IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA (CHARLESTON)

IN RE: **Case No. 2:15-bk-20085**

Garrett Properties, LLC,

Debtor-in-possession. **Chapter 11**

The Huntington National Bank,

v.

Garrett Properties, LLC.

OBJECTION OF THE HUNTINGTON NATIONAL BANK TO
DEBTORS' PLAN AND DISCLOSURE STATEMENT DATED OCTOBER 25, 2017

Now comes The Huntington National Bank ("Huntington"), by and through counsel, and submits this objection (the "Objection") to Garrett Properties, LLC's Disclosure Statement Dated October 25, 2017 (the "Disclosure Statement") [Doc. No. 173] and Debtors' Chapter 11 Plan of Reorganization Dated October 24, 2017 (the "Plan") [Doc. No. 180]. In support of this Objection, Huntington respectfully states as follows:

Nearly three years after this case was filed the Debtor-in-possession has not been able to confirm a Plan. In The Disclosure Statement, the Debtor states that although it has made adequate protection payments, Huntington has reversed position as to its desire as to how the Debtor proceeds with respect to the Collateral and suggests generally that the Debtor's failure to reorganize to date is largely due to actions of Huntington. Disclosure Statement, p. 4-5. Huntington disagrees with the Debtor's characterization of the history of the negotiations and interactions between the parties. Nevertheless, Huntington's only goal is for the Debtor to take some action to either confirm a Plan or otherwise address the loans at issue while interest and other expenses continue to mount on these matured loans. Unfortunately, the disclosure

statement and proposed Plan are deficient on their face and otherwise violate Huntington's rights under applicable law, and therefore should not be approved or considered for confirmation.

1. The Terms of the Debtor's Proposed Plan and Disclosure Statement Cannot Be Accomplished Based on the Debtor's Income and Therefore the Plan and Disclosure Statement Should not be Considered.

Even if Huntington had no objection to the proposed Plan and Disclosure Statement, the Court should decline approval of the Disclosure Statement because the Debtor cannot perform the proposed obligations. Even accepting the Debtor's valuations, proposed interest rates and amortization term (which Huntington disputes), the Plan and Disclosure Statement are inadequate on their face.

Specifically, Page 10 of the Disclosure Statement proposes monthly payments on Huntington's two loans in an aggregate amount of $3,492.01. Additionally, Page 11 of the Debtor's Disclosure Statement proposes monthly payments to Michael Carey and the Top of the World Condo Association in the aggregate amount of $564.00. Combined, the Plan would pay a total of $4,056.01 per month to the three secured creditors.

The Debtor's Operating Reports reflect the following history of income for the Debtor:

Docket No.	Month	Income	Sufficient to Make Payment
Doc. 203	December, 2017	$3,475.00	No
Doc. 196	November, 2017	$8,800,00[1]	-
Doc. 195	October, 2017	$3,200.00	No
Doc. 170	September, 2017	$3,665.00	No
Doc. 169	August, 2017	$2,655.00	No
Doc. 163	July, 2017	$2,625.00	No
Doc. 160	June, 2017	$4,875.00	Yes
Doc. 154, 156	May, 2017	$3,880.00	No
Doc. 153	April, 2017	$4,035.00	No
Doc. 151	March, 2017	$3,900.00	No
Doc. 150	February, 2017	$3,330.00	No
Doc. 149	January, 2017	$3,585.00	No

[1] While the income for November, 2017 was more than double the amount usual for the Debtor, the expenses were also more than double the norm.

Excluding the month of November, 2017, which appears to be an outlier due to tax payments, the Debtor's income exceeded the amount which it proposes to pay to secured creditors for one out of eleven months.

Given that the Debtor's own Plan and Disclosure Statement reflect that the Debtor has insufficient income to make payments for 10 out of 11 months, approval of the disclosure statement under these facts would set up the Debtor for immediate default. Accordingly, no objective analysis of the Plan and Disclosure Statement can conclude that the Disclosure Statement and Plan can be confirmed.

It is well-established that when a chapter 11 plan is so deficient that it cannot be confirmed, the court should refuse to approve a disclosure statement based on that plan. *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) ("The court believes that disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible."); *accord In re Pecht*, 57 B.R. 137, 193 (Bankr. E.D. Va. 1986) (declining to subject estate to expense of soliciting votes for unconfirmable plan). *In re Market Square Inn, Inc.*, 163 B.R. 64, 68 (Bankr. W.D. Pa. 1994); *In re 266 Washington Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992), *cited with approval by John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 (3d. Cir. 1993); *In re Filex, Inc.*, 116 B.R. 37, 40 (Bankr. S.D.N.Y. 1990). It is imprudent to undertake the burden and expense of distributing, and soliciting votes on, a plan that legally cannot be confirmed. *In re E. Me. Elec. Coop., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991). This "exercise in futility" would only lead to further delays in the debtor's attempts to reorganize. *In re Atlanta W. VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988).

Moreover, if there are additional circumstances which suggest potential improvement in the Debtor's income potential, they are not apparent from the Disclosure Statement. Accordingly, the Disclosure Statement lacks the "adequate information" required by 11 U.S.C. 1125 to entitle a plan to consideration. Section 1125(b) of the Bankruptcy Code conditions a debtor's solicitation of votes on a proposed chapter 11 plan on the bankruptcy court's determination that the disclosure statement contains "adequate information." The Bankruptcy Code defines "adequate information" as

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of claims or interests in the relevant class to make an informed judgment about the plan….

11 U.S.C. § 1125(a)(1); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 99-100 (Bankr. D. Del. 1999) (disclosure statement must contain information that is reasonably practicable [to permit an] informed judgment by holders of claims or interests entitled to vote on the plan. Without information explaining how the Debtor's income situation will improve, the current Disclosure Statement is deficient as a matter of law and should not be approved.

In fact, the circumstances suggest that the Debtor's income potential will only decrease. The Debtor's Disclosure Statement makes clear that the Debtor's business is to lease properties for the business operation of Garrett Tire Corp. and various residential rental properties. Disclosure Statement p. 2-3. The Debtor's income entirely consists of rental payments for these properties. The most recent disclosure statement of the Debtor shows an income of $3,475.00 for the month of December, 2017. Disclosure Statement, Doc. 203. The vast majority of this income ($2,900.00) comes from Garrett Tire Corp.

Clearly, the viability of the Debtor in this case depends on the viability of Garrett Tire,

Corp. Recent developments place the viability of Garrett Tire Corp. in question. Specifically, a number of tax liens have been recently placed against Garrett Tire Corp. (For example, liens were placed by the State of West Virginia against Garrett Tire Corp. on November 28, 2017 in Book 285, Page 998, Book 286, Page 81, Book 286, Page 8). This is only a partial list. Several additional liens have been placed against Garrett Tire Corp. during the pendency of this case. The Disclosure Statement fails to explain how the Debtor will reorganize given its history of insufficient income and the questionable viability of its primary source of income. Therefore, the Disclosure Statement should not be approved and the Plan is not entitled to consideration.

2. The Proposed Treatment of Huntington's Claims Violate the Bankruptcy Code.

As to Huntington, the Plan and Disclosure Statement contemplate a reorganization of the two matured secured loans at a value less than the amount of the debt owed according to the market value of the collateral pursuant to 11 U.S.C. 506 and reducing the interest rate to 4% and reamortizing the loan balance over 20 years. The proposed treatment of Huntington's secured claim is objectionable for several reasons. First, the Debtor's valuation of the Collateral is disputed.[2] Additionally, the proposed interest rate and loan term are objectionable.

Despite the fact that Huntington's loans matured pre-petition, the Plan would amortize Huntington's claims over 20 years. Disclosure Statement, p. 10. In other words, the Plan proposes to reverse the calendar, act as if the promissory notes had not matured prior to the filing of this case, and extend the term another 20 years. In addition, the Plan proposes to cram down the contractual interest rates to 4%. *Id.* The proposed rate appears to be based upon *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

Huntington does not dispute the use of the *Till v. SCS Credit Corp.* formula approach in

[2] The Debtor has objected to Huntington's proofs of claim pursuant to 11 U.S.C. 506 and other grounds, and Huntington has responded (*See*, Docs. 171, 172, 187, 188). A hearing on the Objections to Claim is scheduled for March 28, 2018.

this case. However, the proposed rate is without factual support and does not properly reflect the risk presented by offering a 20 year loan to a Debtor with limited income and which will be under-collateralized. The Debtor's Disclosure Statement states only that "a risk factor of 500 basis points (0.5%)" was added to the prime rate. Disclosure Statement, p. 13. The Debtor has offered no explanation of what circumstances were used to establish this risk factor. For example, given the nature of the collateral, the slim profit margin of the Debtor and the proposed 20 year term, Huntington submits that .5% is unreasonably low. *See, e.g.* ***In re Pamplico Highway Dev.***, 468 B.R. 783, 793 (Bankr. D.S.C. 2012) (2.25% risk factor appropriate where the debtor made "significant improvements since the petition was filed" resulting in increase to yearly income of in excess of $84,000); *In re Deep River Warehouse, Inc.*, 2005 Bankr. LEXIS 1793 (Bankr. M.D.N.C. Sept. 22, 2005) (1.55% risk factor for 5 year plan).

Moreover, the Plan unfairly discriminates against Huntington. The Plan arbitrarily amortizes Huntington's loans at 20 years and 4%. This arbitrary payment proposal amounts to unfair discrimination and is not fair and equitable given that the Plan proposes to amortize the other secured debt over 5 years.

Furthermore, Huntington submits that a 20 year amortization schedule and a 4% interest rate violate 11 U.S.C. 1123. Especially relevant here, 11 U.S.C. 1123 provides that a "plan shall" "cure or waive any default." 11 U.S.C. 1123(a)(5)(G). Section 1123 also requires that a "plan shall" "contain only provisions that are consistent with the interests of creditors and equity security holders." 11 U.S.C. 1123(a)(7). Finally, any plan that proposes to cure a default must do so "in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. 1123(d).

"[A] 'cure' merely reinstates a debt to its pre-default position, or it returns the debtor and

creditor to their respective conditions before default." *In re Eskim, LLC,* 2008 Bankr. LEXIS 2224 (Bankr. N.D. W. Va. Aug. 28, 2008), *citing, Landmark Financial Services v. Hall,* 918 F.2d 1150 (4th Cir. 1990). Here, the Plan proposes to "cure" a default that occurred prepetition. Specifically, the loans matured prepetition, which are a default under the terms of the loans. *See*, Claims 1 and 2. Absent consent of the creditor, a matured loan cannot be "cured" under 11 U.S.C. 1123(a)(5)(G) without immediate payment in full because anything else would not restore the prepetition status quo. "For a loan that has matured naturally, any 'cure' would have to return the maturity date to the pre-default status, namely reinstating the obligation's original maturity date and making the obligation immediately due and payable." *In re Lighthouse Lodge, LLC*, 2010 Bankr. LEXIS 3663 (Bankr. N.D. Cal. Oct. 14, 2010), *citing, In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338, 1341 (9th Cir. 1988).

For the reasons stated, Huntington respectfully submits that the proposed Plan and Disclosure Statement violate several provisions of the Bankruptcy Code as to Huntington and the Disclosure Statement should not be approved and the Plan not considered for confirmation.

CONCLUSION

For the reasons stated herein, The Huntington National Bank respectfully requests that this Court (a) sustain this Objection; (b) deny approval of the Disclosure Statement, and (c) grant Huntington such other and further relief as is appropriate under the circumstances.

Huntington National Bank, N.A.
By Counsel,

/s/ Michael R. Proctor
Michael R. Proctor (WV Bar No. 9122)
Dinsmore & Shohl LLP
215 Don Knotts Blvd., Ste 310
Morgantown, WV 26501
Phone: (304) 296-1100
Fax: (304) 296-6116
Email: michael.proctor@dinsmore.com

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA (CHARLESTON)

IN RE: **Case No. 2:15-bk-20085**

Garrett Properties, LLC,

Debtor-in-possession. **Chapter 11**

The Huntington National Bank,

v.

Garrett Properties, LLC.

CERTIFICATE OF SERVICE

I, Michael R. Proctor, counsel for The Huntington National Bank, hereby certify that on the 9th day of February, 2018, I electronically filed the foregoing Objection of The Huntington National Bank to Debtors' Plan and Disclosure Statement Dated October 25, 2017 with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

James M. Pierson, Esq.
PO Box 2291
Charleston, WV 25328

United States Trustee
U.S. Trustee's Office
300 Virginia Street East
Room 2025
Charleston, WV 25301

/s/Michael R. Proctor