

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

In re:

Green Box NA Green Bay, LLC,
Debtor.

Case No. 16-24179-beh
Chapter 11

**BRIEF IN RESPONSE TO THE UNITED STATES TRUSTEE'S OBJECTION TO
CONFIRMATION**

Introduction

The United States Trustee's (UST) objections are either erroneous, in the case of the injunction provisions and the effective date issue, or inconsequential, in the case of disclosing insiders and feasibility. The insider issue can be addressed by making minor changes after the confirmation hearing. And the feasibility issue is an issue of fact, about which the UST has not shown any contrary proof.

1. The injunction provisions are permissible and this case is distinguishable from *Berwick Cattle* because the release here could not be more different from the two releases in *Berwick*.

In its reply to the SEC's objection the Debtor already explained why the SEC's, and by extension the UST's, objections to the release provisions are wrong.

The challenged releases in *Berwick* released "not just claims arising out of the bankruptcy cases, but pre-petition claims also, including claims based on nonbankruptcy law, that exist outside of bankruptcy and that have nothing to do with the bankruptcy proceedings." *In re Berwick Black Cattle Co.*, 394 B.R. 448, 457 (Bankr. C.D. Ill. 2008). For instance, one of the releases would have enjoined

claims and causes of action which **any of the Debtors' creditors** or **any party-in-interest** in the Cases **has or may have** as of the Effective Date of the Plan against the Ward Entities, High Plains, the Creditors' Committee, the members of the Creditors' Committee (with

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respect to their actions as members of the Creditors' Committee), and professionals retained by any of the foregoing **relating in any way** to the Debtors or the Cases, including all litigation relating thereto pending or threatened on the Petition Date shall be included within the Confirmation Order.

Berwick, 394 B.R. at 452.

The Debtor agrees the *Berwick* provisions were impermissibly broad, and the bankruptcy court was correct to deny confirmation. Those provisions would have barred virtually any litigation that had only the most remote connection to the *Berwick* cases. For instance, it could have barred a personal injury claim by the US Trustee against the Creditor's Committee attorney for a car accident on the way to a meeting of creditors. Such a claim would have been a claim by a party-in-interest "relating in any way" to the bankruptcy cases.

In contrast, the release in the Plan enjoins claims on two extremely narrow grounds for the legitimate purpose of ensuring investors that they will not be dragged into litigation because of Ron Van Den Heuvel. The provisions in *Berwick* and the provisions in this case could not be more different.

2. 11 U.S.C. § 1129 does not require a specific effective date.

Contrary to the assumption in the US Trustee's objection, section 1129 contains no requirement for a specific effective date. It is true that some of the provisions would not operate properly without at least an approximate effective date. Most of the references to an effective date relate to present value of payments to claimants. The only provisions that do not are the requirements that all United States Trustee's fees are paid, and that the plan provides for continuation for payment of retirement benefits. §§ 1129(a)(12), 1129(a)(13).

Only one provision referring to the effective date is relevant and the Plan can still be confirmed in spite of not having a specific effective date. The provisions regarding payments of claims are irrelevant, as all of the creditors have accepted the Plan. The provisions about

retirement benefits are inapplicable because the Debtor does not pay any such benefits. The only relevant provision is the one about US Trustee fees. All the fees have been paid, and it is highly unlikely that the Debtor cannot pay for future fees to the extent there will be any outstanding.

3. Feasibility is an issue of fact.

The UST's objection impliedly admits that feasibility is an issue of fact. The Debtor will prove this at the confirmation hearing.

4. The insider issues are inconsequential.

It should be clear from Plan that the Debtor's current principal will continue post-confirmation. The Plan reads:

Specifically, the Debtor's management, which will also be the management of NewCo , will forge ahead with the rollup plan. While the Debtor's management, Smith (through GlenArbor) and Kolasinski, will also be the primary management for NewCo, it should be pointed out that the financing that will be raised in the capital markets by the Investment Bank will undoubtedly be in the form of a Bond Indenture which is typically monitored by a trustee to ensure the funds are applied as agreed and that any and all financial requirements are adhered to. The day to day management of the operation, however, will be in the hands of the management team described herein.

The rest of the issues can be addressed at the confirmation hearing and then added to the Plan before the Court enters an order confirming it.

Conclusion

In sum, none of the UST's objections are fatal to confirmation. The objection to the injunction provisions ignores the text of the Plan and misreads *Airdigm* and *Berwick Cattle*. The lack of a specific effective date is a non-issue since the claimants have accepted the Plan and the Debtor can pay any future fees required. Feasibility is an issue of fact, and to the best of the Debtor's knowledge, the UST will not present any evidence controverting the Debtor's case. Finally, to the extent the Plan does not disclose compensation, affiliates, and insiders, the Debtor can do so at the confirmation hearing.

Dated this January 25, 2017.

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