or order:
- a. The inclusion of a provision in any cash collateral, DIP loan or other financing order that (i) provides for the termination of the automatic stay without notice and hearing; (ii) alters the evidentiary burden with respect to the termination of the automatic stay; or (iii) limits the range of remedies that the Court may order upon a default.
 - b. The inclusion of a provision in any cash collateral, DIP loan or other financing order that terminates or limits the debtors' exclusive rights under § 1121.

- c. Except as contained in a confirmed plan, the assumption of a plan support agreement as an executory contract or otherwise; provided, the Court does not disfavor the debtors' actual performance under a plan support agreement, including without limitation, the debtors' post-petition agreement to include performance deadlines in various financing orders and the debtors' reimbursement of the reasonable and necessary professional fees of parties to the plan support agreement.

O. PLAN CONFIRMATION

38. If the debtors file a disclosure statement and plan before the Initial Financing Hearing, then at the Initial Financing Hearing, the Court **will set** the date for the disclosure statement hearing and related objection deadlines and **will consider setting a date** for the confirmation hearing and related voting and objection deadlines.

39. If the debtors file a plan and disclosure statement before the Permanent Financing Hearing, then at the Permanent Financing Hearing, the Court **will set** the date for the disclosure statement hearing and related objection deadlines and **will consider setting** a date for the confirmation hearing and related voting and objection deadlines.

40. If a proposed plan seeks consensual pre- or post-petition releases with respect to claims that creditors may hold against non-debtor parties, then a ballot must be sent to creditors entitled to vote on the proposed plan and notices must be sent to non-voting creditors and parties-in-interest. The ballot and the notice must inform the creditors of such releases and provide a box to check to indicate assent or opposition to such consensual releases together with a method for returning the ballot or notice.