

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:	Case No. 8:17-bk-03597-MGW
NILHAN FINANCIAL, LLC,	Chapter 11
Debtor.	

**MOTION TO EXTEND EXCLUSIVITY PERIOD FOR FILING PLAN OF
REORGANIZATION**

COMES NOW Nilhan Financial, LLC, Debtor and Debtor-in-Possession in the above-styled case (“Debtor”), and files this Motion requesting that the Court extend the exclusivity period under 11 U.S.C. § 1121 for filing Debtor’s Plan of Reorganization and for obtaining confirmation of its Plan of Reorganization (the “Motion”), respectfully showing the Court as follows:

Relief Requested

1.

By this Motion, the Debtor respectfully requests the entry of an order, pursuant to Sections 105(a) and 1121(d) of the Bankruptcy Code, extending the exclusivity period during which the Debtor may file its Plan of Reorganization and also the period for obtaining confirmation of its Plan of Reorganization to dates certain after the Court rules on a pending Motion to Dismiss the above-captioned case and a pending Motion to Convert the above-captioned case, in the event that the case is not dismissed and is not converted to a case under Chapter 7.

Jurisdiction

2.

This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334.

Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), 157(b)(2)(L) and 157(b)(2)(O), as it pertains to administration of the bankruptcy case and estate, confirmation of a plan of reorganization, and proceedings affecting the adjustment of debtor-creditor relationships. Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

3.

On March 20, 2017, this case was initiated through the filing of an involuntary petition for relief under Chapter 7 of Title 11 of the United States Code (the “Bankruptcy Code”) by the law firm of Moffa and Breuer, PLLC.

The case was subsequently converted to a case under Chapter 11 of the Bankruptcy Code.

The Debtor is authorized to operate its business as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4.

Debtor was in the business of assisting affiliated companies in obtaining financing.

5.

Debtor has not filed a proposed Plan of Reorganization for several reasons, including:

- a. Debtor filed a Motion to Dismiss the above-captioned case, which if granted will moot the need to expend considerable time and money on the Plan formulation and confirmation processes;
- b. Certain claimants have filed a Motion to Convert this case to a case under Chapter 7, which if granted over Debtor’s objection would also moot the need to expend considerable time and money on the Plan formulation and confirmation processes;

c. Debtor is presently engaged in discovery regarding the bases for recently filed Proofs of Claim (the various parties involved have scheduled two days of depositions for the end of this month), and further information regarding those claims would assist Debtor in formulation of its Plan of Reorganization since the amount of claims to be paid affects how Debtor proposes to fund payment of claims; and

d. Finishing the presently pending discovery regarding disputed claims would also assist Debtor in preparation of its Disclosure Statement since the amount of claims to be paid is information normally included within the Disclosure Statement and may have a bearing on amounts paid to claimholders and, accordingly, may be material to a claimant's decision on whether to vote for a Plan of Reorganization.¹

Basis for Relief

6.

Section 1121 of the Bankruptcy Code grants a debtor the exclusive right to file a plan of reorganization “until 120 days after the date of the order for relief....” 11 U.S.C. § 1121(b). The time during which the Debtor is the sole party with the right to file a proposed plan of reorganization is commonly referred to as the “exclusivity period.” If not extended by the Court, the exclusivity period terminates if each impaired class of claims or interests has not accepted the plan of reorganization within 180 days of the order for relief. 11 U.S.C. § 1121(c)(3).

7.

In this case, the 120th day after the order for relief falls on November 7, 2017, as the order for relief in this case was effect on July 10, 2017. Based on the facts and circumstances explained

¹ While Debtor could potentially submit a Plan of Reorganization without such details, Debtor anticipates that the Court, United States trustee, and creditors would desire such details before voting on the Plan and before approval of a Disclosure Statement for dissemination with a Plan of Reorganization.

above, Debtor has not finalized its Plan of Reorganization within the exclusivity period for filing or obtaining acceptances of the Plan.

8.

The Court may extend the exclusivity period pursuant to Section 1121(d)(1) of the Bankruptcy Code on a motion made within the exclusivity period and after notice and a hearing “for cause.” 11 U.S.C. § 1121(d)(1). The Bankruptcy Code does not define “cause” for purposes of an extension of the exclusivity period, but it is well established that the decision to extend a debtor’s exclusivity period is committed to the sound discretion of the court and should be based upon the facts and circumstances of a particular case. *See, e.g. In re Amko Plastics, Inc.*, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996) (noting that in determining whether the requisite “cause” exists, “the legislative intent has been construed to leave the question to the reorganization court in the exercise of its discretion and to promote maximum flexibility to suit various types of reorganization proceedings.”) (citations omitted).

9.

When determining whether “cause” exists to extend the exclusivity period, bankruptcy courts may look to a variety of factors and typically examine the following non-exclusive factors:

- (i) the size and complexity of a debtor’s case;
- (ii) the necessity for sufficient time to permit a debtor to negotiate a plan of reorganization and prepare adequate information;
- (iii) the existence of good faith progress towards reorganization;
- (iv) the fact that a debtor is paying its bills as they become due;
- (v) whether a debtor has demonstrated reasonable prospects for filing a viable plan;

- (vi) whether a debtor has made progress in negotiations with its creditors;
- (vii) the amount of time which has elapsed in the case;
- (vii) whether a debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtors' reorganization demands; and
- (ix) whether an unresolved contingency exists.

In re Adelphia Communications Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) (the “*Adelphia*” decision”) (citing *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997) (the “*Dow Corning*” decision)).

10.

The factors enumerated in *Dow Corning* are typically considered as objective criteria by courts evaluating an extension of the exclusivity period. *In re Adelphia Communications Corp.*, 352 B.R. at 587. A court does not, however, need to find the existence of each factor in every case, as not every factor is relevant in a given case or to be given dispositive weight, and courts have found “cause” to extend the exclusivity period based on various combinations of such factors, as well as other factors. *See, e.g., Rinehart v. Hoffinger Indus., Inc. (In re Hoffinger Indus., Inc.)*, 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003) (“we emphasize that these are only factors, not all of which are relevant in every case. Nor is it simply a question of adding up the number of factors which weigh for and against an extension. It is within the discretion of the bankruptcy court to decide which factors are relevant and give the appropriate weight to each.”); *In re Express One Int’l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (finding “cause” to extend the exclusivity period based on fewer than half of *Dow Corning* factors); *In re United Press Int’l, Inc.*, 60 B.R. 265, 269 (Bankr. D.D.C. 1986) (finding “cause” to extend the exclusivity period citing several,

but not all, *Dow Corning* factors).

11.

In the case at hand, consideration of the foregoing factors establishes that good “cause” exists to extend the exclusivity period for the following reasons:

- (i) the size and complexity of a debtor’s case favors an extension of the exclusivity period – Debtor submits that, although this case is not a large case, the case has involved complexities and has led to the filing of motions presently pending for resolution by the Court on December 12, 2017, which have a direct bearing on the submission of a Plan of Reorganization, as explained above;
- (ii) the necessity for sufficient time to permit a debtor to negotiate a plan of reorganization and prepare adequate information favors an extension of the exclusivity period – as noted above, Debtor will not have information regarding the total number of claims and size of those claims until it completes discovery that is presently ongoing with regard to the validity and amounts of claims, which is information needed to calculate projected plan payments to creditors;
- (iii) the existence of good faith progress towards reorganization favors an extension of the exclusivity period – Debtor submits that this factor is neutral in the situation at hand where a Motion to Dismiss the case is pending based on an offer to pay the claims that triggered the original involuntary case, and given that Debtor has attempted to satisfy the claims of SEG Gateway, LLC and Good Gateway, LLC in the amounts Debtor deems valid and when other amounts are disputed presently;
- (iv) the fact that a debtor is paying its bills as they become due favors an extension of the exclusivity period – Debtor does not have ongoing operations so is not delinquent on post-petition obligations;
- (v) whether a debtor has demonstrated reasonable prospects for filing a viable plan favors an extension of the exclusivity period – Debtor submits that it should be permitted an opportunity to submit a plan to pay creditors once it knows the number and amount of claims at issue, which is presently being determined through discovery about the validity and amount of claims;

(vi) whether a debtor has made progress in negotiations with its creditors – Debtor made efforts to negotiate with its largest creditor, including an offer to pay the entire undisputed amounts of the claims of SEG Gateway, LLC and Good Gateway, LLC, and while such efforts have not resulted in a settlement or resolution of those claims, Debtor should not be penalized for undertaking such efforts by losing its exclusivity period simply because such efforts never came to fruition, but rather that factor favors extending the exclusivity period;

(vii) the amount of time which has elapsed in the case favors an extension of the exclusivity period – this is Debtor’s first request for extension of the exclusivity period;

(viii) whether a debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtors’ reorganization demands favors an extension of the exclusivity period – Debtor has not attempted to pressure creditors to submit to reorganization demands, especially because Debtor made an offer to pay the entire amount that it submits is owing to SEG Gateway, LLC and Good Gateway, LLC and indicated it could resolve other claims outside of the bankruptcy context; and

(ix) whether an unresolved contingency exists favors an extension of the exclusivity period – Debtor has three unresolved factors bearing on its Plan and Disclosure Statement because Debtor is currently in the process of taking discovery as to the validity and amount of the majority of claims filed in this case, and has made a Motion to Dismiss this case conditioned upon paying the valid amount of claims of SEG Gateway, LLC and Good Gateway, LLC, and a Motion to Convert is also set for trial. Resolution of those matters will occur in the very near future.

Accordingly, under the circumstances of this case at this time, Debtor submits that the *Dow Corning* factors favor finding the existence of “cause” to extend the exclusivity period.

12.

When a debtor files a motion to extend the exclusivity period within the first 120 days after the order for relief, the Court has authority to extend the exclusivity period although a hearing on the Debtor’s motion is not held until a date more than 120 days after the order for relief. *See, e.g.,*

W. Homer Drake, Jr., *Chapter 11 Reorganizations* (2nd Ed. 2014-2015) at p. 880-881 (“The court may, however, enlarge the exclusivity period after the initial statutory period, but within the period of a previous enlargement. Furthermore, a request may be granted after exclusivity’s expiration, provided that such motion was filed with the court during exclusivity’s pendency.”) (citing 11 U.S.C 1121(d)(1), “permitting the court to grant any request for reduction or increase that is ‘made within’ the respective periods specified in subsections ‘b’ and ‘c’”, and *In re Henry Mayo Newhall Memorial Hosp.*, 282 B.R. 444 (B.A.P. 9th Cir. 2002)).

13.

The instant motion requesting an extension of the exclusivity period is filed within 120 days of the order for relief, as this case was converted to a case under Chapter 11 by an Order entered on October 20, 2017, *nunc pro tunc* to July 10, 2017, and the 120th day after the effective date of that order for relief falls on November 7, 2017.

Conclusion

Based on that situation, and the factors explained above that courts commonly consider when finding the existence of “cause” to extend the exclusivity period, Debtor submits that the exclusivity period should be extended until a date certain to be set by the Court once the Court rules on the pending Motion to Dismiss and Motion to Convert.

WHEREFORE, the Debtor respectfully requests that this Court:

- a) Enter an order extending Debtor’s exclusivity period regarding submission of a Plan of reorganization and the period for obtaining acceptances of the Plan to a date certain from the date on which the Court enters Orders resolving the Motion to Dismiss and Motion to Convert to Chapter 7 in the event that the case is not dismissed and not converted to

Chapter 7, and

b) Grant the Debtor such other and further relief as is just and proper.

This 7th day of November, 2017.

By: /s/ Michael Robl

Michael D. Robl

Georgia Bar No. 610905

Admitted *Pro Hac Vice*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 7, 2017, a true and correct copy of the foregoing **Motion** has been served through the CM/ECF system to all registered CM/ECF recipients.

/s/ Michael D. Robl

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