IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
THE BANNING LEWIS RANCH COMPANY, LLC, *et al.*,[1]	Case No.: 10-13445 (KJC)
	(Jointly Administered)
Debtors.	**Objection Deadline: June 22, 2011 at 4:00 p.m. (ET)** **Hearing Date: June 29, 2011 at 3:00 p.m. (ET)**
	RE: Docket No. 301 & 303

OBJECTION OF KEYBANK NATIONAL ASSOCIATION TO AMENDED JOINT DISCLOSURE STATEMENT WITH RESPECT TO AMENDED JOINT PLAN OF LIQUIDATION FOR THE BANNING LEWIS RANCH COMPANY, LLC AND BANNING LEWIS RANCH DEVELOPMENT I & II, LLC

KeyBank National Association, as Administrative Agent ("Agent") under that certain Senior Secured Revolving Credit Agreement dated as of September 7, 2007 (as amended, the "Revolving Credit Agreement") by and among Banning Lewis Ranch Development I & II, LLC ("Devco") and The Banning Lewis Ranch Company, LLC as Guarantor ("BLRC", together with Devco, the "Debtors"), Agent and the lenders thereto (the "Revolving Lenders"), by and through its undersigned counsel, hereby submits this Objection (the "Objection") to the Debtors' Motion to Approve the Amended Joint Disclosure Statement (the "Disclosure Statement") with Respect to Amended Joint Plan of Liquidation (the "Plan")[2] for The Banning Lewis Ranch Company, LLC and Banning Lewis Ranch Development I & II, LLC. In support of its Objection, Agent respectfully represents as follows:

[1] The Debtors in these proceedings, along with the last four digits of each Debtor's federal tax identification number, are The Banning Lewis Ranch Company, LLC (4090) and Banning Lewis Ranch Development I & II, LLC (3461). The Debtors' corporate headquarters and the service address for each Debtor is 4100 MacArthur Boulevard, Suite 100, Newport Beach, CA 92660.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan and Disclosure Statement.

PRELIMINARY STATEMENT

1. As a threshold matter, the Court should not approve the Disclosure Statement because the Plan is patently unconfirmable. As discussed in greater detail below, the Plan violates the Bankruptcy Code and as such, the Disclosure Statement describes a Plan that can never be confirmed. As a result, this Court should neither approve the Disclosure Statement nor permit the Debtors to waste estate funds soliciting votes on a non-confirmable Plan.

2. Even if the Court were to determine that the issue of the Plan's confirmability should be delayed until the confirmation hearing, the Disclosure Statement, in its current form, cannot be approved as it lacks information of the sort required by section 1125 of the Bankruptcy Code.

BACKGROUND

3. On October 28, 2010 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors are continuing in possession of their properties and are operating and managing their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner or committee has been appointed in these chapter 11 cases.

5. Shortly after the Petition Date, the Debtors, Agent and the Revolving Lenders, along with BLRC's term loan lenders (the "Term Lenders"), entered into that certain Stipulation Authorizing Use of Cash Collateral (the "Cash Collateral Stipulation") which this Court approved on November 17, 2010 [Docket No. 55].

6. Pursuant to the terms of the Cash Collateral Stipulation, the Debtors

were authorized to use the Revolving Lenders' and the Term Lenders' Cash Collateral (as defined in the Cash Collateral Stipulation) in accordance with the budget attached thereto through December 21, 2010. In the Cash Collateral Stipulation, the Debtors acknowledged and agreed (subject to the rights of third parties as set forth therein, which rights have since expired) that Devco's obligations to Agent and to the Revolving Lenders under the Revolving Credit Agreement, which exceed $67 million, are secured by first priority perfected liens in and on substantially all of Devco's assets, including Devco's owned real estate located in Colorado Springs, Colorado ("Devco's Real Property"), in favor of Agent and the Revolving Lenders.

7. BLRC's obligations to the Term Lenders exceed $23 million. In the Cash Collateral Stipulation, the Debtors acknowledged and agreed that those obligations are secured by first priority perfected liens in favor of the Term Lenders in and on substantially all of BLRC's assets, including BLRC's owned real estate located in Colorado Springs, Colorado ("BLRC's Real Property").

8. The liens of the Revolving Lenders do not extend to BLRC's Real Property and the liens of the Term Lenders do not extend to Devco's Real Property. The Revolving Lenders have an unsecured claim against BLRC as a result of BLRC's guaranty of Devco's obligations under the Revolving Credit Agreement.

9. Following approval of the Cash Collateral Stipulation, the Debtors and Agent commenced negotiations regarding the terms of a potential debtor-in-possession financing facility ("DIP Financing"). Ultimately, however, the Debtors chose to proceed with DIP Financing provided by certain affiliates of the Debtors' members (the "DIP Lenders"). The DIP Financing and related credit agreement (the "DIP Credit Agreement")

were approved by a final order dated December 22, 2010 (the "DIP Order") [Docket No. 134]. The DIP Financing currently matures on June 30, 2011 (the "DIP Maturity Date").

10. On May 23, 2011, this Court entered an Order approving procedures to govern the sale of Devco's assets (the "Devco Bid Procedures"). On the same date, the Court entered an Order approving procedures to govern the sale of BLRC's assets (the "BLRC Bid Procedures", together with the Devco Bid Procedures, the "Bid Procedures"). As part of the BLRC Bid Procedures, the Court approved BLRC's entry into a stalking horse asset purchase agreement (the "SH Agreement") with an affiliate of the DIP Lenders (the "Stalking Horse"). Devco has not entered into a stalking horse agreement with any prospective purchaser. Also pursuant to the Bid Procedures, the Debtors will conduct an auction for their assets on June 28, 2011 (the "Auction").

11. On May 25, 2011, the Debtors filed the Plan [Docket No. 300] and the Disclosure Statement [Docket No. 301]. The Debtors propose to effectuate the sale transactions entered into following the Auction through the Plan.[3]

OBJECTION

I. The Disclosure Statement Cannot be Approved Because the Plan is Patently Unconfirmable.

12. Although the issue of whether a plan meets the requirements for confirmation is normally decided at the confirmation hearing, it is well settled that a disclosure statement should not be approved when it describes a plan that is patently unconfirmable. In *re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D.Pa. 1996) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is

[3] Should the ultimate buyer(s) of Devco's assets and/or or BLRC's assets choose to proceed pursuant to section 363 as opposed to section 1129, the Plan will be modified accordingly.

'impossible,' the court should exercise its discretion to refuse to consider the adequacy of disclosures"); *In re Curtis Center Limited Partnership*, 195 B.R. 631, 638 (Bankr. E.D.Pa. 1996) ("[t]he Court notes its agreement with the proposition that a disclosure statement should be disapproved where the plan it describes is patently unconfirmable"); *In re Beyond.com Corp.*, 289 B.R. 138, 143-46 (Bankr. N.D. Cal. 2003) (denying approval of disclosure statement where "plan and disclosure statement are as freewheeling with the Bankruptcy Code and Rules as Enron's accountants were with tax laws in the 1990's"); *In re Mahoney Hawkes, LLP*, 289 B.R. 285, 304 (Bankr. D. Mass. 2002) (refusing to approve disclosure statement because plan that did not provide sufficient justification for permanent injunction and releases in favor of non-debtors was unconfirmable as a matter of law).

13. Denying approval of a disclosure statement relating to an unconfirmable plan avoids the wasteful and fruitless exercise of solicitation when the plan cannot be confirmed regardless of creditor approval. *In re Phoenix Petroleum*, 278 B.R. at 394. In fact, if a plan cannot on its face be confirmed, it is incumbent on the court to deny approval of the disclosure statement in order to prevent the diminution of estate assets that would result from the expense of soliciting votes on the plan and proceeding with a confirmation hearing. *See, e.g., In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999), and *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) ("if, on the face of the plan, the plan could not be confirmed, then the court will not subject the estate to the expense of soliciting votes and seeking confirmation"); *In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("If the disclosure statement describes a plan that is so fatally flawed that confirmation is impossible, the court should exercise its discretion to refuse to consider the adequacy of disclosures. Such an exercise of discretion is appropriate

because undertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed.") Given the leanness of these estates, the concern about wasting estate assets is particularly relevant.

14. The Plan is patently unconfirmable for the following reasons, and as such, the Debtors' estates should not be burdened with the unnecessary expense and efforts related to a futile exercise of soliciting votes on such Plan:

- The sale of BLRC's assets to the Stalking Horse is premised upon the assumption and assignment of the Term Loan which is prohibited by section 365(c)(2) of the Bankruptcy Code and renders the Plan unconfirmable.

- The third party releases included in the Plan are overbroad, unjustified and unwarranted thus rendering the Plan unconfirmable.

- The Plan fails to account for the unauthorized post-petition use of the Agent's and Revolving Lenders' cash collateral and claims related thereto.

A. The Plan Violates Section 365(c)(2) of the Bankruptcy Code.

15. The SH Agreement is premised and conditioned upon an assumption and assignment to the Stalking Horse of BLRC's loan with the Term Lenders (the "Term Loan") on the modified terms set forth in the SH Agreement. *See SH Agreement at ¶¶ 1.6 and 2.1.2.* Bankruptcy Code section 365(c)(2) provides that a debtor may not assume or assign any executory contract if-

> (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

11 U.S.C. § 365(c)(2).

16. The Term Loan falls squarely within the ambit of section 365(c)(2). It is indisputably a "contract to make a loan" and as such its assumption and assignment is expressly prohibited by the Bankruptcy Code. *See, Citizens & So. Nat'l Bank v. Thomas B. Hamilton Co. (In re Thomas B. Hamilton Co.)*, 969 F.2d 1013 (11th Cir 1992) (section 365(c)(2) prohibition applies to "traditional kinds of debt financing arrangements.")

17. Since the sale to the Stalking Horse is the bedrock upon which the Plan is founded and the sale is based upon an impermissible assumption and assignment of the Term Loan, the Plan cannot be confirmed. As such, the Court should not authorize the Debtors to engage in the futile exercise of soliciting votes on an unconfirmable Plan.

B. The Proposed Third Party Releases Render the Plan Unconfirmable

18. As a threshold matter, the Disclosure Statement description of the releases to be granted to third parties is inconsistent with the actual terms of the Plan. For instance, the Disclosure Statement and the proposed form of ballot seem to say that creditors may "opt-out" of all releases to be granted to the third parties specifically named in the Plan and/or the undefined "Released Parties" (a term which is not, but needs to be, defined). But the Plan contains only one section - 6.09 - that describes third party releases, and those releases are given only by the Debtors. There is no corollary section describing releases to be given by creditors to those same third parties. However, section 6.10 of the Plan enjoins creditors from pursuing claims against the (undefined) "Released Parties" with no mention of "opt-out" rights. Section 6.12 of the Plan purports to limit the liability of certain Debtor-related entities and specifically limits the "opt-out" rights to section 6.12 of the Plan.

19. If the intent is to give creditors the opportunity to fully "opt-out" of all the releases proposed to be given to third parties (and the "Released Parties"), as the Disclosure

Statement and the proposed form of ballot indicate, the Plan must be modified. If, instead, the Debtors are seeking to limit the reach of the "opt-out", then the Plan is unconfirmable and the Disclosure Statement should not be approved.

20. With respect to the releases proposed to be granted by the Debtors, a plan may provide for the settlement or release of a debtor's claims, but such a release must be fair and equitable and in the best interest of the estate. *In re Best Products Co., Inc.*, 177 B.R. 791, 794 n.4 (S.D.N.Y. 1995). Whether a claim is settled as part of a plan pursuant to section 1123(b)(3)(A) or pursuant to a motion under Bankruptcy Rule 9019, the standards applied for approval are the same. *Id.*, *aff'd*, 68 F.3d 26 (2d Cir. 1995). When seeking approval of a settlement or compromise, "[t]he settling parties must set forth the facts in sufficient detail that a reviewing court could distinguish it from mere boilerplate approval of the [debtors'] suggestion." *In re Lion Capital Group*, 49 B.R. 163, 176 (Bankr. S.D.N.Y. 1985) (citing *In re Boston & Providence RR Corp.*, 673 F.2d 11, 12 (1st Cir. 1982) and *In re Black Watch Farms, Inc.*, 373 F. Supp. 711, 716 (S.D.N.Y. 1974)).

21. Here, the Disclosure Statement does not provide any analysis or information regarding whether and how the Debtor releases set forth in Section 6.09 of the Plan are fair and equitable and in the best interest of these estates. There is no description at all of the claims being released. Without facts setting forth sufficient detail to enable the Court to distinguish the releases from "mere boilerplate approval", the Disclosure Statement cannot satisfy the standards imposed for approval of compromises and settlements. Furthermore, as noted above, section 6.10 of the Plan mentions "Released Parties" but nowhere in the Plan or Disclosure Statement do the Debtors define such term or provide information with respect to who the "Released Parties" are and from what, specifically, they are being released.

C. The Plan Fails to Address and Remedy the Unauthorized Post-Petition Use of the Revolving Lenders' Cash Collateral

22. The Debtors are plaintiffs in adversary proceedings against Banning Lewis Ranch Management Company LLC (Case No. 11-50219 (KJC)) and Scott R. Baugh (Case No. 11-50385 (KJC)) (collectively, the "Adversary Proceedings"). The Adversary Proceedings deal in part with the unauthorized post-petition use of the Agent's and Revolving Lenders' cash collateral in violation of 11 U.S.C. § 363(c)(2).

23. The Debtors and each of the defendants in the Adversary Proceedings are liable to the Revolving Lenders for the conversion and unauthorized use of the cash collateral and the Revolving Lenders may be entitled to the proceeds of the Adversary Proceedings as a remedy for this wrongful conduct in addition to other potential remedies, including direct claims against the Debtors, the Debtors' principals and other third parties.

24. Neither the Plan nor the Disclosure Statement address the Revolving Lenders' claims in connection with the Debtors' unauthorized post-petition use of cash collateral. In fact, the Plan contemplates that there will be no administrative claims and that the proceeds of the litigation described above would be available to satisfy unsecured creditors. Given the priority interest of the Agent and Revolving Lenders in such proceeds or other recovery, any such payments to unsecured creditors would violate the absolute priority rule and render the Plan unconfirmable.

25. As is clearly demonstrated above, the Plan suffers from multiple fatal defects, is not capable of confirmation and a result, the Disclosure Statement should not be approved.

II. The Disclosure Statement Should Not Be Approved Because it Lacks Information Sufficient to Satisy Section 1125 Of The Bankruptcy Code

26. Section 1125 of the Bankruptcy Code requires that a disclosure statement contain "adequate information," defined as:

> information of any kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.

11 U.S.C. § 1125(a)(1) (emphasis added).

27. The Disclosure Statement does not contain the required adequate information. Specifically, the Disclosure Statement fails to provide essential information concerning the treatment of the Class 3 secured claims of the Revolving Lenders.

28. In particular, the Disclosure Statement states:

> ...Treatment of the Secured Claims of the Revolver Lenders will be determined by the results of the auction for the assets of Devco...

29. This information is wholly insufficient to enable the Revolving Lenders to make an informed decision respecting the Plan.

30. The Disclosure Statement also fails to provide any information required by 11 U.S.C. § 1125 concerning the Adversary Proceedings described above to enable the Revolving Lenders to make an informed judgment about the Plan. In particular, the Disclosure Statement fails to adequately address:

a) the value of the Adversary Proceedings;

b) the status of the litigation;

c) the likelihood of recovery by the Debtors;

d) the proposed distribution of the proceeds of the Adversary Proceedings;

e) whether the Revolving Lenders will receive any portion of the proceeds from the Adversary Proceedings; and

f) the impact that the Plan will have on the Agent's right to pursue direct claims against the defendants in the Adversary Proceedings and other entities on behalf of itself and the Revolving Lenders.

31. Nor does the Disclosure Statement provide any information regarding the impact the Debtors' unauthorized use of the Agent's and Revolving Lenders' cash collateral has on the various classes of claims and the Plan's ultimate feasibility. Absent such information, no creditor can make an informed judgment with respect to the Plan.

32. Finally, there are a number of inconsistencies between the Disclosure Statement and the Plan which may cause the Disclosure Statement to be misleading to creditors reviewing it.

33. As a result of these defects, the Disclosure Statement should not be approved for failure to provide adequate information as required by 11 U.S.C. § 1125.

III. The Disclosure Statement Should not be Approved to the Extent that it Modifies any Order of this Court or any Sale Order in connection with the Auction

34. To the extent that the Debtors take the position that the Plan modifies any prior Order of this Court or any Sale Order in connection with the Auction, the Disclosure Statement should not be approved because such a modification is in violation of 11 U.S.C. § 1129(a) because the Plan is not being proposed in good faith and by means forbidden by law.

CONCLUSION

35. For all the foregoing reasons, the Court should deny approval of the Disclosure Statement.

Dated: June 22, 2011

BUCHANAN INGERSOLL & ROONEY PC

/s/ Mary F. Caloway

Mary F. Caloway (No. 3059)
Mona A. Parikh (No. 4901)
1105 North Market Street
Suite 1900
Wilmington, Delaware 19801
Telephone: (302) 552-4200
Facsimile: (302) 552-4295
Email: mary.caloway@bipc.com
mona.parikh@bipc.com

Attorneys for KeyBank National Association, as Administrative Agent