UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re

ADM Vending, Inc.
Debtor

Chapter 11
Case No. 16-10477-BAH

Hrg: 1/18/17 @ 2:00 p.m.

UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR'S DISCLOSURE STATEMENT DATED NOVEMBER 29, 2016

To the Honorable Bruce A. Harwood, United States Bankruptcy Judge:

Pursuant to 28 U.S.C. § 586(a)(3)(B), 11 U.S.C. § 1125, and Fed. R. Bankr. P. 3017, the United States Trustee submits this objection to the Debtor's Disclosure Statement Dated November 29, 2016 ("**Disclosure Statement**") filed by ADM Vending, Inc. ("**Debtor**") in support of the Debtor's Plan of Reorganization Dated November 29, ("**Plan**").

General Status of the Case

The Debtor acknowledges that its coffee business has all but wound down. On November 10, 2016, the Court approved a carve-out agreement between the Debtor and its secured lender, NBT Bank, which on information and belief has a lien on all tangible assets of the estate. Under the carve-out agreement, 12.5% of the gross proceeds of the sale of NBT's collateral shall be paid to the estate for distribution to creditors. After February 1, 2017, however, NBT has relief from the automatic stay to liquidate its remaining tangible collateral. The Debtor anticipates that the NBT carve-out will result in the recovery of only $3,125. Cash on hand is reportedly $7,084. The only other assets available for distribution are causes of action, valued by the Debtor at no more than $50,000. *See* Debtor's Hypothetical Liquidation Summary, annexed as Exhibit C to the Disclosure Statement. The Debtor admits

that it is unlikely that administrative creditors will be paid in full unless the Debtor makes a significant recovery on account of "Retained Causes of Action." Similarly, priority Tax claims also are not projected to be paid in full unless there is a significant recovery on the retained causes of action. General unsecured creditors are not expected to receive a dividend. Disclosure Statement, page 11.

Against this backdrop are these specific objections to the Disclosure Statement:

1. **Ongoing Operations?** It is not at all clear whether there are any ongoing operations. There are few tangible assets to liquidate. After February 1, 2017, NBT has relief from the automatic stay to liquidate them. The Debtor's Plan appears to be a liquidating Plan but it is identified as a Plan of Reorganization. Mr. Mendenhall states he will have a salary but the amount of the salary is not defined and there are minimal funds to pay any salary. The Plan says the Debtor will not have the authority or power to act or engage in any transaction "other than to wind up its affairs and dissolve itself in accordance with applicable state and federal law." Plan, page 11. Elsewhere, the Disclosure Statement defines the Plan term as five years. Disclosure Statement, p. 26; s*ee also* Plan Glossary, ¶ 43.

2. **Delinquent Operating Reports.** The Debtor's last report was filed for the month ending October 31, 2016. That report reflected just $3,693 on hand, with a notation that there may be taxes owed to the State in the amount of $2,904 for 2013 and $2,002 for 2014.

3. **Projections.** The Debtor's Disclosure Statement and Plan refer to projections "of a very complicated and uncertain business." Disclosure Statement, p. 26. The United States Trustee is not aware whether the Debtor is operating, or whether the coffee business

sold in vending machines is "very complicated," but the United States Trustee found no projections attached to the Disclosure Statement or Plan.[1]

4. **Priority Tax Claims.** The Debtor's October, 2016 operating report points out that there may be nearly $5,000 owed to the State for priority taxes, but in the Disclosure Statement the Debtor refers to unpaid taxes of $300 and $906.36. Disclosure Statement, page 11. The Debtor states that even if there are priority tax claims owed, "it is extremely unlikely that Allowed Claims in this Class will be paid in full unless the Debtor makes a significant recovery on account of Retained Causes of Action." *Id.* The Debtor does not make clear that unless the taxing authorities were to agree to payment of less than 100%, the Plan would be unconfirmable as a matter of law. 11 U.S.C. § 1129(a)(9)(C).

5. **Dividend to General Unsecured Creditors.** The Debtor's executive summary table projects a 59% dividend to chapter 11 administrative creditors, 0% to priority tax claims and 0% to general unsecured creditors, yet the Debtor states "[i]f the Plan is confirmed, the Debtor expects that *all* creditors in *all* Classes will receive a dividend on account of their allowed claims." Disclosure Statement, pages 3, 5 (emphasis supplied).

6. **Released Causes of Action Against Adam Mendenhall and Adams Coffee.** Adam Mendenhall is Daniel Mendenhall's son who operate(s) or operate(d) another coffee sales company within the Debtor's premises, without paying rent. Adam Mendenhall also was on the Debtor's payroll. Without providing any details, the Debtor's Plan says it shall be deemed a motion for an order settling all causes of action the Debtor may have against Adam Mendenhall or Adam's Coffee. The Plan further provides that if the Court withholds approval of the release for any reason,

[1] The Plan states the Financial Projections are found at Exhibit B. *See* Glossary, ¶24 at page 3.

> the entry of the Confirmation Order shall constitute a finding that the prosecution of the Causes of Action would be burdensome to the estate and of inconsequential value and the claims shall be abandoned without further notices or pleadings.

Plan, page 13.

The United States Trustee calls upon the Debtor to provide the legal or factual basis to provide a release to Adam Mendenhall or Adams Coffee, against whom the estate has potential claims. While the First Circuit has not squarely addressed the issue of whether third-party, or non-debtor, injunctions and releases are permissible as a matter of law, a number of courts, including the Fifth, Ninth and Tenth Circuits, have held that § 524(e) prohibits nonconsensual, nondebtor releases.[2] Other courts have upheld such provisions in chapter 11 plans or otherwise noted that they may be permissible in unique circumstances. *See In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009); *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d Cir. 2005). First and foremost, a clear showing of necessity is required. *See In re Ingersoll*, 562 F.3d at 865 ("[I]t is important to note in all this what we are *not* saying. We are not saying that a bankruptcy plan purporting to release a [non-debtor] claim … is always - or even normally - valid. In the unique circumstances of this case, however, we believe it is"). These cases find authority to approve nonconsensual nondebtor releases in § 105(a).

Notably, the First Circuit has cautioned that using section 105 of the Code to enjoin a non-debtor third party involves an extraordinary exercise of discretion. *In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st. Circ. 1991). The Second Circuit has held that non-debtor third party releases are proper only in "rare cases." See *In re Metromedia Fiber Network, Inc.*,

[2] *In re Zale Corp*. 62 F. 3d. 746, 760-61 (5th Cir. 1995), *In re Lowenschuss*, 67 F. 3d. 1394, 1401-2 (9th Cir. 1995); *cert denied* 517 U.S. 1243 (1996); *In re Western Real Estate Fund, Inc*. 922 F. 2d. 592, 601-2 (10th Cir. 1990).

supra, 416 F.3d at 141. The Second Circuit articulated at least two reasons for its reluctance to approve these releases:

> First, the only explicit authorization in the Code for non-debtor releases is 11 U.S.C. § 524(g), which authorizes releases in asbestos cases when specified conditions are satisfied, including the creation of a trust to satisfy future claims, [and] …
>
> Second, a non-debtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect it may operate as a bankruptcy discharge without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.

Id. at 142.

The Debtor has failed to justify the propriety of a third-party non-debtor release and how these non-debtor releases are appropriate and comply with applicable law. *See, e.g.,National Heritage Foundation, Inc. v. Highbourne Foundation,* 760 F.3d 344 (4th Cir. 2014)(a chapter 11 plan's non-consensual, third party release of non-debtors was invalid because the release lacked adequate factual support) *cert denied* 135 S.Ct. 961 (2015); *In re Washington Mutual, Inc. et al.*, 442 B.R. 314, 349-350 (Bankr. D. Del. 2011) (Bankruptcy Court held, *inter alia*, that under applicable law, there was no basis for the debtors to grant releases to the debtors' directors and officers or any professionals, current or former, because no evidence was presented with respect to, among other things, a "substantial contribution" having been made to the case by the parties seeking such releases; further, exculpation clause could only protect fiduciaries who served in the case and only for negligent acts or omissions).

7. **"New Equity Contribution."** The Debtor states that its president, Mr. Daniel Mendenhall, will purchase the New Equity Interests by making a New Equity Contribution,

which includes a) consenting to a subordination of his claims, b) executing a Limited Plan Guaranty, and c) entering into an employment agreement and a restrictive covenant.

These provisions are at best confusing. Mr. Mendenhall's offer to subordinate his claim has little value given that as President of the Debtor he has already made clear that a dividend to general unsecured creditors will not occur. There is no further information provided that would tell creditors what the "Limited Plan Guaranty" means. The Debtor should at least be required to tell creditors a) why the proffered subordination agreement has value in these circumstances, b) whether there really is an employment agreement and what the terms are, and c) whether there is a Limited Plan Guaranty being offered to creditors.

8. **Debtor's Lease**. The Debtor provides no information about the status of its lease and whether it has value for the estate.

9. **Delinquent Quarterly Fees**. The Debtor is currently delinquent with the payment of quarterly fees and owes the United States Trustee the minimum amount of $975. The Debtor projects chapter 11 administrative creditors would receive a 59% dividend. To the extent the Debtor proposes a Plan that would provide for less than full payment of outstanding quarterly fees, the United States Trustee objects and notes such a Plan would be unconfirmable as a matter of law. 11 U.S.C. § 1129(a)(12).

WHEREFORE, the United States Trustee submits this objection to the Debtor's Disclosure Statement Dated November 29, 2016.

Respectfully submitted,

WILLIAM K. HARRINGTON,
UNITED STATES TRUSTEE

By: /s/ Geraldine Karonis
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Dated: January 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing upon all parties below via CM/ECF unless otherwise noted:

William Gannon, Esq.
Mark Kanakis, Esq.
William Amann, Esq.
Peter Tamposi, Esq.
Jack White, Esq.

Dated: January 11, 2017

/s/ Geraldine Karonis
Geraldine Karonis