

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:13-bk-00516-JAF
Jointly Administered Under
DAMES POINT HOLDINGS, LLC,
f/k/a B&B Properties, Chapter 11
Debtor.

P&B MARINA DEVELOPMENT, LLC'S
RESPONSE TO DEBTOR'S OBJECTION TO CONFIRMATION

P&B MARINA DEVELOPMENT, LLC (“**P&B**”) hereby files its response to Debtor’s objection to confirmation (Doc. No. 127) (“**Objection**”) of its plan (Doc. No. 112) (“**Plan**”).¹

SUMMARY

Debtor objects solely on the ground that P&B’s Plan was not filed in good faith. Debtor does so without filing a ballot voting for or against the Plan and without filing a plan during its exclusivity period or through the date of this response. P&B, however, has not acted in bad faith, but been left with no choice but to advance a plan. It has done so in good faith. In fact, none of Debtor’s allegations, even if true, demonstrate bad faith. As such, this Court should confirm the Plan.

I. LEGAL STANDARD

1. A bankruptcy court may only confirm a plan “proposed in good faith.” 11 U.S.C. § 1129(a)(3). The Bankruptcy Code does not define “good faith,” but courts have interpreted this phrase as requiring “a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Code.” *McCormick v. Banc One Leasing Corp.* (*In re McCormick*), 49 F.3d 1524, 1526 (11th Cir. 1995).

¹ As modified by the First Modification to P&B’s Plan of Reorganization for Dames Point Holdings, LLC (Doc. No. 136).

2. Thus, it is not bad faith to utilize and rely upon a particular provision of the Code. *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1076 (9th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003). *Sylmar Plaza* has been cited approvingly by this Court. *See, e.g., In re Proud Mary Marina Corp.*, 338 B.R. 114, 123 (Bankr. M.D. Fla. 2006). Rather, more appropriate examples of plans filed not in good faith include those which are parts of schemes of delay and those proposed solely for tax purposes. *See, e.g., Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.)*, 779 F.2d 1456 (10th Cir. 1985); *In re Maxim Indus., Inc.*, 22 B.R. 611 (Bankr. D. Mass. 1982).

II. ALLEGATIONS

A. Debtor's allegations of bad faith are legally unfounded.

3. Debtor alleges that the Plan “illustrates bad faith” because of (a) the disparity in amount between Debtor’s counsel’s legal fees and P&B’s counsel’s legal fees, (b) the proposal to increase P&B’s ownership of Debtor, (c) the liquidating of all assets, and (d) the failure to acknowledge Shafnacker’s son claim. Debtor’s Obj. to Confirmation ¶ 54 (Doc. No. 127). These provisions do not evidence bad faith: they achieve results “consistent with the objectives and purposes of the Code” because these measures are authorized *and contemplated* by the Code. *McCormick*, 49 F.3d at 1526.

4. First, Section 503 of the Code does not require a proportional relationship between a creditor’s administrative expenses and a debtor’s counsel’s legal fees. Moreover, the Plan does not and cannot establish this relationship or cap Debtor’s counsel’s fees. Rather, the Court determines the amount of fees to be awarded to Debtor’s professionals and other administrative creditors. The Plan estimates Debtor’s counsel’s legal fees (\$11,000 inclusive of the \$7,500 retainer) based on the record before the Court, including its docket. In short, the

Debtor has advanced only the most minimal pleading, and eight (8) months after the petition date, has not filed a plan.

5. Debtor's second, third, and fourth grounds also do not evidence bad faith. The Plan's proposal to reorganize Debtor's equity interests is not inconsistent with the objective and purposes of the Bankruptcy Code, and Debtor has cited no law supporting this proposition. Moreover, such restructuring is the norm when one party provides the entirety of the Plan's funding. Further, the Plan's proposal to liquidate assets is entirely consistent with the Bankruptcy Code's objectives and is quite common for real estate based debtors. Finally, the Plan does not acknowledge William M. Shafnacker's claim in part because he has filed no Proof of Claim evidencing a right to remuneration for \$180,000 for four years of deferred earnings, yet his scheduled claim is denominated as disputed.

B. Debtor's other allegations are irrelevant and inaccurate.

6. The Objection makes other allegations but does not claim they amount to bad faith. Nonetheless, P&B feels compelled to respond and clarify the inaccurate representations made to this Court, and P&B does so in order of their appearance in the Objection.

7. First, Debtor alleges that Philip Tingle did not provide written disclosure to William Shafnacker as required by rules regulating the Florida Bar. Debtor's Obj. to Confirmation ¶ 7. However, the rule cited by Debtor requires disclosure only to *clients*, and William Shafnacker was never a client of Philip Tingle. Fla. Bar Code Prof. Resp. D. R. 4-1.8(a).

8. Second, Debtor alleges that P&B is the "**Tax Matters Member** as per Section 7.4 printed in bold and underlined for emphasis in the operations agreement" and that P&B "failed to file suit to have the real estate Ad Valorem tax issue resolved."

Debtor's Obj. to Confirmation ¶¶ 16, 19. However, Debtor's Operating Agreement (an exhibit to Debtor's Objection) clearly limits P&B's responsibilities to federal income tax matters:

7.4 **Tax Audits.** The Member [*sic*] appoint P&B Marine [*sic*] to be the "tax matters member" of the Company under Section 6231(a)(7) of the Code (the "**Tax Matters Member**"). The Tax Matters Member shall represent the Company, with the consent of Dames Point, in all administrative and judicial proceedings involving federal income tax matters as the "Tax Matters Member."

Debtor's Obj. to Confirmation Ex. A § 7.4. The paragraph above clearly limits P&B's responsibilities to federal income tax matters. The Operating Agreement does not provide P&B with authority to file a lawsuit by itself – even for federal income tax matters. *Id.* Given the straightforwardness of these provisions and Debtor's removal of them from context (including Debtor's emphasis on the underlining and bold), this cannot merely be a misreading.

9. Third, Debtor alleges that Philip Tingle "failed to resolve the tax issue in direct violation of Section 4.2 of the operations agreement." Debtor's Obj. to Confirmation ¶ 17. However, the Operating Agreement provides that after the effective date

P&B Marine agrees to contribute as an additional capital contributions in the aggregate of \$120,000 and thereafter amounts on a monthly basis *as agreed to by the Members*. ... For avoidance of doubt ... P&B Marine agree ... to provide the financial support to *the best of its ability* to support *the development activity*.

Debtor's Obj. to Confirmation Ex. A § 4.2 (emphasis added). Thus, Section 4.2 does not require either P&B or Philip Tingle to "resolve" the tax property tax issues or make financial contributions to that end: P&B was only obligated to provide additional contributions to which it agreed and in support the development activity, which does not include property taxes. Moreover, Debtor has had nearly eight months to file an adversary proceeding against P&B or Philip Tingle; Debtor's failure to do so further highlights the frivolity of this allegation. Further, Debtor fails to list any such claim in its schedules.

10. Fourth, Debtor alleges that Philip Tingle failed to provide the "required capital to

resolve the initial \$12,189.67 tax issue, failed to stop the tax certificates from being issued, then allowed them to be assessed interest at 18% since 2008.” Debtor’s Obj. to Confirmation ¶ 18. However, P&B provided the initial contributions required by the Operating Agreement, and, as discussed above, neither Philip Tingle nor P&B had authority to file a lawsuit regarding the tax issues, and the interest rate of the certificates is set by Florida Statutes. *See Fla. Stat. § 197.172.*

11. Fifth, Debtor alleges that Shafnacker has expanded the docks of the marina. Debtor’s Obj. to Confirmation ¶ 26. However, Debtor again fails to provide context. Debtor obtained unapproved financing resulting in a postpetition lien filed by Alyssa Properties, to which Debtor still owes \$32,000 according to its own schedules (Doc. No. 55).

12. Sixth, Debtor alleges that P&B has refused to provide the “\$25,000 necessary and required to substantially increase the Marina’s profitability.” Debtor’s Obj. to Confirmation ¶ 28. P&B is unaware of what this allegation references, but (as discussed above) any contribution cannot be required without P&B’s consent, which was never given.

13. Seventh, Debtor has disclosed settlement negotiations in its Objection. *Id.* at Ex. C. P&B considers such disclosure inappropriate. However, to the extent Debtor has already opened this door, P&B believes this Court would benefit from the full context of settlement negotiations and will gladly provide such context to this Court upon request.

14. Eighth, Debtor alleges that the contents of the disclosed settlement negotiations violated the Operating Agreement. *Id.* at ¶ 32. However, these provisions were proposed amendments to the Operating Agreement, which are expressly permitted by its terms. *Id.* at Ex. A § 13.2. Moreover, these settlement efforts demonstrate P&B’s good faith in attempting to resolve Debtor’s financial problems.

15. Ninth, Debtor alleges that P&B inaccurately represents itself as a creditor and has no right to demand funds back under the Operating Agreement. *Id.* at ¶¶ 39-40.² However, the Operating Agreement only limits P&B's ability to seek the return of its capital contributions. *Id.* at Ex. A § 4.3. Debtor has authority to "borrow money" pursuant to the Operating Agreement, which incorporates the powers provided to Florida limited liabilities companies by statute. *See Id.* at Ex. A § 3.2; Fla. Stat. § 608.404(5). Debtor borrowed money from P&B pursuant to this provision, and P&B filed an uncontested Proof of Claim for the loaned amounts.³ For purposes of confirmation and balloting, its claims is therefore deemed allowed.

16. Tenth, Debtor alleges that P&B delayed court ordered mediation and then filed its Plan prior to mediation. Debtor's Obj. to Confirmation ¶ 43. P&B's counsel rescheduled mediation because its client was out of the state, and P&B's Plan could have been a starting point for negotiations. Filing the Plan was not an act of bad faith but an effort by P&B to advance this case, fueled by a concern that Debtor had not filed a plan during the exclusivity period.

17. Eleventh, Debtor states that it will file a competing plan on the eve of the confirmation hearing of P&B's Plan. Debtor's Obj. to Confirmation ¶ 50. After failing to file any plan for nearly eight months and failing to even file a ballot for P&B's Plan, Debtor's filing a competing plan on the eve of the confirmation hearing on P&B's Plan will only further highlight Debtor's dilatory tactics to date. P&B suspects that this "competing plan" will mirror P&B's plan if not contain identical language in most respects.

18. Twelfth, Debtor alleges that P&B "intentionally and fraudulently ... [f]iled

² Debtor also alleges that "P&B has fraudulently represented themselves as a '40% creditor.'" *Id.* at ¶ 52. P&B has only alleged that it is a 40% equity interest holder.

³ Debtor also alleges that P&B is "using its legal knowledge and financial resources to act adversely to the Debtor when in fact they are co-debtors." Debtor's Obj. to Confirmation ¶ 48. P&B notes that it is the obligation of all parties to use their legal knowledge and resources to advance the case.

Chapter 11 after only hours before not giving Shafnacker permission thereby doubling costs.” *Id.* at ¶ 53(c). P&B notes that it refused to consent to P&B’s voluntary petition in part because of concerns about Debtor’s proposed selection of counsel, Gust. G. Sarris, who has admitted, in interrogatory responses filed with the Court (Doc. No. 61), to representing (and possibly continuing to represent) another entity owned by Debtor’s current manager, William F. Shafnacker. P&B continues to maintain that Debtor’s counsel is not a “disinterested person” under 11 U.S.C. § 101(11).

WHEREFORE, P&B respectfully requests that this Court confirm the Plan over Debtor’s Objection and grant such further relief that the Court deems appropriate.

Dated: September 18, 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to those parties registered to receive service via CM/ECF and by U.S. Mail to all parties on the attached Mailing Matrix on September 18, 2013.

/s/ Scott A. Underwood
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