

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

Capitol Supply, Inc.,

Chapter 11

Debtor.

Case No.: 17-21544-EPK

DEBTOR'S MOTION TO EXTEND EXCLUSIVITY AND SOLICITATION PERIODS

Debtor, Capitol Supply, Inc. (the "Debtor"), by and through undersigned counsel, files this *Motion to Extend Exclusivity and Solicitation Periods* (the "Motion"), and in support thereof, states as follows:

Factual Background

1. On September 20, 2017, the Debtor filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (the "Petition Date"). The Debtor is operating its business and managing its assets as a debtor-in-possession pursuant to §§ 1107(a) of 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner, or statutory committee has been appointed in the Case.

2. Pursuant to 11 U.S.C. § 1121(b), the Debtor has the exclusive right to file a plan of reorganization for a period of 120 days following the date of the order for relief (the "Exclusive Filing Period"). Further, under 11 U.S.C. § 1121(c)(3), the debtor has the balance of 180 days after the order for relief to solicit acceptances of such plan (the "Exclusive Solicitation Period"). Based on the Petition Date, the Exclusive Filing Period expires on January 18, 2018 and the Exclusive Solicitation Period expires on March 19, 2018.

3. On October 20, 2017, the Court entered an *Order Shortening Time for Filing Proofs of Claim, Establishing Plan and Disclosure Statement Filing Deadlines, and Addressing*

Related Matters [ECF No. 60], which provided *inter alia* that the Debtor's deadline for filing a plan and disclosure statement is January 18, 2018 (the "Procedures Order Deadline").

4. Since the Petition Date, the Debtor has devoted a significant amount of time to complying with the requirements of operating as a debtor-in-possession during a Chapter 11 case, prosecuting a motion to enforce automatic stay against an action by the United States and Louis Scutellaro pending before the District Court for the District of Columbia (the "DC Case"), defending the appeal of the Court's order granting in part such motion to enforce automatic stay, negotiating the sale of the Debtor's interest in certain agreements and related business divisions with proposed sellers and the Debtor's secured lender, obtaining court approval of such sale and related contract assignment, seeking use of cash collateral, and negotiating use of cash collateral with the Debtor's secured lender.

5. Additionally, the Debtor recently began settlement discussions with one of its largest unsecured creditors, the United States, with respect to the claims asserted in the DC Case. As a result, the Debtor requires additional time pursue such settlement discussions with the United States and to formulate its plan of reorganization.

Relief Requested and Legal Argument

6. The Debtor requests an extension of the Exclusive Filing Period for a period of 46 days to through and including March 5, 2018, and an extension of the Exclusive Solicitation Period for a period of 46 days to through and including May 4, 2018, without prejudice to seeking further extensions in the event circumstances require such relief. The Debtor further request that the Procedures Order Deadline be extended to through and including March 5, 2018.

7. Pursuant to 11 U.S.C. § 1121(d) and F.R.B.P. 9006(b), on request of the Debtor, the Court may extend, for cause, such exclusive periods. Although the Bankruptcy Code does

not define “cause” for an extension, courts have looked to the legislative history of 11 U.S.C. § 1121(d) for guidance. *See In re Gibson & Cushman Dredging Corp.*, 101 B.R. 405, 409 (E.D.N.Y. 1989); *see also In re Amko Plastics, Inc.*, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996). Congress did not intend that the 120-day and 80-day exclusive periods be a hard and fast rule; rather, Congress intended that the exclusive periods be of adequate length, given the circumstances, for the debtor to formulate, negotiate and draft a consensual plan without the dislocation and disruption to the business that would occur with the filing of competing plans of reorganization. Congress recognized that often a 120-day exclusivity period will not afford a debtor sufficient time to formulate and negotiate a plan:

The court is given the power, though, to increase. . .the 120-day period depending on the circumstances of the case. For example, if an unusually large company were to seek reorganization under chapter 11, the court would probably need to extend the time in order to allow the debtor to reach an agreement.

H.R. REP. NO. 95-595, at 232 (1977) (footnotes omitted). Indeed, Congress intended courts to have flexibility in dealing with extensions of exclusivity. *See In re Amko Plastics*, 197 B.R. at 77. “The hallmark of [section 1121(d)] is flexibility.” *In re Perkins*, 71 B.R. 294, 297 (W.D.Tenn. 1987).

8. In determining whether a debtor has had an adequate opportunity to negotiate a plan, a court should consider a variety of factors to assess the totality of the circumstances. *See In re Dow Corning Corp.*, 208 B.R. 661, 664-665 (Bankr. E.D. Mich. 1997); *In re Express One Int'l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987). Bankruptcy courts have identified the following factors, among others, as relevant in determining whether cause exists to extend the 120-day and 180-day periods set forth in section 1121: a) the size and complexity of the case; b) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate

information; c) the existence of good faith progress toward reorganization; d) whether the debtor is generally making required post-petition payments as they become due and is effectively managing its business and preserving the value of its assets; e) whether the debtor has demonstrated reasonable prospects for filing a viable plan; f) whether the debtor has made progress in negotiations with its creditors; g) the amount of time that has elapsed in the case; h) whether the debtor is seeking an extension of exclusivity to pressure creditors into accepting a plan they find unacceptable; i) whether an unresolved contingency exists. *See McLean Indus.*, 87 B.R. at 834; *Express One Int'l*, 194 B.R. at 100; *Dow Corning*, 208 B.R. 661 at 664-665; *In re Henry Mayo Newhall Mem. Hosp.*, 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002); *In re Public Co. of New Hampshire*, 88 B.R. 521, 537 (Bankr. D.N.H. 1988).

9. As previously stated, the Debtor requests an extension of the Procedures Deadline Order, Exclusive Filing Period and Exclusive Solicitation Period for a period of 46 days in order to have additional time to formulate its plan of reorganization and pursue settlement negotiations with the United States. The Debtor is generally making required post-petition payments, and effectively managing its operations and finances. The Debtor believes that there are reasonable prospects for filing a viable plan.

10. The Debtor is not seeking to use exclusivity to pressure creditors into accepting a plan they find unacceptable. To the contrary, extending exclusivity will allow the Debtor to pursue settlement negotiations with the United States, and formulate a plan of reorganization based on the outcome of such negotiations without incurring legal fees associated with presently preparing a plan and disclosure statement. The request for extension is reasonable given the Debtor's progress to date and the current posture of the case. The Debtor is not seeking an extension as a delay tactic or to pressure creditors to accede to a plan that is unsatisfactory to

them. The Petition Date was September 20, 2017. This is a relatively insignificant period of time given the contingencies of the instant case.

11. In conclusion, the Debtor has responded to the operational and administrative demands for this case. The Debtor should be afforded a full and fair opportunity to negotiate, propose and seek acceptance of a plan. The Debtor believes that an extension is warranted and appropriate under the circumstances. The Debtor submits that an extension is realistic and necessary, will not prejudice the legitimate interest of creditors and other parties in interest and will afford a meaningful opportunity for the Debtor to pursue a confirmable plan.

WHEREFORE, the Debtor respectfully requests that the Court enter an Order: i) extending the Exclusive Filing Period to through and including March 5, 2018, without prejudice to seeking further extensions in the event circumstances require such relief; ii) extending the Exclusive Solicitation Period to through and including May 4, 2018, without prejudice to seeking further extensions in the event circumstances require such relief; iii) extending the Procedures Order Deadline to through and including March 5, 2018, and iv) granting the Debtor any other and further relief the Court deems equitable and just.

Respectfully submitted,

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By: /s/ Bernice C. Lee
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ATTORNEY CERTIFICATION

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Notice of Electronic Filing by CM/ECF to all parties registered to receive such service in this case on this the 18th day of January, 2018.

/s/ Bernice C. Lee
Bernice C. Lee