

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re: Green Box NA Green Bay, LLC,

Case No. 16-24179-beh
(Chapter 11)

Debtor.

**UNITED STATES TRUSTEE'S OBJECTION
TO CONFIRMATION OF THE DEBTOR'S PLAN DATED DECEMBER 21, 2016**

The United States Trustee, Patrick S. Layng, by Attorney Amy J. Ginsberg, objects to confirmation of the Debtor's Plan dated December 21, 2016 (the Plan) because (1) it provides for prohibited non-debtor party releases; (2) the Plan's effective date is not fixed firmly; (3) the Debtor has not provided evidence of feasibility; and (4) compensation of insiders and officers is not disclosed. In support of this objection, the United States Trustee states:

1. Ron Van Den Heuvel (Van Den Heuvel) owns roughly 79% of the Debtor. Since 2012, Steve Smith (Smith), the Debtor's current managing member, has invested more than \$7 million in various entities controlled by Van Den Heuvel. Plan, page 15. Pre-petition, Van Den Heuvel and Smith agreed to allocate \$4 million of this investment to the Debtor and obtained a General Business Security Agreement, encumbering all of the Debtor's unencumbered assets. Since commencement of this case, Smith propped up the Debtor and the related company, Patriot Tissue, financially; funding Attorney Swanson's retainer, the adequate protection payments, United States Trustee quarterly payments and Patriot's operating expenses and payrolls.

2. The Plan provides that the Debtor will be "rolled up" with other non-Debtor entities including the Debtor's parent company, EARTH, n/k/a RTS, and other entities creating "NewCo."

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The Debtor owns the real property and equipment necessary for the “roll up.” In turn, the Debtor will receive a 30% equity interest in NewCo. Plan, page 13.

3. It is not clear what RTS is contributing to the “roll-up” outside of its 79% interest in the Debtor’s assets. Nor is it clear what RTS will receive for its assets transferred to NewCo. Van Den Heuvel holds an equity interest in RTS, albeit indirectly. Plan, Exhibit B. It is unclear whether he will receive any money when NewCo obtains financing. Similarly, RTS is rolling up other entities into the Debtor, but these other entities are not disclosed. For example, it is not clear whether Green Box, NA, which received pre-petition payments due the Debtor, is part of the “roll up.” The Plan does not address how much cash these other entities will receive from the “roll up” and whether Van Den Heuvel will receive any cash through his ownership interest in those entities.

4. Another related company, PC Fibre Technology, LLC (PC Fibre), owns the intellectual property necessary for the “roll up.” However, PC Fibre will not be part of the “roll-up”; PC Fibre will license its intellectual property to the “roll-up.” Plan, page 17. Van Den Heuvel will receive a portion of the license fees. *Id.* Neither the Plan nor the Disclosure Statement addresses the amount of the licensing fee that Van Den Heuvel will receive for his licenses.

5. Days after filing this chapter 11 case, Smith says that he removed Van Den Heuvel from the Debtor’s management and control. The Plan asserts that Van Den Heuvel remains removed from management and control of the Debtor and NewCo. While the Debtor assures creditors that Van Den Heuvel will not receive any payments on account of his equity interest in the Debtor or NewCo before the unsecured creditors are paid, Van Den Heuvel will be paid by PC Fibre, LLC for licensing his technology.

6. The United States Securities and Exchange Commission (SEC) filed an unsecured claim arising from possible violations of Federal securities laws which benefitted the Debtor. *See* Claim No. 7. The Debtor’s Disclosure Statement did not address the SEC’s claim. Upon

information and belief, the SEC did not receive a ballot to vote on the Plan. See 11 U.S.C. § 1126(a).

7. The Plan provides that the Debtor's assets will be transferred to NewCo free and clear of any liens and pre-petition claims. Adding to the force of this provision, the Plan provides for a blanket release for NewCo from claims asserted by any creditor, scheduled or not. Plan, Article VI, page 18. Although the Debtor argues that this non-debtor release is narrowly tailored, it is a blanket release, releasing the Debtor from any claims arising from any actions other than willful misconduct. The Debtor argues that this blanket release is necessary or new investors will not fund the Plan. Plan, pages 18-19.

A. The Debtor's Plan Should Not Be Confirmed Because It Provides Releases to Non-Debtors

8. Essentially, the Debtor's new management is transferring its assets to NewCo to separate Van Den Heuvel and his necessary technology from the new paper reclamation business. This new business, NewCo is a non-debtor entity. "Blanket immunity," such as that proposed by the Debtor--barring claims against non-debtor entities for all times, all transgressions and all omissions--amounts to a prohibited plan provision. *Airadigm v. Federal Communication Comm. (In re Airadigm)*, 519 F. 3d 640, 657 (7th Cir. 2008).

9. Elaborating on *Airadigm*, the Seventh Circuit stated that a third-party release as part of a plan is only permissible when: (1) the party released is a participating creditor, (2) the claim enjoined arises from the reorganization and not pre-petition conduct, and (3) the release is necessary for the reorganization. See *In re Ingersoll, Inc.*, 562 F. 3d 856, 865 (7th Cir. 2009). The Seventh Circuit warns that because a non-debtor release gives the non-debtor the benefit of a bankruptcy discharge without a bankruptcy filing and the safeguards of the Code, such release should only be approved in rare cases. *Ingersoll* at 865.

10. As the Court in *Ingersoll* noted, most non-debtor releases fail to pass muster under the *Airadigm* standard. *Ingersoll* at 865. As anticipated by the *Ingersoll* court, the non-debtor release contained in the Debtor's Plan fails to pass muster when considered under the *Airadigm* standards. First, the release applies to all creditors, whether or not they received actual notice. Barring creditors who have not received any notice of this chapter 11 case from pursuing any claim against NewCo violates their fundamental due process rights. Second, the non-debtor release precludes creditors from pursuing any claims, including claims arising from non-bankruptcy law, rather than claims arising from the reorganization. The Debtor claims that the non-debtor release is essential to the reorganization but has presented only Smith's testimony to support its position. Testimony from the Investment Bank is necessary to support the Debtor's position.

11. In addition, in *Airadigm* the Seventh Circuit noted that the non-debtor release expressly preserved the FCC's regulatory powers and was not proposed to skirt the FCC's regulations. *Airadigm* at 657. In contrast, in the present case, the Debtor directed the non-debtor release at the SEC, and it is designed to stop the SEC from using its regulatory powers.

12. The case before the bar is much like *Berwick Cattle Co.*, 394 B.R. 448, 451-2 (Bankr. C.D. Ill. 2008). In *Berwick*, the debtor transferred its assets to a new company, American Cattle Co. (ACC). A potential lender, WFY, planned to finance ACC's operations. Berwick's plan provided releases for several non-debtors, including ACC, barring creditors from pursuing ACC on any claims. Berwick argued that without the release of ACC, WFY would not provide the financing necessary and the plan would fail. The *Berwick* court denied confirmation of Berwick's plan because the proposed non-debtor releases failed to meet the narrow *Airadigm* standards, including: (1) including all creditors whether or not the creditor had notice of the bankruptcy; (2) barring claims unrelated to the bankruptcy; (3) the non-debtor release amounted to a blanket release; (4) the

releasers did not receive any consideration for their release; and (5) the rationale for granting releases in a liquidating case was not compelling. *Bernick* at 460-463.

13. Finally, the injunction assumes Van Den Heuvel is the only party with any pre-petition liability, but that may not be the case. If Smith wants the benefit of the non-debtor release, the Plan must expressly say so in a conspicuous manner. Fed. R. Bankr. P. 2002(c)(3).

14. The Debtor's Plan cannot be confirmed because the Debtor failed to provide proper notice of the non-debtor release. *See* Fed. R. Bankr. P. 2002(c)(3).

B. The Debtor Cannot Set a Firm Effective Date: The Debtor's Plan Cannot Be Confirmed Because the Effective Date Remains Elusive

15. According to the Plan, the effective date is March 31, 2017. However, the Debtor reserves the right to ask the Court for additional time if the Debtor fails to raise the \$14 million it needs to pay creditors. The Plan does not tell creditors when they will know if the Debtor cannot meet its March 31, 2017 effective date. The Plan does not state how much longer it will ask the Court to enlarge the effective date, leaving creditors without sufficient information to know when the Plan is in default.

16. In addition, the Plan also remains elusive about when unsecured creditors will be paid. According to the Plan, unsecured creditors will be paid from NewCo's net proceeds. Plan, page 13. However, the Plan does not impose a duty on NewCo to report to the unsecured creditors on its gross income, expenses and net income. As a result, unsecured creditors have no means to enforce their rights under the Plan.

17. In its Motion to Convert or Dismiss, the United States Trustee argued that the Debtor could not propose a confirmable plan because it had no assets to offer creditors as security. *See* Docket Entry #59. At the September 30, 2016 hearing on the Motion, the Debtor's CFO, Ed Kolasinski, testified that he would have interim funding to pay accountants to prepare the Debtor's

tax returns in a few weeks. *See* Docket Entry #92, page 24. As set out in the Disclosure Statement, the Debtor has not yet raised the funds to pay an accountant to prepare the Debtor's tax returns for 2012-2015.

18. The Plan does not provide for specific alternatives in the event it fails to fund by March 31, 2017.

19. The Plan cannot be confirmed without a more specific time frame for the effective date, including a fixed deadline for the Debtor to file a Motion to extend the Plan's effective date.

C. The Debtor's Plan Should Not Be Confirmed Because It Is Not Feasible

20. In order to confirm a plan, it must be feasible. 11 U.S.C. §1129(a)(11).

21. The United States Trustee asked Debtor's counsel if any of the \$2.5 million in funds necessary for confirmation have been raised. Debtor's counsel advised that Smith says he raised the necessary funds. That is the extent of the evidence provided. Despite the United States Trustee's requests, to date, the Debtor has not provided any documentation that it raised any funds and has not identified what party agreed to provide the funds.

22. The United States Trustee puts the Debtor to its proof that its Plan is feasible.

D. The Plan Should Not Be Confirmed Because Compensation of Insiders Is Not Disclosed

23. In order for a court to confirm a chapter 11 plan, the Plan must disclose the compensation of insiders that are employed or retained by the reorganized debtor. 11 U.S.C. §1129(a)(5)(B).

24. The Plan does not disclose Smith's compensation or the compensation of other officers and insiders.

25. In addition, a Plan must disclose all of the debtor's affiliates participating in the successor to the debtor. 11 U.S.C. §1129(a)(5)(A)(ii).

26. NewCo is a successor to the Debtor. The Plan does not disclose all of the Debtor's affiliates which are included in the "roll up." For example, the Plan does not disclose whether Green Box, LLC or Patriot Tissue is included in "roll up."

27. Therefore, the Plan as proposed is contrary to the provisions of the Bankruptcy Code and cannot be confirmed. 11 U.S.C. § 1129(a)(5).

WHEREFORE, the United States Trustee objects to confirmation of the Debtor's Plan. The United States Trustee does not intend to file a brief in connection with this pleading, but reserves the right to file a responsive brief or pleading if necessary.

Dated: January 19, 2017.

PATRICK S. LAYNG
United States Trustee

AMY J. GINSBERG
Attorney for the United States Trustee

UNITED STATES BANKRUPTCY COURT
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I electronically filed the **UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF THE DEBTOR'S PLAN DATED DECEMBER 21, 2016** with the Clerk of the Bankruptcy Court using the ECF system which did and will send notification of such filing to the following parties:

Attorney Paul G. Swanson

and further, that I mailed a copy of the pleading, via first-class U.S. mail, to the following party:

Green Box NA Green Bay, LLC
2107 American Boulevard
DePere, WI 54115



MARY JO MALONE, Paralegal Specialist
Office of the United States Trustee