IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
T-L Cherokee South LLC, a Delaware limited liability company,	)	Case No. 13-20283
	)	Chapter 11
	)	Judge J. Philip Klingeberger
Debtor/Debtor-in-Possession.	)	
	)	

NOTICE OF FILING

Please take notice that on September 6, 2013, a copy of the attached **Reply in Support of Cole Taylor Bank's Limited Objection to the Debtor's Joint Disclosure Statement** was filed in the above-captioned case, a copy of which is hereby served upon you.

Dated: September 6, 2013

Respectfully submitted,

COLE TAYLOR BANK

By: /s/ Maria A. Diakoumakis

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CERTIFICATE OF SERVICE

Maria A. Diakoumakis, an attorney, certifies that on the 6th day of September, 2013, she caused a copy of the **Reply in Support of Cole Taylor Bank's Limited Objection to the Debtor's Joint Disclosure Statement**, to be filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the filing receipt as follows:

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And to the following parties by U.S. Mail first-class, postage prepaid, on September 6, 2013:

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Dated: September 6, 2013 /s/ Maria A. Diakoumakis

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	)	

REPLY IN SUPPORT OF COLE TAYLOR BANK'S LIMITED OBJECTION TO THE DEBTOR'S JOINT DISCLOSURE STATEMENT

Cole Taylor Bank ("Cole Taylor"), through its undersigned counsel, submits this Reply ("Reply") to the Debtor's Response to Limited Objection of Cole Taylor Bank to Joint Disclosure Statement ("Response") (Docket No. 127), and in support hereof, states as follows:

INTRODUCTION

In its Limited Objection to the Debtor's Joint Disclosure Statement (Docket No. 112) ("Objection"), Cole Taylor argued that section 1123(a)(5)(C) of the Code[1] does not authorize the Court to order substantive consolidation of the Debtors' estates. Instead, the only authority for substantively consolidating the Debtors' estates is the Court's equitable power, to be exercised under certain limited circumstances, none of which are present in this Case.

In its Response, the Debtor simply ignores Cole Taylor's argument that, based on the dictionary definition of the word "consolidation," Code section 1123(a)(5)(C) refers only to a corporate transaction in which at least one of the constituent entities ceases to exist, and not to substantive consolidation, in which assets and liabilities of multiple debtors are pooled, but those debtors maintain their separate existence. The cases that the Debtor cites in support of its

[1] Capitalized terms used and not defined herein shall have the meanings ascribed to them in the Objection.

argument that Code section 1123(a)(5)(C) authorizes substantive consolidation do not consider the ordinary meaning of "consolidation," are factually distinguishable from the circumstances of this case, and contain no reasoning to support the statements, many of which are *dicta*, that Code section 1123(a)(5)(C) authorizes substantive consolidation. Consequently, the Court should disregard those cases.

Notably, the Debtor relies *solely* on Code section 1123(a)(5)(C) as the basis for substantive consolidation. The Debtor has not asked the Court to use its equitable power to order substantive consolidation. Disclosure Statement at p. 21. Nevertheless, the Debtor argues in its Response that the Court should exercise its equitable power to order substantive consolidation because doing so will not harm Cole Taylor. This argument is inconsistent with the Debtor's contention that Code section 1123(a)(5)(C) authorizes substantive consolidation. The Debtor's argument also disregards the harm that Cole Taylor will suffer if substantive consolidation permits the Debtor to use Cole Taylor's collateral to fund Plan payments to creditors of four unrelated Debtors.

In short, Code section 1123(a)(5)(C) does not authorize the substantive consolidation proposed in the Debtors' Plan. Nor should the Court use its equitable power to order substantive consolidation because (1) the Plan does not request for the Court to do so, and (2) substantive consolidation would harm Cole Taylor. Therefore, the Plan is unconfirmable as a matter of law, and the Court should deny approval of the Disclosure Statement.

ARGUMENT

A. Section 1123(a)(5)(C) of the Code Does Not Permit Substantive Consolidation of the Debtors' Estates.

In its Response, the Debtor does not even attempt to address Cole Taylor's argument that the ordinary meaning of "consolidation" in Code section 1123(a)(5)(C) refers to consolidations authorized under State law governing business organizations, rather than to substantive consolidation in which the assets and liabilities of related debtors in bankruptcy are combined while maintaining the separate existence of those debtors. Indeed, if Congress had intended to codify the bankruptcy court's equitable power to order substantive consolidation in Code section 1123(a)(5)(C), Congress would have explicitly used the words "substantive consolidation," rather than the word "consolidation." The Debtor's failure to consider the ordinary meaning of the word "consolidation" in Code section 1123(a)(5)(C) should be deemed an admission that "consolidation" in that section does not refer to or authorize "substantive consolidation."

Long-standing rules of statutory construction support the conclusion that the word "consolidation" in Code section 1123(a)(5)(C) does not encompass substantive consolidation. It is well-settled that the meaning of statutory language should be determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As explained in the Objection at pp. 3-5, the words "merger" and "consolidation" (which are not defined in the Code) refer to a combination of two legal entities (usually in a manner prescribed by a State statute) that results in a single, surviving entity. The dictionary definitions of those terms do not include the pooling of the assets and liabilities of related debtors that continue to exist as separate legal entities. Furthermore, all of the means for implementing a plan of reorganization described

in Code section 1123(a)(5) involve common corporate or commercial actions in which legal entities engage when they are not debtors under chapter 11 of the Code. None of these actions require a bankruptcy court's exercise of its equitable power. Consideration of Code section 1123(a)'s introductory phrase reinforces this conclusion. That phrase states: "[n]otwithstanding any otherwise applicable nonbankruptcy law to the contrary…." Applicable nonbankruptcy law does not include substantive consolidation. Consequently, the foregoing phrase can only mean that the words "merger or consolidation" used in Code section 1123(a)(5)(C) refer to state law transactions, and not to an equitable power exercised by a federal bankruptcy court.

Substantive consolidation is materially different than a consolidation under state law governing business organizations. Specifically, substantive consolidation involves the bankruptcy court's exercise in limited circumstances of its inherent power to achieve equitable results for all creditors by "pooling of assets and liabilities of related debtor entities into a unitary debtor estate from which all claims are paid." James H.M. Sprayregan et al., *The Sum and Substance of Substantive Consolidation*, 2005 Annual Survey of Bankruptcy Law, at 5. *See also*, *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988); *In re Standard Brands Paint Co.*, 154 B.R. 563, 569 (Bankr. C.D. Cal. 1993). In contrast to the transactions described in the subsections of Code section 1123(a)(5), substantive consolidation does not exist outside of bankruptcy. If the word "consolidation" in section 1123(a)(5)(C) of the Code included substantive consolidation, which exists only in federal bankruptcy cases, then the introductory language of Code section 1123 would have no meaning. It is well-settled that a court's construction of a statute should give meaning to all of that statute's terms. *See*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.");

United States v. Menasche, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' ") (citations omitted).

Under the former Bankruptcy Act, courts relied on their general equitable powers to order substantive consolidation. *See generally, In re Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1940). Substantive consolidation was not codified by the Bankruptcy Reform Acts of 1978 or 1994, *In re Bonham*, 229 F.3d 750, 763, 765 (9th Cir. 2000), or by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It is a well-settled rule of statutory construction that if Congress intends to change the interpretation of an existing rule or practice, it makes that intent specific. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 252 (1989). This rule is followed "with particular care in construing the scope of bankruptcy codifications." *Id.* Congress worked on drafting the Bankruptcy Code for nearly a decade, *id.* at 240, yet nothing in either the language or the legislative history of Code section 1123(a)(5)(C) suggests that Congress intended to codify the bankruptcy court's power to order substantive consolidation when Congress included the word "consolidation" in that section. Rather, Code section 1123(a)(5)(C) is derived from section 216(10) of the Bankruptcy Act of 1898, which preceded the modern use of substantive consolidation. 7 Collier on Bankruptcy ¶1123.LH[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

In support of its position that Code section 1123(a)(5)(C) authorizes substantive consolidation as a means of execution for a reorganization plan, the Debtor relies heavily on *In re Stone & Webster, Inc.*, 286 B.R. 532, 540-41 (Bankr. D. Del. 2002). *See*, Response, p. 4. However, as the court in that case acknowledged, *Stone & Webster* represents a minority position. *Id.* at 540 (stating that the court's interpretation of section 1123(a)(5)(C) of the Code is "[c]ontrary to what some of the reported cases say"). Furthermore, the court in *Stone & Webster*

did not analyze the facts of that case to determine if substantive consolidation was appropriate. Consequently, the *Stone & Webster* court's reference to Code section 1123(a)(5)(C) as a source of authority for substantive consolidation is mere *dictum*.

The strength of *Stone & Webster* as authority for Code section 1123(a)(5)(C) authorizing substantive consolidation is further diminished by a careful consideration of the cases on which *Stone & Webster* relied, and to which the Debtor cites. Response at p.4. The courts in each of those cases relied on the equitable power of the bankruptcy court as the source of the courts' authority to order substantive consolidation. *Id.* at 541, citing to *In re Affliated Foods, Inc.*, 249 B.R. 770, 777 (Bankr. W.D. Mo. 2000) ("[t]he authority to substantively consolidate cases derives from the bankruptcy court's general equitable power, as implemented by 11 U.S.C. §105(a) … . Additionally, the Code recognizes that, in some circumstances, consolidation of a debtor with one or more other persons might be appropriate. 11 U.S.C. §1123(a)(5)(C). This provision indicates Congress' intent that a Chapter 11 debtor be free to merge or consolidate with another entity as part of the reorganization process.") (citations omitted); *In re Limited Gaming of America, Inc.* 228 B.R. 275, 287 (Bankr. N.D. Okla. 1998) ("the equitable power of a bankruptcy court to order the substantive consolidation of two or more bankruptcy estates has long been recognized.") (citations omitted).[2] The *Stone & Webster* court's failure to consider either (1) the ordinary meaning of the word "consolidation" in Code section 1123(a)(5)(C), or (2) the meaning that "consolidation" derives from the other subsections of Code section 1123(a)(5),

[2] In a footnote, the Debtor also relied on *In re Worldcom, Inc.*, 2003 WL 23861928 at *35-37 (Bankr. S.D.N.Y. Oct. 31, 2003) as support for the argument that Code section 1123(a)(c)(5) authorizes substantive consolidation. Response at p.4, fn.2. However, while *Worldcom* stated that section 1123(a)(5)(C) of the Code contemplates substantive consolidation, the court still referred to substantive consolidation as "an equitable remedy" and relied on the *Augie/Restivo* factors as the basis for granting substantive consolidation. Furthermore, the Worldcom court did not consider either the ordinary meaning of "consolidation," or the meaning of that word in the context of Code section 1123(a)(5).

significantly diminishes the weight, if any, which this Court might consider giving to that opinion. Moreover, an opinion from a Delaware bankruptcy court is not binding on this Court.

In addition to relying on the courts' equitable powers, the cases to which the Debtor cites to support its assertion that Code section 1123(a)(5)(C) authorizes substantive consolidation are factually distinguishable from the circumstances of this case. In each case, there existed some noteworthy circumstance justifying substantive consolidation of those debtors' cases. *See In re Gilbertson Restaurants LLC*, 2005 WL 783063, *5-7 (Bankr. N.D. Iowa, Apr. 4, 2005) (erroneously relying on section 302(b) of the Code and Fed. R. Bankr. P. 1015(b) to grant substantive consolidation and finding that the debtors' cases "have been interrelated from the day they were filed. Debtors have never attempted to hide the connections between the cases."); *In re Affiliated Foods, Inc.*, 249 B.R. at 777-90 (ordering substantive consolidation when the debtor and its wholly owned subsidiaries were, for all practical purposes, being operated as a single entity and untangling the affairs of the debtors would be "a real nightmare"); *In re Limited Gaming of America, Inc.*, 228 B.R. at 288 (finding "substantial identity" between the two debtor entities in holding that substantive consolidation was warranted under the facts); *In re Steury*, 94 B.R. 553, (Bankr. N.D. Ind. 1988) (granting substantive consolidation of the cases of husband-wife debtors to allow their joint creditors reach the real estate owned by the debtors as tenants-by-the-entireties); *In re Bashas' Inc.*, 437 B.R. 874 (Bankr. D. Ariz. 2010) (finding substantive consolidation appropriate when two debtors were, "[f]or all practical purposes … divisions within the larger Bashas' organization," and unsecured creditors were guaranteed a 100% return on their claims).

Unlike the debtors in the foregoing cases cited in the Response, the Debtors have not operated as a single entity, they have always operated unrelated businesses as independent

entities, their estates are not hopelessly commingled, and they are not operating as divisions of a single business enterprise. There are no cross-guarantees among the Debtors, nor are Cole Taylor's loans to the Debtors cross-collateralized. The business of each Debtor is wholly separate and unrelated to the business of the other Debtors. The Debtor has not even suggested either (1) that the five Debtors who are proponents of the Plan have been operating their businesses as divisions of a single business enterprise, or (2) that any creditor of one Debtor relied on the credit of another Debtor when deciding whether to extend credit to the first Debtor.

Like the *Stone & Webster* opinion, the other opinions which the Debtor cites in the Response in support of its argument that Code section 1123(a)(5)(C) authorizes substantive consolidation also failed to consider (1) the ordinary meaning of the word "consolidation" in Code section 1123(a)(5)(C), (2) the significant differences between substantive consolidation in a bankruptcy case and the consolidation of multiple entities pursuant to State law, or (3) the meaning that the word "consolidation" in Code section 1123(a)(5)(C) derives from (a) the other subsections of 1123(a)(5), and (b) the reference to otherwise applicable non bankruptcy law in the introductory language of Code section 1123(a). As a result, the Court should give no weight to those cases in determining that Code section 1123(a)(5)(C) does not authorize substantive consolidation.

B. The Debtor Fails to Recognize the Harm Cole Taylor Will Suffer From Substantive Consolidation.

As noted above, the only issue before the Court is whether, as matter of law, Code section 1123(a)(5)(C) authorizes substantive consolidation of the Debtors' estates. The language of that section permits the "merger or consolidation of the debtor with one or more persons" without requiring a debtor to satisfy any of the standards that courts have articulated for exercise of the equitable power to order substantive consolidation. In its Objection, Cole Taylor pointed

out that the circumstances of this case do not justify the Court's exercise of its equitable power to order substantive consolidation even if the Plan required the Court to exercise that power (and the Plan does not do so). The principal reason why the Court should not exercise that power is the harm that substantive consolidation would inflict on Cole Taylor, i.e., use of the Debtor's cash to fund payments to creditors of other Debtors.

In its Response, the Debtor argues that Cole Taylor has "failed to allege any actual prejudice" that it will suffer upon substantive consolidation of the Debtors' cases. Response at p. 7. Indeed, the Debtor argues that substantive consolidation will *benefit* Cole Taylor by allowing Cole Taylor to look to "the aggregate cash resources of all the Debtors thereby insuring payment to Cole Taylor (and other creditors) under the Joint Plan. With substantive consolidation, all creditors' expectation of payment under the Joint Plan is a certainty." Response at p. 7-8. The Debtor is wrong.

In cases where one or both of the consolidating entities are insolvent, substantive consolidation may result in a significant change in the amount of distribution which creditors of either entity expect to receive. *In re Limited Gaming of America,* 228 B.R. at 286. Put another way, "substantive consolidation has the potential to radically alter the reasonable rights and expectations of the parties." *Id.* at 286-87. *See also, In re Affiliated Foods,* 249 B.R. at 776 (stating that substantive consolidation results in a "redistribution of wealth" among creditors of the various estates, because the consolidated entities are very unlikely to have the same assets, debts and creditors) (quotations in original). Substantive consolidation is appropriate only when it benefits debtors' estates "without betraying legitimate expectations of the debtors and their respective creditors." *In re Affiliated Foods*, 249 B.R. at 776.

Substantive consolidation under the Plan does exactly what it should *not* do: betray Cole Taylor's legitimate expectation that the collateral and the proceeds of that collateral securing

each Debtor's independent obligations to Cole Taylor will be only used to pay claims against each of the separate Debtors to whom Cole Taylor made its loans. The substantive consolidation proposed by the Debtors constitutes a recognition that Conyers and Smyrna likely lack the cash flow required to cram down on Cole Taylor's secured claims against those entities under Code section 1129(b)(2)(A)(ii).[3] As a result, the Plan proposes substantive consolidation so that the cash generated by the Debtor and Village Green can be used to satisfy Code section 1129(b)(2)(A)(ii)'s requirements for a cramdown on Cole Taylor's secured claims against Smyrna and Conyers (and, perhaps, the claim of Brywood's secured creditor).

It is clear from the Limited Objection and the lift stay motions Cole Taylor filed in the case of each Debtor that Cole Taylor opposes confirmation of the Plan and wants to foreclose on its mortgages. Clearly, therefore, Cole Taylor will be harmed, rather than benefited, if the Plan is confirmed and excess cash which could be used to pay Cole Taylor's claims against the Debtor and Village Green is diverted to support a cramdown on Cole Taylor's secured claims against Smyrna and Conyers, thereby preventing Cole Taylor from obtaining stay relief.

Notably, the Plan proposes to pay Cole Taylor a mere 3% on its separately classified unsecured deficiency claim, while all other unsecured creditors are repaid in full using Cole Taylor's cash collateral. Plan at p. 20. The Debtor's argument that this treatment of Cole Taylor's deficiency claims represents a benefit to Cole Taylor is plainly absurd.[4]

In short, the Plan radically alters Cole Taylor's rights and expectations under both the loan documents and the Code. Consequently, Cole Taylor believes that the Court would not

[3] Again, Cole Taylor disagrees with the Debtor's valuations of all the Real Property and makes no representations as to the values of the Real Property at this time. Cole Taylor also disputes the interest rates proposed in the Plan. Based on the true values of the Real Property and the correct interest rates to be determined at the appropriate time, Cole Taylor believes that Conyers and Smyrna cannot cramdown on Cole Taylor's secured claims against those Debtors under Code section 1129(b)(2)(A)(ii).

[4] Cole Taylor is not waiving its right to elect treatment of one or more of its secured claims under Code section 1111(b)(2) until such time, if ever, that Cole Taylor must decide whether to make that election.

exercise its equitable power to substantively consolidate the Debtors' estates, even if the Plan had proposed that the Court do so (which it has not).

In its Response, the Debtor also argues that *Matter of Woodbrook Associates*, 19 F.3d 312 (7th Cir. 1994), prevents Cole Taylor's unsecured deficiency claims from being classified with the claims of the Debtors' general unsecured creditors. The Debtor's argument is based on an incorrect reading of *Woodbrook*. *Woodbrook* required separate classification of an undersecured non-recourse creditor's deficiency claim that existed only in chapter 11 by virtue of section 1111(b)(1) of the Code. *Id.* at 318-19.[5] Cole Taylor's loan to the Debtor is a recourse loan. *See* Claim No. 3. As a result, Cole Taylor, unlike the non-recourse creditor in *Woodbrook*, will have a deficiency claim if the Debtor's case is converted to chapter 7. Thus, Cole Taylor's deficiency claim is no different than any other general unsecured claim against the Debtor. Therefore, consistent with *Woodbrook*, separate classification of Cole Taylor's deficiency claim is improper.

Finally, the Debtor mischaracterizes the arguments set forth in Cole Taylor's Objection regarding the substantive consolidation of these cases. Cole Taylor does not argue that substantive consolidation is "unauthorized by the Bankruptcy Code." Nor does Cole Taylor argue that substantive consolidation is "sanctioned by only a minority of courts." Response at p.8. Cole Taylor recognizes that all bankruptcy courts possess the equitable power to order substantive consolidation in the appropriate circumstances. However, Cole Taylor argues that Code section 1123(a)(5)(C) does not authorize the Court to exercise that power. Objection at p.

[5] Whether the loan at issue is recourse or non-recourse is critical to the classification analysis under *Woodbrook*. The deficiency claim of an undersecured recourse creditor exists under all chapters of the Code, while a non-recourse deficiency claim exists only so long as the case remains in chapter 11. Upon conversion of a case to chapter 7, the undersecured holder of a non-recourse loan can only recover to the extent of its collateral, making its chapter 11 deficiency claim fundamentally different than the deficiency claim of an undersecured creditor that has full recourse against a debtor. It is this distinction that requires a chapter 11 plan to separately classify non-recourse deficiency claims.

2. The Debtor's citation to an empirical study analyzing the occurrence of deemed consolidations in "jumbo" cases is simply irrelevant to the Debtors' single asset real estate cases.

CONCLUSION

Section 1123(a)(5)(C) of the Code does not authorize the Court to substantively consolidate the Debtors' estates. This conclusion is clear both from the ordinary meaning of "consolidation," and from the context of Code section 1123(a)(5). There is no binding or persuasive authority to the contrary. Even if the Plan contemplated the Court's exercise of its equitable power to order substantive consolidation, which it does not, the exercise of that power would be inappropriate under the circumstances of this case as a result of the harm Cole Taylor would suffer from diversion of the Debtor's cash to finance plan payments to creditors of the other Debtors. Consequently approval of the Disclosure Statement should be denied as a matter of law.

[*remainder of page left intentionally blank*]

WHEREFORE, for the foregoing reasons, Cole Taylor Bank respectfully requests that the Court deny approval of the Disclosure Statement and provide such other and further relief as is just and proper, including relief from the automatic stay.

Dated: September 6, 2013

Respectfully submitted,

COLE TAYLOR BANK

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