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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

<p>In re: BEYOND.COM CORPORATION, a Delaware corporation,  Debtor.</p>	<p>Case No. 02-50441-MM Chapter 11  <b>OPINION</b></p>
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**INTRODUCTION**

Before the court is the debtor’s disclosure statement dated November 21, 2002. Because the underlying plan is patently unconfirmable, the disclosure statement may not be approved. See In re Phoenix Petroleum Co., 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001); In re United States Brass Corp., 194 B.R. 420, 422 ((Bankr. E.D. Tex. 1996); In re Eastern Maine Electric Cooperative, Inc., 125 B.R. 329, 333 (Bankr. D. Me. 1991); In re Filex, Inc., 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990).

The offensive plan provisions are not unique to this liquidating chapter 11 case and are not the brainchild of counsel for the debtor, but were copied from some other plan, apparently confirmed in some other jurisdiction and circulated as a model of creativity.

**BACKGROUND**

During the height of the dot-com boomlet, Beyond.com’s stock was publicly traded, raising \$185 million from its initial and secondary offerings and \$63 million from convertible notes. As of December

1 31, 2001, Beyond.com showed a net operating loss carry forward of \$316,578,000. Beyond.com filed  
2 the bankruptcy case on January 24, 2002, after it had ceased operations.

3 The United States Trustee appointed an official unsecured creditor's committee, consisting of  
4 five creditors, on February 6, 2002. Although not identified in the debtor's disclosure statement, the  
5 members of the official unsecured creditor's committee, their individual representatives, and the  
6 amounts of their claims are as follows: (1) LaSalle Bank, N.A., Russell C. Bergman, Esq., \$15,274,000;  
7 (2) Microsoft Corporation, Kathryn A. Mihalich, \$20,595,308; (3) Stellent Chicago, Inc., Louis Gomez,  
8 \$100,000; (4) Sento Corporation, Stanley J. Cutler, \$107,349.49; and (5) Right Now Technologies, Jan  
9 Weikert, \$200,000.

10 The debtor sold its on-line retail software operations in two unrelated sales. The eStore business  
11 sale to Digital River closed on March 31, 2002, and the Government Systems business sale to Softchoice  
12 closed on July 31, 2002. The disclosure statement reveals assets approximating \$9,268,397, a  
13 significant portion of which consists of shares of publicly traded stock, and it estimates liabilities at  
14 \$47,636,000. From the outset, a liquidating plan was the goal of the parties as the quickest method to  
15 distribute funds to creditors.

16 Beyond.com originally filed its plan on August 9, 2002. The plan is unusual in that it envisions  
17 that the reorganized debtor would "retain all of the rights, powers, and duties of a trustee under the  
18 Bankruptcy Code." The debtor's former Chief Operating Officer, John Barratt, would serve as a  
19 Liquidation Manager in accordance with a Liquidation Manager Agreement not a part of the court's  
20 record. Barratt's work would be supervised by the committee pursuant to Committee By-Laws, also not  
21 a part of the court's record. Among other things, the plan authorizes Barratt to "hold, sell, enter into  
22 derivative contracts for hedging, or otherwise dispose of the stock" upon majority approval of a sub-  
23 committee consisting of Barratt and two members of the committee, which is deemed approved twenty-  
24 four hours after written notice to the sub-committee. Post-confirmation, Barratt is authorized to retain  
25 and pay advisors regarding the stock, without supervision or limitation. Otherwise, he is authorized to  
26 abandon or sell assets valued at less than \$50,000 only on notice to or with the consent of the  
27 committee.

28

1 As to the employment of professionals, the disclosure statement, in a sentence certain to  
2 confound, provides:

3 From time to time after the Effective Date, the Reorganized Debtor and/or the Committee  
4 may employ, engage the services of and compensate Persons and Professional Persons  
5 (which may include agents or independent contractors or Professional Persons previously  
6 or concurrently employed by the Committee or previously employed by the Debtor  
7 including, without limitation, Committee Counsel, Debtor's Counsel, Debtor's special  
8 counsel, Committee Accountants and Debtor's Accountants), reasonably necessary to  
9 assist the Liquidation Manager in performing his duties under this Plan, without the  
10 necessity of further authorizations by the Bankruptcy Court, provided that the  
11 Liquidation Manager shall not hire a Professional Person except upon either (1) consent  
12 of the Committee or (2) Bankruptcy Court authorization granted upon no less than ten  
13 (10) days notice to the Committee and Debtors' Counsel; provided, further, after the  
14 Confirmation Date, the Reorganized Debtor and/or the Committee may retain Debtor's  
15 accountants, Debtor's Counsel, Debtor's brokers or agents, Committee Counsel,  
16 Committee's accountants and Committee's financial advisor, as professionals without  
17 further action by the Committee or order of the Bankruptcy Court.

15 Additionally, Barratt, may either act as the disbursing agent or engage one.

16 As to litigation claims, the disclosure statement provides that all of the estate's claims and causes  
17 of action as set forth in Exhibit "A" (litigation listed in the Statement of Affairs) and Exhibit "C"  
18 attached to the disclosure statement may be asserted by the Liquidation Manager and the Committee,  
19 but that the debtor has not had an adequate opportunity to complete its review of these claims and will  
20 not have identified all potential defendants by the time of plan confirmation. Exhibit "C" entitled  
21 "Retained Claims and Defenses" is a five page document. The preface to the exhibit explains that "[t]he  
22 inclusion of a particular claim, including but not limited to claims against insiders and or (sic) officers  
23 of the Debtor, does not indicate an endorsement or opinion on the validity or merits of a particular  
24 claim." Sub-paragraphs (a) through (p) are generally generic in substance, except that Barratt is  
25 identified by name twice and implicated in a third paragraph. Of particular concern are the following  
26 paragraphs:

27 The term "Retained Claims and Defenses" is broadly defined in the Plan to mean:

28 All claims . . . (including but not limited to those arising under Bankruptcy Code sections

1 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, and 553), which . . . arise out of, or are  
2 related to any of the following:

3 (a) All claims, causes of action and defenses against the current and/or past officers  
4 and/or directors of the Debtor, including but not limited to . . . John Barratt . . . including  
5 claims, causes of action and defenses arising out of or related to breach of duty,  
6 negligence, mismanagement and/or excessive compensation together with all claims,  
7 recoveries, and proceeds of and rights in and under any insurance policies therefore,  
8 including but not limited to the Directors and Officers Liabilities Insurance policies . . . .

9 \* \* \* \* \*

10 (c) All claims causes of action, defenses, rights of offset or recoupment, fraudulent  
11 transfer claims, avoidance and recovery of preferential transfers and other bankruptcy  
12 avoidance actions, and all rights and remedies including contractual subordination or  
13 equitable subordination of claims, against or with respect to current and/or past officers  
14 and/or directors of the Debtor, including but not limited to . . . John Barratt . . . with  
15 respect to the Executive Trust.

16 \* \* \* \* \*

17 (j) All claims and causes of action, including bankruptcy avoidance powers, against any  
18 present or former officer or employee of the Debtor on account of payments of salary,  
19 severance pay, termination pay, employee benefits, or other compensation which Debtor  
20 paid or became obligated to pay within four (4) years prior to the Petition Date.

21 Elsewhere in the disclosure statement the Executive Trust referenced above is explained. Prior  
22 to the creation of the Executive Trust, Beyond.com had contracted to pay as severance one year's salary  
23 and bonus totaling \$2,300,000 for its five executives, including Barratt. According to the disclosure  
24 statement, the Executive Trust was created in November, 2001, six weeks before filing, to provide a  
25 mechanism to fund that obligation and to revise executive incentives. It is perhaps noteworthy that the  
26 board of directors received advice from current counsel for the debtor regarding its duties to "various  
27 stakeholders" and that the five executives were represented by independent counsel. Merrill, Lynch  
28 Trust Co. F.S.B., as trustee, distributed half of the severance obligations as a result of certain triggering  
events, specifically, the filing of the bankruptcy petition, non-payment of regular executive

1 compensation, cessation of business and termination of employment. The remaining half of the  
2 Executive Trust was funded in January, 2002, when the board of directors authorized a contract to sell  
3 the operating businesses on favorable terms, but before the filing of the bankruptcy case. These funds  
4 were to be distributed one half upon consummation of a sale in excess of \$5 million for the eStore  
5 business and the remainder upon consummation of a sale in excess of \$5 million for the Government  
6 Systems business. However, after the filing of the case, the favorable contract failed and the sales targets  
7 were not met, resulting in the return by Merrill, Lynch of \$1,150,000 to the estate.

8 The plan also provides that either Barratt or the committee, on ten days' notice to the other and  
9 to a "Post-Effective date Limited Notice List" could modify or amend the plan or request "instructions"  
10 from the court with respect to "authority to undertake certain actions or to refrain from taking actions  
11 under this Plan." For these services, Barratt would be paid at an hourly rate of \$225, a minimum  
12 monthly payment of \$10,000, for an "initial term" of nine months.

13 As to the disclosure statement's liquidation analysis, the sole asserted difference between the  
14 costs of liquidating in chapter 11 versus chapter 7 is the assumption that a chapter 7 trustee would  
15 receive the statutory maximum fee of \$301,601, while Barratt's "initial 9 month budget" proposes to cost  
16 a mere \$255,000. Post-confirmation legal fees are estimated at \$100,000 in the chapter 11 analysis but  
17 are estimated at \$150,000 in the chapter 7 analysis.

18 At the insistence of the United States Trustee, a provision titled "Channeling of Claims," which  
19 purported to preclude post-confirmation date claims against the estate, the reorganized debtor and the  
20 liquidation manager, was deleted from the final version of the plan and disclosure statement filed with  
21 the court. However, other provisions remain that attempt to limit the personal liability of Barratt and  
22 the committee for acts performed in their official capacities.

## 23 24 DISCUSSION

25 Conceptually, Beyond.com's plan and disclosure statement is as freewheeling with the  
26 Bankruptcy Code and Rules as Enron's accountants were with the tax laws in the 1990s. There are many  
27 reasons why the disclosure statement before the court should not be approved. However, this decision  
28 focuses on the requirements of 11 U.S.C. §1129(a), specifically §1129(a)(1), requiring compliance with

1 the applicable provisions of Title 11, § 1129(a)(4), requiring that payments for services in connection  
2 with the case be approved by the court as reasonable, § 1129(a)(5) requiring disclosure of the identity and  
3 affiliations of individuals proposed to serve as directors, officers or voting trustees of the debtor and that  
4 the appointment or continuance in such office be consistent with the interests of creditors and with  
5 public policy, and § 1129(a)(11), requiring that confirmation of the plan not likely be followed by the  
6 need for further financial reorganization.

7  
8 **1. Compliance with Applicable Provisions of Title 11.**

9 Section 1129(a)(1) provides:

10 (a) The court shall confirm a plan only if all of the following requirements are met:

11 (1) The plan complies with the applicable provisions of this title.

12  
13 This section provides that the bankruptcy court has the power to confirm a plan only if it complies with  
14 applicable provisions of the Bankruptcy Code. See In re Lowenschuss, 67 F.3d 1394, 1401 (9<sup>th</sup> Cir.  
15 1995), cert. denied, 517 U.S. 1243 (1996); In re Commercial Western Finance Corp., 761 F.2d 1329,  
16 1338 (9<sup>th</sup> Cir. 1985).

17 Beyond.com's proposed plan contains numerous provisions that modify the requirements of the  
18 Bankruptcy Code. Of greatest concern to the court are those provisions that dramatically reduce notice  
19 to creditors of matters that the drafters of the Bankruptcy Code and Rules considered fundamental to  
20 bankruptcy due process. Notice, after all, is the cornerstone underpinning bankruptcy procedure. In re  
21 Savage Industries, Inc., 43 F.3d 714, 720 (1<sup>st</sup> Cir. 1994); In re Hexcel Corp., 239 B.R. 564, 567 (N.D.  
22 Cal. 1999). For example, the plan grants the Liquidation Manager the authority under the plan to dispose  
23 of property and to engage in agreements without court order or compliance with § 554 and Bankruptcy  
24 Rule 6007 regarding the abandonment of property of the estate, §§ 327 and 330 and Bankruptcy Rules  
25 2002, 2014, and 2016 regarding the retention and compensation of professionals, § 1127 regarding  
26 modification of the confirmed plan, § 363 and Bankruptcy Rules 2002 and 6004 regarding the sale of  
27 property of the estate, and Bankruptcy Rules 2002 and 9019 regarding compromises or settlements of  
28 controversies. The modifications to the applicable provisions of title 11 are not minor, ministerial or

1 simply pragmatic. In effect, the plan affords the reorganized debtor the prerogative to comply selectively  
2 with the provisions of the Bankruptcy Code and Rules without judicial supervision. A more cynical  
3 view suggests that providing the least notice to the fewest people reduces oversight. Accordingly, the  
4 plan fails to satisfy the requirements of § 1129(a)(1).

5  
6 **2. Approval by the Court of Services in Connection with the Case as Reasonable.**

7 Section 1129(a)(4) provides:

8 Any payment made or to be made by the proponent, by the debtor, or by a person issuing  
9 securities or acquiring property under the plan, for services or for costs and expenses in  
10 or in connection with the case, or in connection with the plan and incident to the case,  
11 has been approved by, or is subject to the approval of, the court as reasonable.

12 This section mandates full disclosure of all payments for services, costs, and expenses in connection with  
13 the case and subjects the reasonableness of these payments to the scrutiny and approval of the court. In  
14 re Future Energy Corp., 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988). It ensures compliance with the  
15 policies of the Code that the bankruptcy court should police the awarding of fees in title 11 cases and  
16 that holders of claims and interests should have the benefit of information that might affect the  
17 claimants' decision to accept or reject the plan. Id.

18 The requirements under § 1129(a)(4) are two-fold. First, there must be disclosure. Second, the  
19 court must approve of the reasonableness of payments. 7 *Collier on Bankruptcy* ¶ 1129.03[4]. Here,  
20 the debtor's plan can't estimate the cost of services because it is premature. The debtor has not yet  
21 announced what litigation it will pursue. At a minimum, however, there appears to be a likelihood of  
22 significant litigation over the Digital River sale, the Executive Trust, and possibly the Softchoice sale.

23 As a result, the generalized projection provided to creditors in the liquidation analysis of the disclosure  
24 statement may become so understated as to be meaningless. The plan fails to satisfy the requirements  
25 of § 1129(a)(4).

1 **3. Disclosure of Identity and Affiliations of Individuals and Governance Consistent with the**  
2 **Interests of Creditors and Public Policy.**

3 Section 1129(a)(5) provides:

4 (A)(i) The proponent of the plan has disclosed the identity and affiliations of any  
5 individual proposed to serve, after confirmation of the plan, as a director, officer, or  
6 voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the  
7 debtor, or a successor to the debtor under the plan; and

8 (ii) the appointment to, or continuance in, such office of such individual, is consistent  
9 with the interests of creditors and equity security holders and with public policy. . . .

10 This section contains a blend of disclosure and substantive requirements. 7 *Collier on Bankruptcy*  
11 ¶ 1129.03[5](15<sup>th</sup> ed. rev. 2002).

12 While the disclosure statement identifies Barratt as the initial Liquidation Manager, it fails  
13 adequately to disclose his affiliations. In particular, it fails to disclose the terms of the agreement that  
14 governs Barratt’s duties. As a former executive of the debtor, Barratt is subject to potential conflicts of  
15 interest, particularly with respect to the administration of the Executive Trust. Notably, the Executive  
16 Trust was created as a vehicle that allowed Beyond.com executives, presumably including Barratt, to  
17 receive 50% of their “golden parachutes,” an amount substantially in excess of the less than 20%  
18 distribution anticipated to other unsecured creditors of the estate. Barratt and the committee have the  
19 responsibility of deciding whether to sue the executives to recover the funds.

20 Under the plan, the official committee of unsecured creditors is charged with monitoring and  
21 supervising the activities of the Liquidation Manager. While the express language of § 1129(a)(5)(A)(i)  
22 does not require it, some courts have extended the reach of the section to include individuals such as the  
23 committee members in this case. *Id.* at ¶ 1129.03[5][a]. See, e.g., *In re Valley View Shopping Center,*  
24 *L.P.*, 260 B.R. 10, 23 (Bankr. D. Kan. 2001); *In re Holley Garden Apartments, Ltd.*, 238 B.R. 488, 493  
25 (Bankr. M.D. Fla. 1999). *But see In re Eagle-Picher Industries, Inc.*, 203 B.R. 256, 267 (S.D. Ohio  
26 1996). The disclosure statement fails to disclose the identities or affiliations of the members of the  
27 official committee of unsecured creditors. It also fails to disclose the terms of the committee’s bylaws,  
28 which generally dictate its duties and rules of governance.

1           Once disclosed, the court makes a substantive determination under § 1129(a)(5)(A)(ii) whether  
2 post-confirmation management serves the interests of creditors and equity security holders and is  
3 consistent with public policy. See In re Sovereign Group, 1984-21 Ltd., 88 B.R. 325, 329 (Bankr. D.  
4 Colo. 1988). Continued service by prior management maybe inconsistent with the interests of creditors,  
5 equity security holders, and public policy if it directly or indirectly perpetuates incompetence, lack of  
6 discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor. In re  
7 Polytherm Industries, Inc., 33 B.R. 823, 829 (W.D. Wis. 1983). While the court is not prepared to find  
8 that the service of Barratt as Liquidation Manager is unfit, or that management by Barratt or the  
9 committee is contrary to the interests of parties in this case or against public policy, the disclosures to  
10 date are insufficient to enable the court to conclude that the converse is true.

11           Without adequate disclosures, the court cannot conduct an intelligent analysis of whether the  
12 continuance of those parties in their roles is consistent with the interests of creditors and equity security  
13 holders and with public policy. Based on the record presently before the court, it appears there are  
14 insufficient safeguards with respect to post-confirmation governance of the debtor to ensure that the  
15 interests of creditors and equity security holders are protected. For these reasons, the requirements of  
16 § 1129(a)(5) have not been satisfied.

17  
18 **4.     Not Likely to be Followed by the Need for Further Financial Reorganization.**

19 Section 1129(a)(11) provides:

- 20           (11) Confirmation of the plan is not likely to be followed by the liquidation, or the  
21 need for further financial reorganization, of the debtor or any successor to the  
22 debtor under the plan, unless such liquidation or reorganization is proposed in the  
23 plan.

24 The feasibility requirement requires courts to scrutinize carefully the plan to determine whether it offers  
25 a reasonable prospect of success and is workable. In re Acequia, Inc., 787 F.2d 1352, 1364 (9<sup>th</sup> Cir.  
26 1986); 7 *Collier on Bankruptcy* ¶ 1129.03[11]. The Bankruptcy Code does not allow modification after  
27 substantial consummation, which generally occurs soon after the effective date. However, the proposed  
28 plan expressly anticipates modification and implements procedures for modification. Plan modification

1 necessarily requires further financial reorganization. See In re Hoffman, 52 B.R. 212, 215 (Bankr. D.  
2 N.D. 1985). For this reason, the requirements of § 1129(a)(11) are not met.

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**CONCLUSION**

This plan is not confirmable chiefly because it alters the Bankruptcy Code in derogation of the notice provisions that provide fundamental protections for creditors and because its thrust is to avoid judicial supervision unless it is convenient to the debtor or its professionals. However, the court has a continuing oversight responsibility in liquidation cases that cannot be selectively invoked. In its exuberance rewriting provisions of the Code, the author of the proposed plan overlooked the requirements of §1129(a), which provide a framework ensuring the integrity of the system. These defects cannot be cured.

The disclosure statement is also deficient because it utterly fails to make disclosures about management. The lack of disclosure brings into question not only the ability of the debtor to fulfill its fiduciary responsibilities, but the true allegiance of debtor’s counsel and, to the extent the creditor’s committee negotiated the proposed plan, the committee’s competency, and perhaps, its counsel’s self-interest.

Beyond.com filed this case because it needed the special provisions available only to bankruptcy debtors. Having sought bankruptcy’s protections, it cannot now rewrite the Bankruptcy Code to suit its purposes.

DATED: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

1 Case No. 02-50441-MM

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3  
4 **UNITED STATES BANKRUPTCY COURT**  
5 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
6 **CERTIFICATE OF SERVICE**

7 I, the undersigned, a regularly appointed and qualified Clerk in the office of the  
8 Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San  
9 Jose, California hereby certify:

10 That I am familiar with the method by which items to be dispatched in official mail from the  
11 Clerk's Office of the United States Bankruptcy Court in San Jose, California processed on a daily basis:  
12 all such items are placed in a designated bin in the Clerk's office in a sealed envelope bearing the address  
13 of the addressee, from which they are collected at least daily, franked, and deposited in the United States  
14 Mail, postage pre-paid, by the staff of the Clerk's Office of the Court;

15 That, in the performance of my duties, on the date set forth below, I served the **OPINION** in the  
16 above case on each party listed below by depositing a copy of that document in a sealed envelope,  
17 addressed as set forth, in the designated collection bin for franking, and mailing:

18  
19 JEFFRY DAVIS  
20 LILLIAN STENFELDT  
21 GRAY CARY WARE & FREIDENRICH  
22 1755 EMBARCADERO ROAD  
23 PALO ALTO CA 94303

RICHARD ROGAN  
NICHOLAS DELANCIE  
JEFFER MANGELS BUTLER MARMARO  
TWO EMBARCADERO CTR 5<sup>TH</sup> FLOOR  
SAN FRANCISCO CA 94111

24 In addition, I am familiar with the Court's agreed procedure for service on the United States  
25 Trustee, by which a copy of any document to be served on that agency is left in a designated bin in the  
26 Office of the Clerk, which bin is collected on a daily basis by the United States Trustee's representative.  
27 In addition to placing the above envelopes in the distribution bin for mailing, I placed a copy of the  
28 **OPINION** in the United States Trustee's collection bin on the below date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on:

\_\_\_\_\_  
Clerk