UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

In the Matter of:
BATE LAND & TIMBER, LLC
Debtor

Chapter 11
Case No.: 13-04665-8-SWH

DEBTOR'S RESPONSE TO OBJECTION TO CONFIRMATION OF PLAN

NOW COMES Bate Land & Timber, LLC ("Debtor"), by and through undersigned counsel, and submits this Response to Objection of Bate Land Company, LLC[1] to Confirmation of the Debtor's Plan of Reorganization ("Objection to Plan"), and shows unto the Court as follows:

1. The Debtor filed its Petition pursuant to Chapter 11 of the United States Bankruptcy Code on July 26, 2013, and operates as a Debtor-in-Possession.

2. The Debtor is a limited liability company organized under the laws of North Carolina and owns real property in various counties in North Carolina.

3. BLC is a Georgia limited partnership and authorized to do business in North Carolina since 1998. Its business, and that of its predecessor Harold Bate (the organizer of BLC), was to hold real estate for long-term investment and to manage timber operations.

4. On or about September 8, 2006, the Debtor purchased seventy-nine (79) tracts of land in nine counties in North Carolina from BLC. The Debtor purchased the real property pursuant to a contract entitled "Agreement for Purchase and Sale of Non-Residential Real Property," dated April 14, 2006 (the "Contract").

5. Pursuant to the Contract, which set forth an individual "Contract Price" for each tract of land, BLC provided purchase money financing in the original principal amount of $56,000,000.00, after Debtor's down payment of $9,000,000 in cash at closing.

6. By July 25, 2013, the Debtor had paid $60,334,242.05 in cash, and the total balance of the debt to BLC on July 25, 2013, including interest which had accrued at the rate of nine percent per annum, was $12,936,254.65. Debtor's bank account stood at $117.56.

7. On July 26, 2013, in full satisfaction of its outstanding obligation to BLC, the Debtor conveyed to BLC two tracts of waterfront property in Pamlico County (the "Property") – the "Bay River – Smith Creek" tract of approximately 408.6 acres, and the "Broad Creek" tract of approximately 212 acres.

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[1] Upon information and belief, "Bate Land Company, LLC" is not a limited liability company, and its true entity name is Bate Land Company, LP ("BLC" or "Creditor").

8. At the time that the Debtor conveyed the Property to BLC, the Debtor was not in default of its obligations to BLC, nor had BLC given any notice to cure a default or declared Debtor in default.

9. The Contract Price of the Bay River – Smith Creek tract is $8,750,000.00. The Contract Price of the Broad Creek tract is $4,750,000.00. The total value of the Property, as stipulated by BLC in the Contract, is $13,500,000.00, approximately $575,582.13 more than the Claim filed by BLC.

10. In Schedule D and F, Debtor lists the following creditors (excluding BLC)[2]:

a. Deere & Company – secured claim of $26,523.00;

b. Northen Blue, L.L.P. – secured claim of $11,778.27;

c. Bank of America, N.A. - $74,000,000;

d. Big Beaver Land & Timber - $38,524.40;

e. Forestree, Inc. - $8,000;

f. Paramounte Engineering - $43,547.50; and

g. Stewart - $503.61.

11. On August 30, 2013, the Debtor filed its Plan of Reorganization (“Plan”), which provides for payment in full of all creditors except Bank of America, whose debt was contingent, unliquidated and disputed. Because BLC’s debt was satisfied in full pre-petition, the Plan provides for no payment to BLC.

12. Debtor anticipates that revenues it will generate from selling, leasing and managing its property will allow it to repay creditors under the Plan. Those efforts are hindered, however, by BLC’s refusal to release the lien of its Purchase Money Deed of Trust recorded against Debtor’s property.

13. In its Objection to Plan, BLC alleges that the Plan was not proposed in good faith and that, as to BLC’s claim, it constitutes a “dirt for debt” plan under 1129(b) of the Bankruptcy Code that is not “fair and equitable.”

<u>The Plan was Proposed in Good Faith</u>

14. BLC’s comparison of this case to <u>In re Swartville</u> is misplaced. The respective Plans in the two cases do not bear even a passing resemblance to each other.[3] The Plan initially proposed in <u>Swartville</u> proposed to pay the unsecured creditors (totaling only $8,901.00) in full within sixty days of the Effective Date. This court’s decision to deny confirmation of the Plan in <u>Swartville</u> was based on the court’s determination that the Plan artificially impaired the unsecured class, particularly because the

[2] In Schedule E, Debtor lists as creditors holding unsecured priority claims the tax departments of each county where it owns real property.

[3] Undersigned counsel assumes that BLC’s Objection to Plan is referring to the Plan that was filed in the <u>Swartville</u> case which was denied confirmation by this Court. The Debtor in <u>Swartville</u> filed an Amended Plan which was not denied by this court, and ultimately reached a consensual arrangement with its creditors, resulting in the filing of a joint Motion to Dismiss.

debtor's principal in that case testified that the unsecured class could be paid immediately. Only one ballot was received by an unsecured creditor in Swartville, for a claim in the amount of $1,170.

15. In its Objection to Plan, BLC asserts that "[t]he Debtor has acted in bad faith not only in the filing of this Plan, but in filing this case." If this assertion is meant to constitute a motion to dismiss the case due to a bad faith filing, then the court must apply the standards set forth in Carolin Corp. v. Miller, 886 F.2d 693, 700-01 (4th Cir. 1989). The movant must satisfy a two-pronged inquiry and demonstrate "both objective futility and subjective bad faith." Id. At 700. A showing of either one, but not the other, is insufficient. The Carolin court explained that

> [t]his means that if the only question raised is whether a reorganization is realistically possible, i.e., if there is no question of the petitioner's subjective good faith in filing, threshold dismissal of a petition is not warranted. In those circumstances the question of ultimate futility is better left to post-petition developments. By the same token, even if subjective bad faith in filing could properly be found, dismissal is not warranted if futility cannot also be found.

Id. At 701.

16. Objective futility may be demonstrated where the court's inquiry reveals that "there is no going concern to preserve…and…no hope of rehabilitation." Id. At 701 (citation omitted). Subjective bad faith is determined by "whether the petitioner's real motivation is 'to abuse the reorganization process' and 'to cause hardship or to delay creditors by resort to the Chapter 11 device merely for the purpose of invoking the automatic stay, without an intent or ability to reorganize his financial activities.'" Id. at 702 (citation omitted). The court found that it is "better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation." Id. at 701.

17. Regarding the objective futility prong of Carolin, the Debtor has proposed a Plan that can be confirmed, even over the objection of BLC. BLC's Objection to the Plan does not allege otherwise.

18. In its Objection to Plan, BLC seems to be focused on subjective bad faith. The Debtor's response to those allegations are set forth below.

19. In its Objection to Plan, BLC asserts that any claims other than its claim are *de minimus* and were created solely to facilitate confirmation of the Plan. All other undisputed claims exceed $160,000, and Bank of America's claim is listed at $74 million. Priority property tax claims must also be paid under the Plan.

20. Deere claim – Debtor purchased a used large utility tractor and rotary cutter that is used to "bush hog" or mow brush. This equipment has been utilized on the Debtor's property and was

purchased for the express purpose of maintaining the property and readying the property for sale now that the Debtor can sell property without the interference and obstruction it has historically experienced from BLC. BLC does not dispute the validity or amount of the debt, and its purchase shortly before the filing of the Petition, as the Debtor prepares to ready its property for sale, cannot be construed as bad faith.

21. Northen Blue - In its Objection to Plan, BLC does not dispute the validity or amount of the debt to this law firm, but alleges only that the note and deed of trust securing repayment, executed after Debtor hired its current law firm (Oliver Friesen Cheek, PLLC), is bad faith. The legal services performed by Northen Blue for Debtor were timely and valuable, and providing some security for repayment to this knowledgeable creditor is good business practice.

22. Bank of America – Interestingly, BLC's Objection to Plan does not include this claim of $74,000,000 when evaluating the Plan. Debtor listed Bank of America's claim of $74 million as "contingent, unliquidated and disputed." Filing of the Petition and the Plan was an appropriate way for Debtor to ensure that the "clawback" and other terms of a Confidential Settlement between Bank of America and other obligors, including Debtor, did not leave any unresolved claim that would thwart Debtor's reorganization and future business activity. The Debtor's objective to remove a $74 million cloud hanging over its assets could never be categorized as bad faith.

23. Big Beaver Land & Timber – This creditor is listed in the Debtor's schedules as an affiliate of Debtor, and BLC alleges that it has seen no records supporting the claim of $38,524.40. In court submissions and in its 2004 document production to BLC, Debtor provided the July 31, 2013 bank statements showing deposits on 7/25/13 and 7/26/13 to its account from Big Beaver in the full amount of the claim. Although this creditor has voted in favor of the Debtor's Plan, this vote is not needed to establish an impaired accepting class.

24. Forestree - A portion of this claim is contingent and is listed as such in the Petition. To enhance development, Forestree conducted timber-thinning operations on some of Debtor's property, pursuant to a written contract that called for a cash performance bond to ensure compliance with good forestry management practices. Forestree is also owed money for an advance payment of sales proceeds from timber. As documents provided to BLC show, these transactions occurred in July, 2011-August, 2012, and certainly not when the filing of the Petition was contemplated. Forestree has not filed a proof of claim, but the deadline for filing proofs of claim in this case is December 3, 2013.

25. Paramount Engineering –Paramount Engineering provided engineering services related to development of Debtor's property. BLC alleges that at least some portion of the claim would be barred by the statute of limitation, so should not be considered under the Plan. As Debtor testified in its deposition conducted by BLC, one condition of the engineering services was the actual issuance of a critical development permit necessitated by looming rule changes, which would have placed limitations

on the highest and best use of the property. Permit issuance was delayed by the issuing governmental agency so project completion was also delayed. The Debtor does not believe that the claim is barred by the statute of limitations, and Debtor anticipates that future work from this engineering company for development of its property may be required. As provided in the Plan, the claim should be paid in full.

26. Stewart – BLC does not elaborate in its objection on Stewart. Debtor's obligation to Stewart was for land planning expenses, necessitated to preserve the highest and best use of the property (residential development).

27. In summary, Debtor's undisputed obligations, which total $164,575.21, are legitimate expenses, not "questionable" as BLC asserts, and incurred over a period of many months, not "immediately before the filing of this Petition" as BLC claims. Moreover, when Debtor's cash totals only $117.56, can $164,575.21 in payables be considered "de minimis". Additionally, through this Chapter 11, the Debtor has accomplished its goal of making sure that Bank of America will not make a claim against the Debtor in the future for the contingent debt of $74,000,000.

28. This court found in Swartville that "[a]s compared to the good faith filing inquiry under § 1122, the court's consideration of a debtor's good faith under § 1129(a)(3) is more 'narrowly focused, and tests directly whether the debtor's conduct in formulating, proposing and confirming a plan displays the requisite honesty of intention.'" (In re Swartville, August 17, 2012 Order, at 9). Given the many creditors involved in this case, and the various interests, the Debtor's Plan cannot be said to have been filed in bad faith.

29. Clearly, under any objective or subjective standard, the various undisputed claims listed by Debtor are valid debts and incurred for valid business purposes, and the Plan, required for effective reorganization, was proposed by Debtor in good faith and should be confirmed by this court.

The Plan is Fair and Equitable

30. The Plan proposed by the Debtor is not a "dirt-for-debt" Plan. BLC's analysis of Fazekas, although interesting, is not relevant to this case. The Plan proposed by the Debtor involves paying nothing to BLC, because BLC's debt was fully satisfied prior to the filing of the Chapter 11 petition. This Court is acutely aware of Fazekas and very familiar with its progeny, most of which were authored by this Court. There may come a time when this Court's attention is again focused on the intricacies of "dirt-for-debt" concepts—but that time is not now, not in this case.

31. The Debtor will be prepared to argue the merits of the Plan that has been proposed, at the hearing on November 7, 2013.

WHEREFORE, the Debtor prays for the following relief:

1. That the relief requested in the Objection to Plan be denied; and,

2. For such other and further relief as to the Court may deem just and proper.

This the 6th day of November, 2013

s/George Mason Oliver
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CERTIFICATE OF SERVICE

I, George M. Oliver, Post Office Box 1548, New Bern, North Carolina 28563, certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the 6th day of November, 2013, I served copies of the foregoing Response on the parties electronically as indicated.

I certify under penalty of perjury that the foregoing is true and correct.

DATED: 11/06/2013

s/George Mason Oliver
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