

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Odyssey Properties III, LLC,

Case No. 8:10-bk-18713-CPM

Debtor.

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UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION

Donald F. Walton, the United States Trustee, by and through his undersigned counsel, hereby objects to confirmation of the Debtor's Plan of Reorganization pursuant to 11 U.S.C. § 1129(a) for the following reasons:

1. Paragraphs 11.2 and 11.6 of the plan of reorganization improperly provide for (a) an exculpation from liability for the Debtor, Mr. Maxwell, Mr. Maloney, their agents, professionals, and various other individuals and (b) a release from liability for many of the same individuals from “any and all claims . . . which is in any way relating to the Debtor, any assets or Property of the Debtor, the business or operations of the Debtor, the Plan, or any of the transactions of the Debtor”

2. The exculpation provision is overly broad. The provision references 11 U.S.C. § 1125(e), but then goes beyond the scope of the protection offered therein to persons who among other things solicit plans. The Debtor's proposed exculpation even extends to professional negligence.

3. Section 524(e) generally prohibits the discharge of non-debtor third parties through the confirmation process. See In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir.

1995). Notwithstanding this general prohibition, some courts have found narrow exceptions following specific criteria. See, for example, In re Master Mortgage Inv., Inc. 168 B.R. 930, 934 (Bankr. W.D. Mo. 1994) (among other things, these courts consider whether claims are paid substantially in full, the non-debtor contributes property, and the release is essential to the reorganization); In re Transit Group, Inc., 286 B.R. 811 (Bankr. M.D. Fla. 2002) (court looked to “(1) Whether the debtor and the third party share an identity of interest, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) Whether the non-debtor has contributed substantial assets to the reorganization; (3) Whether the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) Whether the impacted class, or classes, has overwhelmingly voted to accept the plan; (5) Whether the plan provides a mechanism to pay for all, or substantially all, of the class, or classes, affected by the injunction; (6) Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full, and; (7) Whether the bankruptcy court made a record of specific factual findings that support its conclusions.”

4. The plan provides for the payment in full of the unsecured claimants on the effective date of the plan. To the secured noteholders, who hold claims totaling \$29,000,000 per schedule D, the plan provides \$500,000 in cash, apparently paid by CHC VII, Ltd. on the effective date of the plan, and payments from a fund, the source of which is generally excess cash flow, proceeds from sales, and recoveries from litigation. If any amount remains to be paid under the Guaranty, it is to be paid thirty months after the effective date. Separately,

it appears that Mr. Maxwell, or someone related to him, will fund a \$500,000.00 line of credit, which is to be repaid from net proceeds of sales, prior to paying noteholders. It is unclear that there is an identity of interest between the Debtor and the other released parties, how meaningful the contribution is, whether noteholders will be paid in full, and whether the plan provides an opportunity for those claimants who choose not to settle to recover in full. Indeed, as Judge Jennemann held in Transit, “Rarely, if ever, can one envision a case where a related affiliate of the debtor is entitle to a non-debtor release.” 286 B.R. at 820.

WHEREFORE, the United States Trustee respectfully requests that the Court sustain his objection and deny confirmation, and grant such other and further relief as the Court deems just.

Respectfully submitted,
Donald F. Walton
United States Trustee--Region 21

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing objection to confirmation has been sent by electronic or regular U.S. Mail to the parties listed below on or before May 12, 2011.

/s/ Benjamin E. Lambers
Attorney

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