UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In the Matter of:	In Bankruptcy No. 16-24179-BEH 11
GREEN BOX NA GREEN BAY, LLC,	
Debtor.	

WISCONSIN ECONOMIC DEVELOPMENT CORPORATION'S REPLY BRIEF IN SUPPORT OF CONVERSION TO CHAPTER 7

Wisconsin Economic Development Corporation ("WEDC"), a creditor and party-in-interest, in further support of conversion of the Debtor, Green Box NA Green Bay, LLC ("Debtor")'s, case to Chapter 7 in lieu of dismissal, respectfully represents and requests:

ARGUMENT

I. THERE ARE STILL ASSETS OF THE DEBTOR'S ESTATE TO ADMINISTER.

While the Debtor gives shorter shrift to the issue in its Brief than Ability Insurance Company ("Ability"), both parties' arguments initially rest upon the false premise that there is no longer any property of the bankruptcy estate left to administer. However, these vesting arguments are unavailing for at least two reasons: (1) the plain language of the Debtor's confirmed Revised Third Amended Chapter 11 Plan ("Plan") provides otherwise; and (2) bankruptcy law is able to provide a per se alternate conclusion.

A. The Debtor's confirmed Plan did not re-vest title to all assets in the Debtor.

While it is true that 11 U.S.C. § 1141(b) generally re-titles property of the estate in a debtor upon plan confirmation, that subsection contains an important qualifier to the Debtor

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and Ability's assumptions—"Except as otherwise provided in the plan or the order confirming the plan."

In this case, Article V of the Debtor's Plan states, among other things,

> General Terms. The Debtor shall continue to be the Debtor in Possession and *the bankruptcy estate* shall remain in existence *and* hold *all* of the assets until all of said assets have been administered *and* the proceeds distributed in accordance with the terms of this Plan. . . .

(italicized emphases added). Thus, the Debtor specifically chose to have the "bankruptcy estate" retain "all" assets until those assets were both "administered" and all Plan proceeds distributed.

Even if not explicit, the Debtor's Plan as a practical matter compels the retention of the Debtor's property by the bankruptcy estate. The facts of this case are illustrative of the facts presented in a similar case, *In re Hughes*, 279 B.R. 826 (Bankr. S.D. Ill. 2002). In *Hughes*, while the individual debtor's plan was confirmed, performance under Hughes' individual chapter 11 plan was contingent upon confirmation of one or more bankruptcy filings by Hughes' related businesses. 279 B.R. at 827-28. Hughes' business cases failed, and therefore Hughes was unable to fund his personal plan. *Id.* at 828. As a result,

> Because the premise upon which confirmation was based never came into being, confirmation of the debtor's plan was ineffective to create a valid contract between the debtor and his creditors. Under these circumstances, the Court declines to find that confirmation of the debtor's plan vested estate property in him individually so as to preclude the trustee from administering such property upon the subsequent conversion of his case to Chapter 7.

Id. at 831.

The same type of facts are present here. Without closing or an investment fund "roll-up", the Debtor admits in its Consent that it is unable to pay claims and actually perform its

Plan (*see generally* Docket 317). Of course the Plan was founded upon the premise that the roll-up actually occur (*see* Plan at 16-17). Just as in *Hughes*, "the premise upon which confirmation was based never came into being." Just as in *Hughes*, all of the Debtor's assets can and should vest in a chapter 7 trustee.

In support of their argument, the parties apparently rely upon the holding in *In re T.S.P. Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990). That reliance is misplaced for several reasons. First, the holding in *T.S.P.* has since been characterized by, for example now-Chief Bankruptcy Judge Isicoff, as "extreme." *In re Sundale, Ltd.*, 471 B.R. 300 (Bankr. S.D. Fla. 2012). This is because the *T.S.P.* Court "conflates" the creation of a converted estate with what assets are transferred to that estate. *Sundale*, 471 B.R. at 306. In fact, ample authority exists for a completely opposite conclusion—that either: (1) all property at the time of the filing of the petition is property of the new converted estate, *see, e.g.*, *In re Smith*, 201 B.R. 267, 274 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998); *In re Calania Corp.*, 188 B.R. 43, 43 (Bankr. M.D. Fla. 1995); or (2) even post-confirmation accounts receivable are also included as property of the bankruptcy estate, *see Bezner v. United Jersey Bank*, 166 B.R. 585, 590 (Bankr. D.N.J. 1994). Regardless, "the weight of authority emphatically supports" a conclusion other than *T.S.P.* *In re Freeman*, 527 B.R. 750 (Bankr. N.D. Ga. 2015).

T.S.P. itself even explicitly concedes there are certain instances where post-confirmation conversion is proper. One of those occasions specifically mentioned by *T.S.P.* as a possibility (but apparently not present in that case) is the presence of preferences or fraudulent transfers. As stated in *T.S.P.*, "Post-confirmation conversion of a chapter 11 case

also may be in the best interest of the creditors when there is a preference or a fraudulent conveyance that occurred before the commencement of the chapter 11 proceeding and the debtor currently has no significant assets." 117 B.R. at 379. Here, there is of course evidence of not one, but multiple apparent fraudulent transfers (*see* Docket 344 at 2-3).

Indeed, even if this Court were to for some reason adopt the "extreme view" of *T.S.P.*, the facts of *T.S.P.* are inapposite to this case. Specifically, following confirmation T.S.P. had already made full payment to all of its priority creditors and made the first payment due under its plan to unsecured creditors. *See T.S.P.*, 117 B.R. at 375. Here, much like in *Hughes*, all priority claims have not been paid (*see, e.g.*, Plan, § 3.4 & at 17 (relying upon post-confirmation hypothetical roll-up funds to pay, among others, certain priority claims)), and there has certainly been no payment to any unsecured creditor. There can be no post-confirmation disbursement reliance by any party. In short, *T.S.P.* is nothing like the case at bar.

B. Undisclosed assets are still property of the Debtor's bankruptcy estate.

The Debtor and Ability's vesting arguments fail for a second reason. Property claimed to be owned by the Debtor during two (2) years prior to the filing of this case, but then not disclosed anywhere on the Debtor's bankruptcy schedules in this case, are unadministered asserts and therefore could not have re-vested in the Debtor. Under 11 U.S.C. § 554(d), "Unless the court orders otherwise, property of the estate this is not abandoned under this section and that is not administered in the case remains property of the estate." *See also, e.g.*, *In re Pace*, 146 B.R. 562 (9th Cir. B.A.P. 1992); *Kunica v. St. Jean Financial*, 233 B.R. 46 (S.D.N.Y. 1999), *amended on denial of reconsideration*, 63 F.

Supp.2d 342; *Erickson v. Baxter Healthcare, Inc.*, 94 F. Supp. 2d 907 (N.D. Ill. 2000), (all holding that unscheduled claims remain property of the bankruptcy estate).

Again, there is not one, but multiple assets that were undisclosed, and thus unadministered in this case (*see, e.g.*, Docket 344 at 2-3). To effectively grant the Debtor or any of its principals (whether pre- or post-petition) permission to simply hide assets would encourage individuals to not just fraudulently hide assets from the bankruptcy court, but remain willfully ignorant of other important financial affairs. Such an effect should not be permitted. Nor is the fact that WEDC has pointed to documentation from three years ago a problem for WEDC (*see* Debtor's Br. at 2). Particularly when examining whether a conveyance was fraudulent, the whole point is that: (1) the conveyance occurred within two years of the filing of this case; (2) the property is now apparently transferred; and (3) the pre-petition documentation was drafted by someone currently under federal indictment for acts relating to the Debtor in this case. WEDC does not need to prove by a preponderance of evidence that a fraudulent transfer actually occurred, nor is this Court permitted to engage in a factual credibility determination at this stage. Rather, WEDC needs to only identify certain specific affected assets. It has done so.

II. RONALD VAN DEN HEUVEL ("RVDH")'S INVOCATION OF THE FIFTH AMENDMENT CAN AND SHOULD BE CONSTRUED A NEGATIVE INFERENCE AGAINST THE DEBTOR.

The Debtor next suggests that an individual's invocation of the Fifth Amendment cannot be used as a negative inference against a business entity part to a suit (*see* Debtor's Br. at 3). This is not accurate. Courts have, for example, employed a four-part test to determine whether an individual's invocation of Fifth Amendment rights should be used

against a business associated with that individual. *See, e.g.*, *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997). Those factors, at the time the statement is given, include: (1) the nature of the individual's relationship with the company; (2) the company's degree of control over the individual; (3) whether the individual and business's interests in the litigation are compatible; and (4) the importance of the individual's role in the litigation. *LiButti v. United States*, 107 F.3d 123-24.

Prior to the filing of this case, Green Box was for all practical purposes RVDH, both in management and ownership, whether in whole or in part (*see* Docket 182 at 5-12). RVDH was not a low-level employee or former employee. He was an executive, a current and actively-involved executive (*see id.*). As the fortunes of the Debtor went, so did the fortunes of RVDH (*see id.*; *see also, e.g.*, Docket 183 at 18 (confirming RVDH's continued retention of equity interest)). At the time of the filing of this case, a bench warrant had been signed for RVDH's arrest for physically transferring one or more of Debtor's assets to another state (*see* Docket 182 at 12). Yet, as pointed out by even the Debtor's successor leadership team, the filing of this case had the objective effect of not only staying creditors in the prior Chapter 128 action, but also staying the bench warrant against RVDH individually (*see id*.). The Debtor and RVDH each benefited from the: (1) delay created by RVDH's pre-petition silence; and (2) filing of this bankruptcy case. The interests of the Debtor and RVDH clearly aligned.

Nor is the fact that that RVDH is not talking now a basis to deny conversion to chapter 7 (*see* Debtor's Br. at 4; Ability's Br. at 6). Nearly ninety-five years ago, Justice Louis Brandeis observed just the exact opposite, "Silence is often evidence of the most

persuasive character." *Bilokumsky v. Tod*, 263 U.S. 149, 153, 44 S. Ct. 54 (1923). To the extent RVDH is no longer talking, that serves as all the more reason to convert, not dismiss.

III. ABILITY AND THE DEBTOR'S REMAINING ARGUMENTS ARE INADEQUATE AND UNPERSUASIVE.

The appointment of "Mike Polsky, one of the most prominent and successful receivers in Wisconsin" (*see* Debtor's Br. at 4) does not serve as some sort of consolation to WEDC and other creditors. First, nowhere does the Debtor cite with any factual support what Mr. Polsky actually did or did not do prior to the filing of this case (*see generally* Debtor's Br.). The fact that WEDC, a co-plaintiff to the Chapter 128 proceeding who sought to get Mr. Polsky appointed in that action (*see* Thill Aff., Ex. 2), now prefers conversion of this case over dismissal should speak volumes. Even Ability concedes, "Unfortunately, the information obtained by the Receiver was shoddy, at best . . ." (Ability's Br. at 4). Notably, the expansive reach of the United States Bankruptcy Court is far greater than the limited jurisdiction of the State of Wisconsin Brown County Circuit Court. *Compare, e.g.*, 28 U.S.C. § 157, *with* Wis. Stat. § 801.05. That is not an immaterial detail, particularly given RVDH's physical transfer of at least one asset over state lines (*see* Docket 182 at 12). WEDC is in a far better position than either the Debtor or Ability to determine what is in the best interest of WEDC.

Nor is the potential nominal inconvenience to Debtor's counsel a reason to deny conversion (*see* Docket 230 & 299). Debtor's counsel has already invested nearly 360 hours in this case (Docket 212 & 296). Yet the greatest fear now is apparently that there will be "at least one 341 meeting" (Debtor's Br. at 4). The Debtor's attorneys are already versed in the Debtor's affairs. None of the Debtor's fee applications have ever been objected to (*see*

generally Docket). In other words, the relative amount of time required to complete this case and collect fees should pale in comparison to the steps the Debtor has taken thus far. Conversely, the amount of machinations WEDC and other creditors have been forced to endure to-date, both in the Chapter 128 action (*see, e.g.*, Thill Aff., Exs. 2-3; Docket 182 at 9-12) and this case, should not be ignored. Quite simply, WEDC does not ask for comparatively much when it makes its conversion request to investigate matters which both the Receiver and Debtor have failed to address, for whatever reason, for a period of now multiple years. "[W]hile the Bankruptcy Code is indeed a code of debtors' rights . . ., it is equally a code of creditors' remedies." *United States v. Frontone*, 383 F.2d 656 (7th Cir. 2004).

CONCLUSION

WHEREFORE, WEDC, for the reasons stated herein and on or to be on the record, respectfully requests the Court convert this matter to a case under Chapter 7 of the Bankruptcy Code, and grant WEDC the relief requested herein any other relief in this matter deemed fair and/or equitable, including but not limited to its attorneys' fees and costs.

Dated this 11th day of December, 2017.

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