UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
AT NEW ALBANY

In Re: Davis Holding Co., LLC, Chapter 11

Debtor. Case No.: 16-91361-BHL-11

OBJECTION FILED BY CITY OF LAWRENCEBURG TO DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN [DOC. # 197]

Now comes the City of Lawrenceburg, Indiana (the "City"), by and through counsel, and files the following Objection to the Debtor's Disclosure Statement for its Second Amended Plan (referred to herein as "Second Amended Disclosure Statement" and cited herein from time to time as "Second Amended D.S.").

I. INTRODUCTION

As was the case with the Debtor's prior two disclosure statements, the Second Amended Disclosure Statement is deficient. It does not provide sufficient information in many areas, most of which are the same areas that were deficient in the first two disclosure statements. The City also believes that the Second Amended Plan is not confirmable on its face, and has cited case authority in past disclosure statement objections holding that courts should not approve a disclosure statement if the plan in unconfirmable. (See, e.g., Objection Filed by City of Lawrenceburg to Disclosure Statement [Doc. # 118] at p. 2.) This Objection will explain several reasons why the Second Amended Plan is unconfirmable.

The City understands that the Court is disinclined to dismiss or convert the case during the disclosure statement process. The Court did approve a two-tiered process under which the City filed a specifically-focused motion to dismiss or convert the case based on the Debtor's

violation of the absolute priority rule and improper classification of the claims.[1] The Court convened a hearing on the City's motion on June 21, 2017, and the motion remains pending. The City respectfully suggests that the hearing on the Second Amended Disclosure Statement scheduled for July 25, 2017 might be used at least in part to discuss how this case should proceed toward a resolution, should the Court not issue an order dismissing or converting the case prior to the July 25, 2017 hearing date.

II. LEGAL DISCUSSION

A. The Debtor's Second Amended Plan is not fair and equitable on its face.

As with the Debtor's prior two plans, the Second Amended Plan impermissibly seeks to cram down the Plan on the City and other classes of creditors as well. As was the case regarding the Debtor's prior two plans, the Second Amended Plan does not meet the conditions for cramdown. First, all of the requirements of Section 1129(a) must be proved, except for the requirement under Section 1129(a)(8) that each impaired class accept the plan. Second, the plan must not discriminate unfairly, and must be fair and equitable as to each impaired class of claims that has not accepted the plan. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999).

Section 1129(b)(2)(A)(i)(II) requires that the amount of the plan payments must be at least equal to the amount of the secured claim, discounted to present value. Since the City has elected under Section 1111(b) as to the 2012 Note, the plan payments must equal the value of the 2012 Note collateral discounted to present value, as well as the entire amount of the City's 2012

[1] The City hereby incorporates by reference its Objection to the Debtor's First Disclosure Statement [Doc. # 150]; its Objection to the Amended Disclosure Statement [Doc. # 183], its Motion to Dismiss, or in the Alternative, to Convert the Case [Doc. # 188]; its Brief Regarding the Debtor's Violation of the Absolute Priority Rule and Improper Classification of the City's Claims [Doc. # 191], and its Reply Brief [Doc. # 202]. The City also reserves the right to object to the confirmation of the Debtor's Second Amended Plan or any future plans.

Note claim. As to the City's 2007 Note secured claim, the plan payments must equal the value of the 2007 Note collateral discounted to present value. As to the City's unsecured claim relating to the 2007 Note, the City must receive property or payment equal to the allowed amount of such claim. 11 U.S.C. § 1129(b)(2)(B).

Plans containing balloon payments with negative amortizations or below market interest rates over long amortization periods are regarded with skepticism as to whether they are fair and equitable. *See, e.g., Pelham Street Assoc.,* 134 B.R. 700, 701 (Bankr. D.R.I. 1991) ("Amortizing the bank debt at a below-market interest payment rate over a twenty-five year period, with the promise of a balloon payment at the end of five years, does not even begin to meet the "fair and equitable" treatment test pursuant to § 1129(b). . .The Court has considerable concern over the size and feasibility of the contemplated balloon. This Plan is pure pie in the sky, and no secured creditor should be required to depend on such illusory pie.").

The balloon plan proposed in the Second Amended Plan appears to not be fair and equitable, and the Second Amended Disclosure Statement contains no information to suggest otherwise. The Debtor's two prior plans and this one all are negative amortization plans with long amortization periods. The Debtor's initial plan proposed to pay the City's 2012 Note claim at an interest rate of 4% over a 30 year period (*see* Doc. # 117 at p. 13). The Debtor's Amended Plan proposed to pay the 2012 Note claim at an interest rate of zero percent (0%), amortized over 30 years, with a 15 year balloon payout. (*See* Debtor's Amended Plan [Doc. # 171] at p. 12.) The Debtor's original plan proposed to pay the City's 2007 Note claim at an interest rate of zero percent (0%) over 30 years. The Amended Plan proposed to pay the 2007 claim (as a fully secured claim) at an interest rate of 2.00%, also with a 15 year balloon payout. (See Doc. # 117 at p. 13.)

Now, the Debtor's Second Amended Plan [Doc. # 196] proposes to split the City's claims into three separate classes. As set forth in Class 1-B, the Second Amended Plan proposes to pay the City's 2012 Note claim at an interest rate of zero percent (0.00%), amortized over 30 years, with a 10 year balloon payout. (See Doc. # 196, at p. 14.) As set forth in Class 1-A(i), the Second Amended Plan proposes to pay the City's 2007 Note secured claim in full at an interest rate of 2.00%, amortized over 30 years, also with a 10 year balloon payment. As set forth in Class 1-A(ii), rather than properly classify the City's unsecured claim with the other lender's similar unsecured claims in Class 4, the Second Amended Plan proposes to pay the City's separately classified unsecured claim in full at an interest rate of 2.00%, amortized over 30 years, also with a 10 year balloon payout. (See Doc. # 196, at p. 13.)

Do the proposed interest rates for the City's Notes have any economic basis? As was the case with the other two disclosure statements, there does not appear to be. For example, there is no justification in the Second Amended Disclosure Statement for the proposed below market interest rates. The Debtor should be required to disclose how its proposed treatment of the City's 2012 Note claim and 2007 Note claims in the Second Amended Plan is fair and equitable under Section 1129(b)(2).

Further, as set forth in the City's absolute priority briefs [Doc. ## 191 and 202], the Second Amended Plan is not confirmable on its face because it violates the absolute priority rule by proposing that the Debtor's sole member retain his interest in the reorganized Debtor, while superior priority classes, the Class 4 unsecured claims, are proposed to be paid less than in full.[2]

[2] In reference to the discussion at the telephonic hearing on the City's Motion to Dismiss, it is notable that the Debtor recognizes that the City's 2012 Note Claim is impaired. (See Debtor's Second Amended Plan [Doc. # 196], at p. 14; Debtor's Second Amended Disclosure Statement [Doc. # 197], at p. 13.)

B. The Debtor's Second Amended Plan is not feasible.

Similar to the Debtor's two prior disclosure statements, the Second Amended Disclosure Statement provides very little information from which to determine whether the Second Amended Plan is feasible. The Second Amended Plan proposes paying the City's claims over 10 years, with a proposed balloon payment at the end, but the Second Amended Disclosure Statement provides no information suggesting that the Debtor could make the proposed payments over a 10 year period. Similar to the prior two disclosure statements, all the Debtor provides in the Second Amended Disclosure Statement is an attached exhibit with a snapshot view of income and expenses presumably current as of the date the Amended Disclosure Statement was filed. As with the prior two disclosure statements, there is nothing in the Second Amended Disclosure Statement that reliably projects, or even projects at all, future cash flow and expenses sufficient to fund and maintain both its future operations and obligations for the 10-year pre-balloon payment period under the Debtor's Second Amended Plan.

The lack of disclosure is particularly problematic when the City is being expected to take on the additional risk of the Debtor's non-performance by virtue of its claims being negatively amortized (zero percent interest on a million dollar note, 2% interest on the other note claims) over 10 years, at which point the Debtor says it will pay the City in full on its claims. This is an unfair and inordinate risk that the City is being asked to bear, particularly when (1) the properties are severely under water; (2) it cannot be assumed that the Debtor's income will rise and that its expenses will remain constant, and (3) taking into account the Debtor's historically thin margins. (*See* City's Objection to the Debtor's first Disclosure Statement [Doc. # 150)], cases cited at p. 6-8; City's Objection to the Debtor's Amended Disclosure Statement [Doc. # 183], at p. 3-4.)

As with the Debtor's prior two plans, the Second Amended Plan provides no information as to how the Debtor will be able to pay the City's claims in full when the balloon payment becomes due after 10 years. The City is justifiably skeptical about the feasibility and legitimacy of any plan proposed by the Debtor, given the moving target provided by the Debtor's payment proposals. More disclosure should be required as to the feasibility of the current plan, given the numerous and varied proposals floated by the Debtor, all without any long term projections.

The Debtor's Second Amended Disclosure Statement contains no information indicating that the Debtor will be able to make the balloon payments to the City, even assuming the Debtor makes all of its plan payments. The Debtor has contributed no money, has not offered to contribute any money, and has not produced an investor or a buyer. The Debtor's Second Amended Plan is based on speculative hope and is not feasible.

C. The Debtor's Second Amended Plan does not comply with the good faith requirement under 11 U.S.C. § 1129(a)(3), and more disclosure is needed to explain how and why the Debtor has classified claims the way it has in the Amended Plan.

Section 1129(a)(3) requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." The Debtor has not filed its plans in good faith, including the current Second Amended Plan. The Debtor has now filed three plans that violate the absolute priority rule and have impermissibly classified the City's claims. The Debtor demonstrated a lack of good faith by proposing an amended plan that treated the City's 2007 Note claim as fully secured, when the Debtor knew that the City had not elected as to that claim. The Debtor's Second Amended Plan impermissibly classifies the City's 2007 Note unsecured claim as a separate claim, in a gerrymandering ploy without any business justification. (See Debtor's Second Amended Plan [Doc. # 196] at p. 14.)

Further, it is questionable whether the Debtor's Second Amended Plan, like the other two prior plans, can obtain a consenting class as required by 11 U.S.C. § 1129(a)(10) without gerrymandering or artificially impairing creditors. The Seventh Circuit recognizes that an artificial impairment analysis requires an inquiry into the debtor's motives, and that courts must determine whether the proposed impairment of a particular class is supported by legitimate reasons. *Matter of 203 N. LaSalle St. Partnership,* 126 F.3d 955, 968 (7th Cir. 1997) , *rev'd on other grounds, Bank of America Nat. Trust and Savings Ass'n v. 203 North LaSalle St. Partnership,* 119 S. Ct. 1411 (1999).

As raised in the City's prior objections, the Debtor's separate classification of Adam Jent's Class 3 Judgment Lien claim is dubious, since his claim appears to be an unsecured claim that should be not be separately classified. (See Second Amended D.S., Doc. #197, at p. 14). Further, the Class 2 secured claim allegedly belonging to Anthony Reed in the amount of $8,400 on account of a truck loan, is a *de minimis* claim that might have been impaired solely to obtain a consenting class.

D. The Debtor's Second Amended Plan cannot be confirmed because the Debtor still seeks impermissible third-party releases for the Debtor's sole member, Gregory Davis and perhaps other non-debtors, and the Debtor's attempted fix does not redress the essential lack of justification for the third-party releases.

The Debtor's proposed third-party releases and injunctions for non-debtor individuals, presumably mainly Mr. Davis, are not properly disclosed in the Disclosure Statement and are simply unacceptable. In fact, the Second Amended Disclosure Statement, like the other two disclosure statements, fails to disclose the third-party releases and injunctions. The lack of disclosure and the inclusion of these releases and injunctions in the Second Amended Plan are particularly problematic where many courts do not even allow third-party releases and

injunctions under any circumstances, and those that do, allow them rarely and only when the non-debtors make significant and essential financial contributions toward the reorganization. *See, e.g., In re Ingersoll,* 562 F.3d 856, 865 (7th Cir. 2009) (finding that "nondebtor release should only be approved in 'rare cases' . . . because it is a 'device that lends itself to abuse.'"); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002).

Further, the City raised several issues as to the third-party releases and injunctions sought by the Debtor in the Amended Plan, and those have not been rectified or addressed by the Debtor in its Second Amended Plan. (See City's Objection to Amended Plan [Doc. # 183], at p. 7-10.) The Amended Disclosure Statement and Amended Plan are fatally defective based on the proposed third-party, non-debtor releases and injunctions in and of themselves, irrespective of other defects in the Second Amended Plan.

E. The Amended Disclosure Statement does not accurately project the Administrative Expenses Claims. (Second Amended D.S., Doc. # 197, p. 9-10.)

Even assuming the other administrative expense claims are projected reliably, the Second Amended Disclosure Statement still omits the administrative claim of the City in the event that the Debtor fails to fully pay the $7,000 cash collateral arrearage before the conclusion of the case. (*See* March 24, 2017 Order regarding cash collateral [Doc. # 165.] This is particularly concerning since this case may very well be administratively insolvent.

F. Executory Contracts/Leases are not adequately disclosed. (Second Amended D.S., Doc. # 197, p. 15.)

The Second Amended Disclosure Statement states that the Debtor is the lessor on four written unexpired leases, but does not disclose the terms of the leases, the time remaining on the leases, the value of the leases and the amounts generated therefrom, and whether the lessees are

current on the leases. The Amended Disclosure Statement also does not disclose whether there are any oral leases, and if so, any information about them.

III. CONCLUSION

Wherefore, for the foregoing reasons and good cause shown, the City of Lawrenceburg respectfully restates its request that the Court enter an order dismissing or converting the case. In the event the Court does not dismiss or convert the case, the City recommends that a discussion take place at the hearing on the Second Amended Disclosure Statement on how to resolve the case most expeditiously. The City also requests any additional or alternative relief favoring the City that this Court deems appropriate.

Respectfully submitted,

/s/ Reuel D. Ash
Reuel D. Ash (*admitted pro hac vice*)
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202
Telephone: (513) 698-5118
Fax: (513) 698-5119
Email: rash@ulmer.com
Attorney for City of Lawrenceburg, Indiana

CERTIFICATE OF SERVICE

I, Reuel D. Ash, hereby certify that on the 19th day of July, 2017, a true and accurate copy of the foregoing was served electronically through the Court's Electronic Case Filing System, upon the following:

David M. Cantor, Esq.
cantor@derbycitylaw.com;
swann@derbycitylaw.com;
SeillerWatermanBankruptcymyecf@gmail.com

William P. Harbison, Esq.
harbison@derbycitylaw.com;
swann@derbycitylaw.com;
SeillerWatermanBankruptcymyecf@gmail.com

Keith J. Larson, Esq.
larson@derbycitylaw.com;
swann@derbycitylaw.com;
SeillerWatermanBankruptcymyecf@gmail.com

Ronald J. Moore, Esq. on behalf of U.S. Trustee
ronald.moore@usdoj.gov

U.S. Trustee
ustpregion10.in.ecf@usdoj.gov

Ashley Sanders Cox, Esq.
asanders@andrewassoc.com;
cjohnson@andrewassoc.com

Jeremy R. Mason, Esq.
bkcy@mason-law.com; mssbkcy@fuse.net

Patricia L. Johnson
bankruptcies@gernerlaw.com

I also certify that a true and accurate copy of the foregoing was mailed this 19th day of July, 2017, via U.S. First Class Mail, postage prepaid, to the following:

Davis Holding Co., LLC
7 East High St., Apt. 301
Lawrenceburg, IN 47025

/s/ Reuel D. Ash
Reuel D. Ash (*admitted pro hac vice*)
Attorney for City of Lawrenceburg, Indiana