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 REPONSE TO THE SECURITIES AND EXCHANGE COMMISSION'S OBJECTION TO CONFIRMATION

Introduction

With no cognizance of or concern for the effects of its actions, the Securities and Exchange Commission ("SEC") has objected to confirmation. The SEC has not articulated a cause of action against the reorganized Debtor and NewCo, a newly formed entity formed with new money from unrelated parties. Instead, the SEC urges the Court to disregard section 1141's discharge provisions—the whole point of bankruptcy—and to excise a permissible and necessary safeguard to ensure a successful reorganization.

The Court should overrule the SEC's objections to the injunctions. Sustaining the SEC's objections would doom the Plan by making funding infeasible, leave creditors unpaid, and strangle an innovative, useful technology in its crib. The injunctions the Debtor are permissible under the Code, do not restrict the SEC from enforcing securities laws, and are necessary for a successful reorganization.

Background

As the Court is well-aware, this case was required to ensure the effective reorganization of Green Box so that it can utilize innovative technology that (1) recycles used tires and (2) ensures that otherwise useless, unrecyclable wastepaper can be recycled and otherwise put to good use. For reasons the Court already knows, Green Box's former principal, Ron Van Den Heuvel, partly

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precipitated the bankruptcy and the case's complexity by putting assets necessary to Green Box's operations in various entities.

The Plan will allow the reorganized Debtor to continue operating, it will unwind Van Den Heuvel's complicated entity structure, and it will pay all creditors with discernable claims in full. The premise is simple. A new entity called NewCo will be formed. NewCo's management will then solicit funding from outside, third-party investors. Using the new money, NewCo, in turn, will purchase necessary assets from Van Den Heuvel's various entities for their full, appraised value, and operate as a business. The reorganized Debtor will continue to develop and contract pyrolysis units as it has and use them to convert used tires into oil, carbon black, steel, and synthetic gas. In addition, the reorganized Debtor will receive a 30% interest in NewCo. Using the income from its operations recycling tires and income it receives from its equity stake in NewCo, it will repay general unsecured claims in full. Importantly, Van Den Heuvel will continue to have no role in the operations of either the Debtor or NewCo (other than as a technical advisor, if needed).

In other words, once the Plan is confirmed and successfully consummated, all of the creditors will be paid in full using money unconnected to Van Den Heuvel. And Van Den Heuvel's only connection to the Debtor and his various entities will be his various trusts' equity interests in them.

Key to the Plan's success, however, is the Debtor's new management $179,000,000 from new investors. No new investor providing millions of dollars of funding would invest into a situation with even the slightest risk of being hauled into an expensive, uncertain securities case or other similar litigation. For that reason, it is imperative that the Debtor and NewCo obtain an effective fresh start to separate them from any risk that Van Den Heuvel may pose due to of uncertainty about litigation by governmental entities or successorship liability. Consequently, Article

VI of the Plan provides for a "release & injunction" for NewCo. Specifically, the release would bar any creditor,

> on account of claims it has against the Debtor, [from pursuing] NewCo on account of the Debtor's transfer of its assets to it or the Debtor's retention of an equity ownership interest of that entity.

Similarly, as a matter of law, once the Plan is confirmed, the Debtor will receive an injunction for all prepetition claims that may stem from Van Den Heuvel's pre-petition acts. Bankruptcy practitioners have a specific term for this injunction: a discharge.

The SEC, however, objects to the Plan's key component. But it is not clear *why*. The Plan does not release Van Den Heuvel. It does not release any possible post-confirmation securities violations by anyone. And the SEC has not even articulated any cognizable cause of action that it could bring against NewCo. Indeed, it cannot, since NewCo did not exist before the bankruptcy and none of its potential financing can plausibly be linked to Van Den Heuvel.

Discussion

If the Court considers the provisions in Article VI of the Plan a third party release, the provisions are permissible under section 1123(b)(6)'s plain text and Seventh Circuit case law. The provisions are unobjectionable, harm nobody, and are akin to uncontroversial 363 sales and comfort orders. In fact, the Plan does not prejudice the SEC. If the reorganization is successful, the Plan will benefit the SEC and any of Van Den Heuvel's alleged creditors the SEC may seek to compensate through a securities action.

1. The provisions are permissible because they are narrowly tailored and appropriate to provide potential investors assurance that they will not be embroiled in litigation.

There is no dispute that third-party releases are permissible in the Seventh Circuit. Section 1123(b)(6) states that, besides the other discretionary provisions, a Chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). On two occasions, the Seventh Circuit has held that this provision, paired with section 105(a), grants the Court "'residual authority' to release third parties from liability to participating creditors" if two conditions are met:

1. The release must be "appropriate"; and
2. Not inconsistent with any provision of the Bankruptcy Code.

In re Ingersoll, Inc., 562 F.3d 856, 864 (7th Cir. 2009). If the release is narrowly tailored and critical to the Plan as a whole, it is appropriate and can pass muster. *Id.* at 865; *see Hotel 71 Mez Lender LLC v. Nat'l Ret. Fund*, Case No. 13-C-03306, 2015 U.S. Dist. LEXIS 180376, at *41-44 (August 21, 2015 N.D. Ill. 2015).

1.1. The release is narrowly tailored and critical to the Plan as a whole.

The release is narrow. It only bars creditors from pursuing NewCo for two reasons: (1) because NewCo purchased assets from the Debtor or other Van Den Heuvel-related entities and (2) because the Debtor retained an equity interest in NewCo. By the plain terms of the Plan, it does not bar the SEC or any other creditor from pursuing Van Den Heuvel, nor does it bar pursuing claims for post-confirmation acts by the Debtor or NewCo. Frankly, this is an extremely narrow release.

Moreover, the release is critical to the Plan as a whole. The Plan depends on NewCo securing an enormous injection of new funds to purchase necessary assets and finance operations. One needs to only Google "Green Box NA Green Bay" or "Ron Van Den Heuvel" to understand why investors may hesitate to invest in NewCo without a release. The first search result would read: "New charges filed in Van Den Heuvel fraud case."[1] A review of the Green Bay Press Gazette article reveals that no fewer than five governmental agencies are pursuing Van Den Heuvel, including the federal government.

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[1] Green Bay Press Gazette, *New charges filed in Van Den Heuvel fraud case*, http://www.greenbaypressgazette.com/story/money/2016/10/12/new-charges-filed-green-box-fraud-case/91891822/.

Any investor risking millions of dollars performing due diligence would discover Van Den Heuvel's situation and his pre-petition ties to Green Box. In fact, NewCo would have to disclose those details to potential investors or face securities charges of its own.[2] And any investor knowing those facts would require strong assurance that it will not be dragged into what could be a prolonged, multi-party melee against governmental entities with unlimited litigation budgets. The release provides that assurance. Without that assurance, funding NewCo and the Debtor will be infeasible.

The SEC's claim that this is a "blanket release" is ill-founded. Compare the release in this case with the one in *Airadigm*. The release of TDS, the plan's non-debtor, third-party financier in *Airadigm* stated:

> [e]xcept as expressly provided. . . [TDS shall not] have or incur any liability to . . . any holder of any Claim . . . for any act or omission arising out of or in connection with the Case, the confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or property to be distributed under this Plan, except for willful misconduct.

Airadigm Communs., Inc. v. FCC (In re Airadigm Communs., Inc.), 519 F.3d 640, 655 (7th Cir. 2008).

A simple comparison of that provision with the one at issue in the Plan shows that the release of NewCo is much narrower. The provision in *Airadigm* literally enjoined any claim by creditors for ***any act or omission*** related to the case or the plan. Compare that injunction with the one in this case. The release of NewCo merely enjoins creditors from pursuing claims against NewCo because (1) NewCo purchased assets or (2) the Debtor was issued an equity interest in NewCo. "[A]ny act or omission" is simply broader than the injunction here. If the release passed muster in *Airadigm*, it should certainly pass muster here.

1.2. The release is not inconsistent with the Bankruptcy Code.

[2] *See* Wis. Stat. § 551.501(2) ("It is unlawful for a person, in connection with the offer, sale, or purchase of a security . . . [t]o omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.").

The first part of the release bars creditors from pursuing NewCo for its purchase of assets that were connected with Van Den Heuvel and his entities. When sales of assets are concerned, such provisions are uncontroversial, and in fact, allowable under 363(f).[3] It is commonplace for 363(f) sales to cut off successor liability claims. Such provisions have been included in Chapter 11 plans in both the Eastern and Western Districts of Wisconsin.[4] The rationale is obvious: potential investors and purchasers will not invest money unless they are assured they will not be hauled into court for a predecessor's acts.

The Seventh Circuit has endorsed the so-called "expansive" definition of "interest." *Precision Indus. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 545-46 (7th Cir. 2003). In interpreting the term "interest," the Seventh Circuit relied on Black's Law Dictionary: "[a] legal share in something; all or part of a legal or equitable claim to or right in property." The SEC's hypothetical right to pursue a disgorgement action on account of property NewCo purchased would be an "interest" that section 363 can legitimately cut off. What is the basis for a disgorgement action but a "legal or equitable claim to or right in property?"

Admittedly, the analogy to 363 sales is not perfect. NewCo is buying some assets from the Debtor's affiliates. However, given the unusual circumstances of the case and considering that the assets were necessary to Green Box's intended operations just before bankruptcy, Green Box had at least an equitable interest in the assets. Therefore, the equitable interests in the assets are property of the estate. 11 U.S.C. § 541(a). Consequently, the analogy to a 363 sale still applies.

In any case, nothing in the Code prevents this provision, so it cannot be inconsistent with the Code. A more wasteful, roundabout method would achieve the same result: placing all the

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[3] *See generally*, 3-363 *Collier on Bankruptcy*, ¶ 363.06[7] (discussing sales free and clear of interests and successor liability).

[4] *See, e.g.*, *In re Renaissant Layayette LLC*, Case No 09-38166-PP, 2011 Bankr. LEXIS 1893, at *11-12 (Bankr. E.D. Wis. Jan. 7, 2011); *In re Grede Foundries, Inc.*, Case No. 09-14337, 2009 Bankr. LEXIS 5241, at *3-4 (Bankr. W.D. Wis. Dec. 14, 2009).

entities into Chapter 11, jointly administering the cases, and using 363(f) to sell the assets free and clear of the SEC's alleged claims to NewCo. Alternatively, the Debtor could obtain financing, purchase the assets, and receive a discharge. But it would be much cleaner for investors prefer to invest in a new entity.

The second part of the release bars creditors from pursuing pre-petition claims solely because the reorganized Debtor will own 30% of NewCo. Debtor's counsel does not understand why the SEC or any other creditor would take issue with this provision. Simply owning a minority interest in a company does not give rise to a cause of action against that company. This provision, then, is functionally equivalent to a "comfort order," which courts routinely issue pursuant to section 105(a). *See, e.g.*, *In re Hill*, 364 B.R. 826, 829-30 (M.D. Fla. 2007) (citing *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007) ("The power to issue comfort orders is encompassed within Section 105 of the Bankruptcy Code . . . .")).

1.3. The Plan does not conflict with 11 U.S.C. § 362(b)(4).

Contrary to the SEC's suggestion, section 362(b)(6) does not prohibit bankruptcy courts from enjoining police power litigation. Section 105(a) empowers bankruptcy courts to enjoin litigation—even litigation prosecuted under governments' police power. *In re Commonwealth Cos.*, 913 F.2d 518, 527 (8th Cir. 1990) (holding that "The bankruptcy court has 'ample other powers' to stay" actions excepted from the automatic stay under section 362(b)(6)); *see Caesars Entm't Operating Co. v. BOKFN/A (In re Caesars Entm't Operating Co.)*, 808 F.3d 1186 (7th Cir. 2015) (holding that 105(a) grants bankruptcy courts power to enjoin litigation not automatically stayed under section 362).

The Debtor does not disagree that a hypothetical securities case would be an exercise of the police power. But the SEC's argument does not follow. The issue before the Court is not whether police power actions are automatically stayed.

The issue is whether enjoining SEC litigation on extremely narrow grounds to provide investors comfort conflicts with the Bankruptcy Code. It doesn't. Section 362(b)(6) only concerns what actions are *automatically* enjoined; it does not prohibit what actions a Bankruptcy Court *may* enjoin under 105(a) and 1123(b)(6). The Seventh Circuit has held on several occasions that bankruptcy courts have the power to enjoin litigation to ensure a successful reorganization. *See, e.g., Fisher v. Apostolu*, 155 F.3d 876, 882 (7th Cir. 1998); *Ceasars Entm't Operating Co. v. BOKF, N.A (In re Ceasars Entm't Operating Co.)*, 808 F 3d 1186 (7th Cir 2015).

The Debtor is only asking to enjoin litigation concerning speculative claims that the SEC cannot bring. In other words, the only actions the Plan would prohibit are actions the SEC would have no right to take absent some other circumstances. Thus far, the SEC has not articulated a factual or legal basis to explain why it should have *carte blanche* to draw NewCo into securities litigation for purchasing assets at their full, appraised value or issuing an equity interest to a reorganized Debtor in order to repay the Debtor's creditors. Without more, the SEC's hyperbole and speculation do not justify denying confirmation.

The Debtor does not dispute that a release prohibiting the SEC from enforcing federal securities laws against Van Den Heuvel would conflict with 362(b)(4) and would likely be impermissible. But the Plan does not contain such a release. As described above, the Plan provides narrow injunctions that are similar to the protections afforded by comfort orders and 363(f) sales. They do not prohibit the SEC from prosecuting Van Den Heuvel or any other individual for pre- or post-petition conduct.

2. The injunctions will not disadvantage the SEC. In fact, the injunctions will benefit the SEC if it decides to pursue Van Den Heuvel or seek disgorgement.

The Debtor sympathizes with the SEC. The SEC wants to ensure that if Van Den Heuvel did, in fact, violate securities laws, that it can hold Van Den Heuvel accountable and possibly seek disgorgement from entities that received the fruits of securities fraud. The Plan will not hinder the SEC's efforts.

The assets at issue here are almost entirely encumbered with prior liens incurred by *bona fide* creditors. Ability's claim is secured by $7.6 million of real estate and over half a million dollars in past-due real estate taxes. Clifton's Kool units, pelletizing units, and sorting units are fully encumbered by Clifton's lien. Quotient's Bretting equipment is fully encumbered. And the same applies to Varde's dryer units and equipment. The fact is that there is little to no equity that could be obtained in a hypothetical disgorgement action.

If there is equity in the assets NewCo is purchasing, those entities will receive cash on account of the equity, since NewCo is purchasing the equipment for the full appraised value. By allowing NewCo to purchase these assets, the SEC is in a much better position to repay people who may have been defrauded by Van Den Heuvel. Would the SEC rather try to compensate defrauded individuals by selling large, difficult to market, encumbered assets, or would it rather let NewCo purchase the equipment and take allow itself to take the cash?

Moreover, if the Plan is successful, the SEC will be able to collect against Van Den Heuvel's equity interest in Green Box.

Putting aside the fact that NewCo's sale will actually benefit the SEC, it is implausible that the SEC could even pursue NewCo for any claim by Van Den Heuvel. The name says it perfectly: NewCo would a new company, totally unrelated to Van Den Heuvel, purchasing assets at their full, appraised value. It is unimaginable that the SEC could seek "disgorgement" in that situation.

3. The Debtor is entitled to a discharge because it will continue operating.

The Plan is clear that the Debtor will retain specific pieces of equipment to process used tires and to convert them into various products to sell. The SEC has not provided any evidence that the Debtor does not intend to continue operating. Instead, it suggests that the Debtor has a duty to file detailed business Plans. The Court should not be duped by the SEC's red herring. There is no duty to file business plans codified in the Code or in the Rules.

The absence of evidence filed on the docket is not evidence of absence of an intent to continue operating. The Court should determine whether the Debtor will continue to operate at the confirmation hearing. If it will continue operations, then it is entitled to a discharge which includes a discharge of the SEC's speculative claims.

Conclusion

The Debtor is requesting the Court to grant a narrow injunction that is necessary for the reorganization. It would only prohibit creditors of the Debtor from pursuing claims against the Debtor against NewCo because it (1) purchased assets or (2) issued the reorganized Debtor a minority interest in NewCo. The provisions are narrowly tailored, necessary to the reorganization, and do not conflict with the Code. The SEC has not sufficiently articulated why it objects to the provisions or how it will be harmed. As a result, the Court should overrule the SEC's objections and ensure that the Debtor can reorganize to allow creditors to be paid. In sum, the SEC should not be allowed to hang a Sword of Damocles over NewCo.

Dated this January 25, 2017.

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