GUIDELINES FOR CHAPTER 11 CASES ASSIGNED
TO BANKRUPTCY JUDGE ROBERT E. NUGENT III
(Revised September 14, 2016)

In the current economic climate, our chapter 11 filings have increased, prompting me to review the Guidelines I issued for chapter 11 cases in November, 2001. Obviously much has changed in that time. In the years since I first issued Chapter 11 Guidelines, we have experienced a number of law and practice changes that need to be addressed. My purpose in issuing and revising these guidelines is to inform counsel of my preferences and concerns in hearing, managing and deciding reorganization cases. They are intended as a reminder to counsel familiar with the practice in our District and as a head's-up to those who are not. If something in the Guidelines contravenes a statute, case law, or a rule, that is unintentional. These are, after all, just guidelines. Nothing is more helpful to you, and me, than having a solid working knowledge of the applicable Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, or the Local Bankruptcy Rules of this District.

As always, I look forward to your chapter 11 cases and am open to any suggestions the Bar may have about furthering their fair and efficient administration.

I. FIRST THINGS:

A. FILING A CASE.

If you can, make a complete initial Chapter 11 filing. With the understanding that larger or more exigent cases must sometimes be filed as "face-sheet" filings including only the matrix, the petition, and the list of twenty largest creditors, a complete initial filing really helps me and the other parties to grasp what your case is about.

B. EMPLOYMENT OF PROFESSIONALS.

(a) Court Approval. Debtor-in-possession counsel and other professionals to be hired by any party in a Chapter 11 case must be appointed by the Court under 11 U.S.C. § 327.[1] This requires that an application be filed and noticed consistent with Fed. R.

[1] All subsequent statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101 et. seq., unless otherwise noted.

Bankr. P. 2014 and D. Kan. L.B.R. 2014.1.[2] Applications should be filed, if at all possible, with the petition.

(b) L.B.R. 2014.1. Be sure to comply with L.B.R. 2014.1 which requires, *inter alia*, separate disclosures for each individual attorney who will appear before the Court in the conduct of the case. The rule outlines the required elements of the accompanying affidavit or declaration, as well as the requirement that all such applications be noticed to the Chapter 11 docket and served on a variety of parties.

(i) In the past, I customarily granted interim orders to employ on the "first day," and directed that a final hearing be conducted on the docket to which the initial application is set. With adoption of Fed. R. Bankr. P. 6003, discussed below, interim appointments within 21 days of the petition date are not available, except where necessary to avoid immediate and irreparable harm. S*ee* Fed. R. Bankr. P. 6003, *infra* at § I.C.(b).

(c) Disclosure of Connections. Please consider carefully the connections you disclose. If you or your firm has previously represented any party in the case, disclose it. If you have previously represented some person or entity affiliated in some other respect with the debtor or the estate, disclose it. While disclosure of these connections may not disqualify you from appointment, an unjustified failure to disclose these connections can be fatal to your appointment, compensation request, or both. Keep in mind that the Court determines whether the professional is disinterested and does not represent interests adverse to the estate, whether or not a party in interest objects to the employment.[3] Not only is running these issues time-consuming, it distracts from the real business at hand and hurts the client and the other parties in the case. Please apply for appointment as soon as possible and, when possible, before rendering any services to the debtor or to the estate.

(d) *Nunc Pro Tunc* Orders. I only approve "nunc pro tunc," or retroactive, appointments in extraordinary or exigent circumstances as is consistent with controlling Tenth Circuit

[2] Also relevant in this regard are the Court's more specific *Professional Fee and Expense Guidelines*, revised September 14, 2016 and posted to Judge Nugent's chambers link on the Court's website: www.ksb.uscourts.gov.

[3] *In re Interwest Business Equipment, Inc.,* 23 F. 3d 311, 317 (10th Cir. 1994).

authority.[4]

C. "FIRST DAY" ORDER CONCERNS[5]

(a) Emergency Hearings. Usually debtors require the entry of "first day" orders allowing cash collateral usage under § 363, post-petition credit under § 364, the payment of pre-petition vendors pursuant to the "doctrine of necessity," payment of employees, cash management under § 345, utility service under § 366, and other pressing matters. I recognize that in many cases, these matters have been extensively negotiated among counsel for the debtor, lenders and other constituencies before the petition date. Here are some suggestions about "first day" practice in cases assigned to me.

(i) Warn us! If you believe there is substantial agreement on some or all first day issues, please advise the Clerk's office of the likely filing of the Chapter 11 case and attendant motions. There is no need to disclose the debtor's identity until the case is filed, but early warning to the Clerk will allow me to schedule time for these hearings on a short schedule. I like to have an opportunity to review the pleadings and support documents prior to these hearings, *preferably twenty-four hours in advance*.

(ii) Securing an Expedited Hearing. Please contact the courtroom deputies about expedited hearings. They will clear dates and times with my chambers. File a motion to expedite, along with any motions you are seeking to expedite, and submit a proposed order that (i) grants the expedited hearing; (ii) leaves blank the date and time of the hearing (we'll fill that in); and (iii) directs moving counsel to give notice of the hearing to all concerned parties, *see*

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[4] *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F. 2d 1265, 1267-68 (10th Cir. 1991) (simple neglect does not justify nunc pro tunc approval; disapproved nunc pro tunc employment resulted in return of compensation received by the attorney, even if the fees were reasonable). *See also In re Schupbach Investments, L.L.C.,* 808 F.3d 1215, 1220 (10th Cir. 2015) (adhering to *Land*); *In re Boot Hill Biofuels, LLC*, Case No. 08-13128, 2009 WL 982192 at *12 (Bankr. D. Kan. Mar. 27, 2009) (Nugent, J.).

[5] Also relevant in this regard is the Court's *Statement Concerning Notice of Expedited Relief and First Day Motions in Reorganization Cases*, revised July 29, 2016 and posted to Judge Nugent's chambers link on the Court's website: www.ksb.uscourts.gov.

infra, § I.C.,¶ (a)(iii) and (a)(iv) .

(iii) GIVE GOOD NOTICE. This is a point of emphasis for me. Notice of first day motions should be given to all appearing parties, any party whose interests may be affected (*e.g.*, secured creditors whose collateral is to be used or whose liens may be primed, unsecured creditors whose interests will be affected by granting post-petition liens or priority, *etc.*). You need to give notice as required by Fed. R. Bankr. P. 4001.

(iv) GET GOOD SERVICE. This is a further point of emphasis. Emergency hearings are called on a short schedule. Accordingly, service by first class mail within the United States, while technically compliant with Fed. R. Bankr. P. 7004, may not reach the necessary recipients in time and is likely inadequate. Remember, these motions are contested matters and Rule 9014 applies. Always contact your opposing counsel, if known, by phone, e-mail, or fax with notice of the expedited hearing and certify that you have done so as promptly as possible. Notify unrepresented parties directly, preferably by e-mail or mail as is practical, of the date and time of the hearing. Be ready to explain how you have given notice at the commencement of the hearing. If I conclude that service has been insufficient, only such relief as is necessary to avoid harm and that can be undone at the final hearing is likely to be granted.

(b) Timing of First Day Matters, Fed. R. Bankr. P. 6003. Certain first day matters are not to be considered until 21 days after filing except where the court finds that immediate and irreparable harm will result from that delay. Rule 6003 includes attorney applications, motions to assume or assign leases or contracts, and motions to use, sell, lease or otherwise incur an obligation concerning estate property (including a motion to pay a pre-petition incurred claim). Rule 6003 expressly excepts motions under Rule 4001 (stay relief, cash collateral, post-petition credit). If you seek any Rule 6003 relief, be prepared to represent why immediate consideration of the motion is necessary to avoid immediate and irreparable harm.

(c) Content of First Day Motions and Orders. The required content of cash collateral, and post-petition credit motions is set out in

Fed. R. Bankr. P. 4001(b)(1)(b) and (c)(1)(B). The purpose of these rule changes was to provide a concise statement of the relief sought. Please carefully review these requirements as they vary between cash collateral motions and credit motions. Please incorporate a parallel recitation in the interim order, along with a provision for filling in the date and time of the final hearing.

II. SECOND THINGS: CASE MANAGEMENT AND ADMINISTRATION

A. DEBTOR DUTIES AND RESPONSIBILITIES

(a) Advising Debtor Management. Please be sure that debtor's management understands its duties and responsibilities to the creditors and to the Court. A good checklist is found in § 1107 which requires a debtor-in-possession to perform all of the functions and duties of a trustee serving in a Chapter 11 case except those provided in § 1106(a)(2), (3), (4). Section 1106(a)(1) provides that a trustee will perform the duties of trustee as specified in § 704(2), (5), (7), (8) and (9). Perhaps most important is that you impart to your debtor clients that once they are debtors-in-possession, they are fiduciaries who must place the estate's interests above their own.

(i) Small Business Debtors. When BAPCPA was enacted, small business debtors (as defined in § 101(51D)) were given enumerated duties that are listed in § 1116 and include initial financial disclosures, attendance by management at all scheduling conferences and meetings, deadlines for filing schedules and post-petition reports, maintaining insurance, submitting tax returns, and permitting inspections by the U.S. Trustee.

(b) Reporting. Fed. R. Bankr. P. 2015 requires a trustee or debtor-in-possession in all chapter 11 cases to make monthly and quarterly reports of the debtor's financial status as well as to provide the Office of the United States Trustee with a statement of disbursements made during each calendar quarter and a statement that the fees required by 28 U.S.C. § 1930(a)(6) have been paid.

(i) Small Business Cases. Section 308 and Rule 2015(a)(6) require monthly financial reporting by small business debtors.

B. CHAPTER 11 STATUS CONFERENCES, § 105(d)

(a) Timing. I will convene an initial Chapter 11 status conference within 60 days of the commencement of the case. Generally, this status conference will be conducted after the first meeting of the creditors in order to afford the Office of the United States Trustee an opportunity to designate an official unsecured creditors committee.

(b) Report. In advance of the initial status conference, the debtor should prepare and submit a report that proposes dates to be adopted for the filing of claims, filing of a disclosure statement and plan, solicitations of acceptances, etc., all as set out in § 105(d). The report should also specify whether the debtor qualifies as a small business debtor.

(c) Appearances. The debtor's managing officers should appear at the initial conference and any subsequent status conferences unless they are released from doing so. Counsel should be prepared to discuss any unresolved motions or other pending contested matters and how such matters might be resolved. Counsel should bring their calendars to these conferences as these serve as scheduling opportunities. I generally require the personal attendance of counsel and debtor, absent extenuating circumstances. Unless I specifically order otherwise, the debtor or debtor's principal is welcome to appear at subsequent § 105(d) conferences, but that appearance is not required.

III. CLAIMS

A. Allowance. Because only the holders of allowed claims or interests can vote to accept or reject plans, the scope of claims should be determined as soon as possible in a chapter 11 case. A claims bar date order should be entered early on so that the debtor may evaluate the extent of the claim pool and prosecute objections to claims before the disclosure statement and confirmation stage.

B. Bar Date Orders. When requesting a bar date, please attach a proposed version of the order (including a proposed bar period) to the motion for bar date. The bar date notice should clearly state that the holders of claims that are unscheduled or scheduled as disputed, contingent or unliquidated can lose their rights to distribution if they fail to file a proof of claim. Fed. R. Bankr. P. 3003(c)(2). The bar date notice should further

state that any holder of a claim may inspect the schedules and statement of affairs filed by the debtor in the office of the Clerk.

C. Claims Objections. Claims are deemed allowed unless objected to. *See* § 502(a). Under Fed. R. Bankr. P. 3001(f), a claim is presumptively valid and correct in amount and under Rule 3003(c)(4) a proof of claim controls over the claim as scheduled.

(a) Fed. R. Bankr. P. 3007. Objections to claims are covered by Rule 3007 pursuant to which the claimant is entitled to 30 days' notice of hearing if a claim is objected to. The objector has the burden of going forward on the issues of the validity and the amount of the claim. If the objector overcomes the prima facie effect given a claim by § 502(a), the burden shifts to the claimant to prove its validity and amount by a preponderance of the evidence. All claims objections should be set for hearing and "negative noticing" is discouraged. This is because neither the Code nor the Rules provides for requiring the claimant to respond to the objection and those objecting to claims should appear and be prepared to meet the presumption of validity of the claim.

(b) Hearings on Objections to Claims. Please set objections to claims on the next chapter 11 motion docket falling outside the thirty (30) day notice period. I use these settings to determine whether the objections have merit and whether the claimant will defend the objection. If objections are resolved at or before the docket setting, I will enter dispositions at that time. If not, I use the docket setting as a scheduling conference. The claim objections are then set to an evidentiary hearing and treated as any other contested matter.

IV. PLANS AND DISCLOSURE STATEMENTS:

A. Timing. Chapter 11 debtors enjoy a 120-day exclusive period in which to file a plan under § 1121(b). In a small business case, that period is extended to 180 days, but can be extended to 300 days which is the outside limitation. § 1121(e). I encourage the earlier filing of plans in either type of case.

B. Content; Projections; Claims. Disclosure statements should explain the provisions of the debtor's plan and should contain both historical and prospective cash flow information. The prospective cash flow information should include a description of the assumptions employed in the generation of the projections. The disclosure statements should

also contain a liquidation analysis so that the Court and creditors may make a reasonable determination as to whether the plan as proposed will meet the Chapter 7 liquidation test. § 1129(a)(7). Please provide three (3) years of historical cash flow information as well as a three (3) year projection of same and, where possible, present that information on a monthly, rather than simply on an annual basis. An annual cash flow summary is helpful to all concerned and should also be included.

(a) Allowed Claims Treatment. The disclosure statement should include a list of the allowed claims by class, with the amount of each allowed claim. The disclosure statement should further include a list of all disallowed claims by claimant.

(b) Ballots. Please provide a proposed ballot form with the plan. *See* Official Form 314.

C. Simultaneous Noticing. In most cases filed in this Division, I will authorize the simultaneous noticing of a preliminarily approved disclosure statement and the solicitation of acceptances in an effort to prevent complication and expense. *However*, if the plan proponent seeks to combine notice in this fashion she should file a Motion for Combined Notice of Disclosure Statement and Plan *at the same time* she files her disclosure statement and plan. I will make a preliminary review of both papers and if I find them facially sufficient, the Clerk will issue an order to notice that includes dates for objecting to the disclosure statement's adequacy and confirmation of plan, final hearing on disclosure statement and confirmation, and balloting. *If the plan proponent does not file a motion for combined notice,* the Clerk will automatically issue separate orders to notice the disclosure statement hearing and the confirmation hearing, each to be heard on different settings, and *each* allowing for at least 28-days' notice as provided by Rule 2002(b). *In small business cases*, I authorize simultaneous noticing without requiring a motion for combined notice, as permitted by Rule 3017.1.

D. Confirmation Hearing. Confirmation hearings are noticed as evidentiary hearings and counsel should be prepared to proceed on that basis. I typically use the first setting of the confirmation hearing to determine the extent of the objections to both the disclosure statement and plan. If they cannot be resolved at that hearing, the first setting also serves as a scheduling conference at which discovery and other matters can be discussed.

(a) Small Business Deadline. Section 1129(e) requires that a small business plan be confirmed within 45 days of its filing unless that

time is extended. Under § 1121(e)(3), that time may only be extended if the debtor gives notice to the parties in interest of her intention to do so and demonstrates by a preponderance of the evidence that the court will confirm a plan within a reasonable time.

V. CONCLUSION

As noted above, these guidelines are intended to make my expectations and preferences in chapter 11 cases known. They apply only to cases assigned to me and they are not intended to supplant or override statutes or rules. Please feel free to direct questions about how to proceed in chapter 11 cases to the Clerk's Office.

/s/ Robert E. Nugent III
UNITED STATES BANKRUPTCY JUDGE
DISTRICT OF KANSAS

September 14, 2016