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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
	§	
NNN 3500 MAPLE 26, LLC, et al.,	§	Case No. 13-30402-HDH-11
	§	
Debtors.	§	Jointly Administered
	§	

REPLY TO DEBTORS' OBJECTION TO CONFIRMATION OF AMENDED PLAN OF REORGANIZATION OF STRATEGIC ACQUISITION PARTNERS, LLC

TO THE HONORABLE HARLIN D. HALE, U.S. BANKRUPTCY JUDGE:

COMES NOW Strategic Acquisition Partners, LLC ("SAP"), a creditor, plan proponent, and party-in-interest in the above styled and numbered bankruptcy case (the "Bankruptcy Case"), and files this its *Reply* (the "Reply") to the *Debtors' Objection to SAP Plan* (the "Objection"), filed by the Debtors in the above styled and numbered bankruptcy case objecting to the confirmation of the *Amended Plan of Reorganization of Strategic Acquisition Partners, LLC* ("SAP Plan"), respectfully stating as follows:

I. SOLICITATION OBJECTIONS

1. In the Objection, the Debtors state that "the Court ruled at the Disclosure Statement Hearing that counsel to SAP could deliver a solicitation letter to the Debtors to solicit

votes in favor of the SAP Plan only after such letter was shown and consented to by Debtors' counsel. In the event the parties could not reach a consensual form of proposed solicitation letter, SAP's counsel was required to obtain Court approval prior to delivering any such correspondence." Objection at ¶ 12. The Debtors make the same allegation in footnote 4 of their Objection.

2. In fact, as evidenced by the transcript of the disclosure statement hearing, the following was the Court's ruling:

> MR. RUKAVINA: Then the only thing that I would suggest, Your Honor, is that I be permitted to maybe send a one-page letter to the TIC owners saying, talk to your own lawyer, but here's why I believe my plan is preferable to the other plans that are out there. And again, I would make it public and I would share it with Ms. Larson, and if Ms. Larson thinks that there's anything inappropriate in there or misleading, then of course she'll have her remedies.
>
> MS. LARSON: No problem at all with that, Your Honor.
>
> THE COURT: Okay.
>
> MR. FINE: And -- and –
>
> THE COURT: Let her see the letter before -- share her with a draft.

January 24, 2014 Transcript [docket no. 681] at 55:3-15.

3. Not only did the Court not require Debtor approval, but the Debtors specifically stated that they had "no problem" with the proposed approach. All that the Court required was for SAP to transmit a draft of its counter-solicitation letter to Debtors' counsel.

4. As the Court has already seen, that is precisely what SAP did. AT 8:58 a.m. on February 14, 2014, counsel for SAP transmitted a draft of the counter-solicitation letter to counsel for the Debtors, exactly as instructed. SAP did not ask the Debtors to indorse the statements in the letter; rather, SAP inquired only into whether the Debtors believed that anything in the letter was inaccurate. At 3:00 p.m., not having heard anything, counsel for SAP

sent a follow-up e-mail. By the end of the day, SAP still had not heard anything, and sent the letter out the evening of February 14, 2014. At no time did the Debtors respond at all to SAP's request, such as by asking for more time to review (which, if they had so asked, more time would have been given). And, if the allegations in the Objection are true, the Debtors (not knowing that the letter had been sent) had still not responded as of February 19, 2014. In a fast moving case like this, any allegation to the effect that the Debtors lacked sufficient time to review and comment is simply not credible.

5. In no event, however, did the Court condition the letter on the approval of the Debtors. And, to the extent that the Debtors now complaint of the sending of the letter or any information in the letter, they should be estopped to make any such argument. SAP sent the letter to the Debtors inviting their review. The Debtors, despite being given a reasonable opportunity to respond, never responded at all. That is the essence of judicial estoppel and latches. It was the Debtors who chose not to respond to the letter or related communications. They cannot now hind behind a log of their own making.

6. Perhaps most importantly, the Debtors do not explain what it is about SAP's letter that is false or misleading. While the Debtors flippantly accuse SAP's counsel of ethical violations for sending a letter to equity interest holders, equity interest holders are not the Debtors' counsel's clients. In fact, in the declaration submitted in support of the application to employ Debtors' counsel, said counsel specifically represented that "[b]esides the aforementioned Parties [creditors and parties in the case], AK has not represented or advised, and will not represent or advise, any Party in Interest in connection with any matter arising in connection with the New Debtors or their chapter 11 cases." *See* Docket No. 230-1 at ¶ 13 (emphasis added). That "Party in Interest" is capitalized is significant, since it is defined as

including "equity security holders." *Id*. at ¶ 4. Not only did Debtors' counsel specifically inform the Court and all parties that equity interest holders were not its clients, and that no advice would be given to them, but this is also black-letter bankruptcy law to the effect that debtor's counsel cannot simultaneously represent equity. *See, e.g., In re Kendavis Indust. Intern. Inc.*, 91 B.R. 742, 751-52 (Bankr. N.D. Tex. 1988) (holding that representation of debtor and equity was conflict of interest and wrongful, and reducing fees as sanction: "[t]his raises most serious issues of conflicts of interest and of benefit to the estate"). *See also In re C&C Demo Inc.*, 273 B.R. 502, 507 (Bankr. E.D. Tex. 2001) (finding as wrongful undisclosed representation of debtor and equity owner). Simply put, Debtors' counsel's clients are the Debtors and not equity interest holders. It is no fault of SAP if the Debtors, their counsel, and equity interest holders are unable to understand or cope with that situation.

7. The whole notion, therefore, that there was something wrong with the counter-solicitation letter sent by SAP based on a client relationship is false, unless the unthinkable has happened and Debtors' counsel has in fact been serving as counsel for equity interest holders (which SAP does not believe could be the case). And, other than the letter, the only other communication was *from* an equity interest holders who specifically informed counsel for SAP that he was not represented by counsel.

8. Nor does SAP understand the attack from the Debtors. It is Breakwater, and not the Debtors, who engaged in the inappropriate counter-solicitation. If the ballots are to be counted, equity interest holders overwhelmingly rejected the SAP Plan (and presumably accepted the Debtors' plan). It is Breakwater and not SAP who devised a plan for its benefit by taking up 24% of what equity interest holders are entitled to. It is Breakwater who sent pre-marked ballots to the equity interest holders, to accept the Debtors' plan and to reject the SAP

Plan. In fact, as of the close of voting, SAP has received dozens of equity ballots, which it received *from Breakwater* and not equity holders, which are pre-marked to reject the SAP Plan, and which do not make the election provided for in the SAP Plan. Perhaps, rather than pointing a finger at SAP, the Debtors and their equity interest holders should finally start asking some serious questions of Breakwater.

II. SECTION 1123(A)(6) OF THE BANKRUPTCY CODE

9. The Debtors object to the SAP Plan arguing that the SAP Plan provides for the issuance of non-voting securities in violation of section 1123(a)(6) of the Bankruptcy Code. Section 1123(a)(6) provides that a plan shall "provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities." The Debtors assume that, as limited liability companies, they are "corporations." Without necessarily agreeing with that assumption, the Debtors' argument still fails.

10. Under the SAP Plan, none of the Debtors are issuing any nonvoting equity securities or anything else. NewCo is the only entity giving equity interest holders anything. The Debtors have cited no law for the proposition that NewCo is prohibited from issuing any alleged nonvoting equity securities or from giving the same to equity interest holders in exchange for their interests in the Debtors. In fact, Texas law (since NewCo is a Texas limited liability company) specifically provides for different classes of membership interests and rights, including as it relates to voting. *See, e.g.,* TEX. BUS. & COMM. CODE ANN. § 101.104 (Vernon 2012).

11. Moreover, the Bankruptcy Code specifically provides that a plan may provide for the "issuance of securities of the debtor, *or of any entity referred to in subparagraph (B) or (C)*

of this paragraph, for cash, for property, for existing securities, or *in exchange for claims or interests*, or for any other appropriate purpose." 11 U.S.C. § 1123(a)(5)(J) (emphasis added). Subsection (C) as referenced above address the "merger or consolidation of the debtor with one or more persons." *Id*. at § 1123(a)(5)(C). In other words, the SAP Plan does *exactly* what the Bankruptcy Code and state law permit: the Debtors issue no securities, voting or otherwise, and equity interest holders are provided with Class B membership interests in NewCo (which themselves may not even be securities).[1] Any modification to the Debtors' charter (there is not even a charter) does not and cannot affect this.

12. Alternatively, SAP must ask whether the Debtors would prefer for SAP to simply modify its plan to remove the "new equity option." The only equity interest holder to have properly voted on the SAP Plan has chosen the cash option, while all others have allegedly rejected the SAP Plan (*via* ballots pre-marked by Breakwater and returned to SAP by Breakwater). As such, any such modification would not be a materially negative modification. And, because the current value of equity interests is zero, the best interests test and the cramdown of equity would still be met. Breakwater may prefer such a result, but SAP seriously doubts that the Debtors or their equity interest holders would.

III. CALL OPTION

13. If the six (6) non-debtor TICs do not consent to the SAP Plan, then it is true that the "call option" in the TIC Agreement will have to be invoked or else the SAP Plan will not be feasible and will not become effective. It is also true that, at present, SAP has no right to invoke the call option because it is not a TIC. None of this is a secret—SAP has told the Court these precise things on more than one occasion.

[1] More accurately, what equity owners receive under the SAP Plan is a profit participation.

14. But the Debtors miss a key point. As provided for in the SAP Plan, the Call Option will take place only *after* the SAP Plan is confirmed. *See* SAP Plan at §§ 5.2(i)(a) and 5.3(i). It will be the Debtors, and not SAP, who will invoke the call option. The only difference is that, at that point in time, the Debtors will be under the control of SAP and not their current equity owners. The whole point of the competing plan process is that someone other than current management tells the debtor, by judicial fiat, what the debtor will do. That is exactly what occurs under the SAP Plan: the Court confirms the SAP Plan and directs the Debtors to do certain things, one of which is to invoke the call option.[2] The Debtors certainly have the right to do so, and that right belongs to their estates. It is by no means certain that the Debtors will stay in control of their estates, and whoever is in control of their estates can direct how and when the estates enforce their rights, subject to Court approval.

15. Under the Debtors' argument, there can never be a competing plan which, for example, provides for a sale, a compromise of a claim, obtaining debt, the assumption of leases, etc., since under the Bankruptcy Code only a debtor (or a trustee) may do such things and a creditor or party-in-interest may not. *See* 11 U.S.C. §§ 363(b), 364, 365; FED. R. BANKR. P. 9019. Such an argument would render the competing plan process a nullity. On the contrary, section 1123(b)(3) of the Bankruptcy Code specifically provides that a plan may provide for the retention and enforcement of claims and interests, and section 1121(d)(1) of the Bankruptcy Code and this Court's prior order specifically enabled SAP to file its plan. It cannot be that SAP is entitled to file a plan, yet is not entitled to the same plan tools that the Debtors are entitled to.

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[2] As SAP has previously informed the Court, SAP filed an adversary proceeding against the non-debtor TICs only to ensure to the maximum extent possible due process and compliance with Bankruptcy Rule 7001. SAP still maintains, however, that the transfer of non-debtor TIC interests can occur by virtue of the plan process itself.

IV. RELEASES

16. The Debtors object to the SAP Plan's releases as provided for in section 9.5 and 9.6 of the SAP Plan. This is strange, since section 14.8 of the Debtors' plan provides for exactly the same releases, albeit in a murkier way by not specifically naming the individuals to be released (presumably including Breakwater, who as it turns out may be a sizable defendant).

17. In any event, the releases provided for in the SAP Plan extend only to "estate" claims, which may be released or compromised by an estate the same as any other claims. No personal claims are released. As such, it is incorrect to label the releases as non-consensual: the estates consent to the releases. In fact, the SAP Plan also releases potential preference claims against creditors. Is this an improper release? Of course not. Section 1123(b)(3) provides that a plan may settle or adjust a claim or interest belonging to the debtor or the estate. That is all that the referenced releases accomplish. Professionals and parties would be less inclined to formulate a Chapter 11 plan (or they would charge much more for it) if they believed that they could be sued postconfirmation for something that they did during the case even though a court confirms a plan and thereby ratifies their actions. Nor do the releases cover any gross negligence, intentional tort, or breach of fiduciary duty.

18. If the Court believes that the referenced releases are improper, the remedy is not to deny confirmation of the SAP Plan, but to condition confirmation on a modification to the release provisions.

V. ALLEGEDLY MISSING ORGANIZATIONAL DOCUMENTS

19. The Debtors object to the SAP Plan because SAP allegedly failed to file a plan supplement timely, including an operating agreement for NewCo. SAP has never taken the position that it must file a copy of the operating agreement by way of plan supplement or

otherwise. It cannot be untimely for SAP to have not done something it never said it was required to do or would do.

20. The SAP Plan and related disclosure statement inform equity interest holders that, if the SAP Plan is confirmed and they do not elect the "cash out" option, they will be given non-voting membership interests in NewCo which will entitle them to participate in potential profits after certain thresholds are met. The Debtors fail to state what more information equity interests holders may want or be entitled to. Tellingly, not a single equity interest holder has filed an objection to the SAP Plan or, for that matter, contacted SAP or its counsel requesting more information regarding the organizational documents of NewCo. Nor did the Debtors request any operating agreement for NewCo in discovery.

21. The issue comes down to one of disclosure, if at all. Although the Debtors filed an extensive objection to SAP's disclosure statement, requesting disclosure of such things as projections, risk factors, and tax consequences, nowhere in that objection did the Debtors raise the issue of an operating agreement for NewCo.

22. Finally, the Debtors have cited to no provision of the Bankruptcy Code or case law requiring SAP to file any organizational document for NewCo prior to or at confirmation, and SAP is not aware of any such law. Nothing in section 1123 or 1129 of the Bankruptcy Code requires all post-confirmation documents to be ready and filed prior to confirmation. On the contrary, plans frequently provide that documents shall be exchanged postconfirmation, in part because parties should be saved the burdens and costs of executing complicated legal documents which may never be needed. Section 1142(b) specifically contemplates postconfirmation instruments and actions and ensures that this Court has continuing jurisdiction to implement a confirmed plan.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, SAP respectfully requests that the Court overrule the Objection and confirm the SAP Plan, including, if the Court finds it appropriate, by conditioning said confirmation on SAP undertaking such actions or modifications as the Court may find appropriate.

RESPECTFULLY SUBMITTED this 20th day of February, 2014.

MUNSCH HARDT KOPF & HARR, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 20th day of February, 2014, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the United States Trustee, the Debtors, CWCapital, and Maple Avenue Tower.

By: /s/ Davor Rukavina
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