UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In the Matter of:

GREEN BOX NA GREEN BAY, LLC,

Debtor.

Case No. 16-24179

ABILITY INSURANCE COMPANY'S OBJECTIONS TO 1ST AMENDED DISCLOSURE STATEMENT DATED NOVEMBER 9, 2016

Ability Insurance Company ("Ability"), by and through its undersigned counsel, objects to the *1st Amended Disclosure Statement Dated November 9, 2016* (the "Amended Disclosure Statement") (Doc. 116) filed by Debtor. The Amended Disclosure Statement does not satisfy the requirements of 11 U.S.C. § 1125(a)(1) because it fails to provide adequate information that would enable Ability, as an impaired creditor under the Plan, to make an informed decision whether to vote in favor of Debtor's proposed Plan. In support of its Objections, Ability states:

OBJECTIONS

Similar to Debtor's first draft of the Disclosure Statement, the Amended Disclosure Statement fails to answer fundamental questions with respect to Debtor's purported "roll up" with other entities. Specifically:

A. **What access does "NewCo" *realistically* have to the funding and/or cash flow necessary to pay the creditors**?

Debtor admits it has no income, and that all expenses related to this case are being funded by Glen Arbor (a non-debtor). (Doc. 116, p. 14). The Amended Disclosure Statement is void of any suggestion that Glen Arbor (or any other party) is committed and able to fund this case through confirmation. Accordingly, Debtor's life-line continues to be dependent on the grace of third parties.

The Amended Disclosure Statement now makes clear that payment to creditors will come from two sources: (1) an initial payment from new money funded by new investors, and (2) subsequent payments from the future cash flow of NewCo. Each of those payment sources are discussed below.

1. *Funding from Investors*. Debtor boasts that it has engaged a "nationally recognized investment bank" to assist it in soliciting new investors for the "project."[1] However, Debtor concedes that it has not fully complied with all conditions required to proceed with a public offering (Doc. 116, p. 14 states that Debtor has satisfied "many" prerequisites, but does not itemize what other prerequisites are left open). The open issue expressly identified in the Amended Disclosure Statement is Debtor's need to raise $2.5 million in capital to complete certain due diligence items required by the investment bank to proceed with the offering. To date, that initial capital is uncommitted. (Doc. p. 14).

   This is where Debtor's momentum stagnates: Debtor admits that this Court cannot address feasibility until the due diligence is completed to the satisfaction of the investment bank (Doc. p. 25); however, the due diligence cannot be completed without a $2.5 million investment of capital (Doc. p. 40); however, the $2.5 million cannot logically be raised without confirmation of this Court that the plan can move forward; however, the court cannot confirm the plan without addressing feasibility.

   Without evidence of a firm commitment to fund (or, in this case, invest), a plan whose success depends on such financing does not satisfy "feasibility" requirement for confirmation. 11 U.S.C.A. § 1129(a)(11). See In re Save Our Springs

[1] Debtor uses the word "project" interchangeably with the terms "roll-up" and "De Pere operations." While those terms do not appear to be synonymous in the context of the proposed plan, Ability will use the term "project" herein to refer to Debtor's Plan.

(S.O.S.) Alliance, Inc., 388 B.R. 202 (Bankr. W.D. Tex. 2008), subsequently aff'd, 632 F.3d 168, 54 Bankr. Ct. Dec. (CRR) 56, 64 Collier Bankr. Cas. 2d (MB) 1686, Bankr. L. Rep. (CCH) P 81924 (5th Cir. 2011). Debtor has provided nothing to assure creditors that the investment bank will be able to move forward with the initial financing of the Project (for example, an engagement letter, terms sheet, etc.) or that investors are willing to invest, leaving creditors to guess about whether months of continued waiting could result in any payment at all.

2. *Projected Cash Flow*. This Court should not lose sight of the fact that NewCo is a *new* operating entity, embarking on a *new* reclamation process, using *new* technology, in *new* markets, with essentially no historical market or financial statistics. Despite the lack of historical data, Debtor now provides financial projections suggesting that NewCo will not only have sufficient cash flow to pay creditors over the next seven 7 years, but that the operating cash flow of NewCo will increase 4 fold in the first 3 years. (Doc. 116, page 64). While creditors would like nothing more than to be paid from such a healthy stream of cash, Debtor provides little by way of support for its projections.

Debtor does not disclose the author of the projections, nor does Debtor provide any information regarding the assumptions made by the author to buttress the projections. Among other things, the Disclosure Statement should clearly identify all assumptions made in calculating pro forma information and should set forth those facts supporting all estimates; information regarding accounting and valuation methods used in preparation of statement's financial exhibits must also be included. See, e.g. In re Cardinal Congregate I, 121 B.R. 760 (Bankr. S.D. Ohio 1990), In re

Malek, 35 B.R. 443, 443–44 (Bankr. E.D. Mich. 1983). While Debtor vaguely references "agreements with various entities" (see, e.g. Doc. 116 page 13), vague "input and output contracts" (Id), and "tentative agreements with several other creditors" (Id. at 14), those references are not specific enough to determine the accuracy of Debtor's aggressive projections.

B. **Is the "roll up" fair and equitable to creditors?**

All creditors are impaired under the Plan. (Doc. 116, p. 32). Debtor purports to pay Ability $7.6 million, leaving a deficiency balance (more than $2 million) as an unsecured Class 8 Claim. In response to Ability's objection to the original Disclosure Statement regarding the Absolute Priority Rule, Debtor now proposes to contribute dividends otherwise payable from Debtor to Ron Van Den Heuvel and his related entities (collectively "RVDH"), which would stem from dividends received by Debtor from NewCo due to Debtor's 30% ownership interest in NewCo, into an unnamed trust for distribution to Class 8 Claims. However, the Amended Disclosure Statement does not address the following:

1. *Jurisdiction of Court to alter non-debtor property rights*. Debtor states that RVDH has been removed from all management activities, and that his continued ownership interest in Debtor is now "held" by an unidentified trust. (Doc. 116, pp. 12, 24, 38). The Amended Disclosure statement purports to strip RVDH (and *only* RVDH) of his right to receive dividends from the Debtor, the payments instead being held in a trust for the benefit of Class 8 creditors. Because RVDH is a non-debtor, Ability questions whether this Court has jurisdiction to affect RVDH's property rights in this manner.[2] In any event, Debtor has offered no evidence regarding this alleged trust or the

[2] Given the short timeframe for filing this Objection, the undersigned has not fully researched the jurisdiction of this Court to affect property rights of a non-debtor. However, a cursory review of 11 U.S.C. §1334 and cases such as In re Xonics, Inc. 813 F.2d 127, 131 (7th Cir. 1987) suggest that it does not. Ability will further research this issue prior to hearing on this Objection and amend its objection accordingly.

entity(ies) who are control of such trusts. Accordingly, even if this Court does have jurisdiction to affect the property rights of RVDH, individually, the Amended Disclosure Statement provides no information on how (or against whom) that provision will be enforced.

2. *Continued Violation of the Absolute Priority Rule*. The Absolute Priority Rule states that junior classes of creditors cannot receive any property on their claims until senior classes of creditors are paid in full. 11 U.S.C. §1129(b)(2)(B)(ii). That is not the structure that the Disclosure Statement proposes. Instead, presuming that cash dividends are made from NewCo to Debtor[3], all current equity owners will receive their prorate share of the dividend. While Class 8 claims would get the *RVDH's* share of the dividend, the Class 8 claims are not given priority over other current equity holders. For example, if NewCo is wildly successful in year 2 and makes a distribution to Debtor of $100,000, approximately $21,000 of that amount will be paid to non-RVDH equity owners *at the same time* that Class 8 claims are paid the reaming $79,000. This is a clear violation of the Absolute Priority Rule. To be clear, the debt owed to Ability is not a debt of RVDH – it is a debt of Debtor. Therefore, Ability must be paid in full before any property of this estate falls to any equity owners.

3. *Lack of Competitive Bidding*. The Amended Disclosure Statement purports to sell Ability's collateral to NewCo in exchange for $7.6 million, with Ability retaining those sale proceeds in full satisfaction of its secured claim. The Amended Disclosure Statement evades any competitive bidding process wherein Ability could make a credit bid for the amount Debtor owns, or wherein other bidders could submit a bid

[3] Based on Debtor's 30% ownership interest in NewCo.

for more than $7.6 million. This structure is contrary to established law in this Circuit, which requires competitive bidding to "prevent the funneling of value from lenders to insiders…" See In re Castleton Plaza, LP, 707 F.3d at 824. It is not fair or equitable for Ability to be stripped of its collateral without first testing the market and without giving Ability the opportunity to credit bid.

4. *Lack of consideration for certain "related" assets*. It does not appear that NewCo is paying any money to Patriot Tissue for its transfer of the converting line portion of the Project, or is there any valuation for that transfer. NewCo should be required to pay Patriot the value of its assets which should, in turn, use those proceeds to pay creditors (including an undisputed $1,000,000 account payable due to the Debtor). Instead, Debtor simply writes Patriot off as being "uncollectible." (Doc. 116, p. 15).

C. **Who is paying the outstanding real estate taxes?**

The Amended Disclosure Statement is silent on the treatment of a significant real estate tax claim – nearly $500,000.00 – made by the Brown County Treasurer stemming from multiple years of unpaid taxes. This claim is secured by a tax lien on the real estate in which Ability has a mortgage, and the Debtor must provide for its full payment.

D. **Why is an injunction necessary?** T

he Disclosure Statement creates an injunction against collection against the Debtor *and* non-debtor insiders (i.e. RTS). (Doc. 116, p. 24). That release includes the guaranty executed by RTS in favor of Ability. Debtor fails to detail why creditors should agree to such a release (other than Debtor's claim that it is "crucial to maintain the timeline" of the roll up), or whether the non-debtor insiders will contribute any consideration to support such a release. Absent a release, Debtor may be able to collect some or all of its debt from RTS.

SUMMARY

Debtor's Amended Disclosure Statement fails to provide "adequate information" that would enable Ability to make an informed judgment whether to accept or reject Debtor's proposed Plan, as required by 11 U.S.C. § 1125(a)(1). Ability respectfully requests that the Court deny Debtor's request for approval of the Disclosure Statement.

Dated this 16th day of November, 2016.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorney for Ability Insurance Company

/s/ Michele M. McKinnon

Michele M. McKinnon (State Bar No. 1041053)

MAILING ADDRESS:
231 South Adams Street
P.O. Box 54305-2300
Green Bay, WI 54305-3200
Telephone: (920) 437-0476
2475210