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10 IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

11
12 In Re:) Case. No. 12-12349-MKN
)
13 AMERICAN WEST DEVELOPMENT, INC.,)
) Chapter 11
14)
)
15) DATE: September 25, 2012
Debtor.) TIME: 10:00 AM
16)

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18 UNITED STATES' OBJECTION TO CONFIRMATION OF
DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION
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20
21 THE UNITED STATES OF AMERICA, on behalf of its agency, the
22 Internal Revenue Service (the Service), hereby objects to
23 confirmation of the DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION
24 (plan). This objection is supported by the following points and
25 authorities.
26

1 1. By an order on July 16, 2012 (dkt. #366), the court
2 approved certain disclosure statements and set a hearing for
3 September 25, 2012 at 10 AM to consider confirmation of the
4 debtor's plan. The same order required that objections to the
5 plan be filed and served on or before September 11, 2012. This
6 objection addresses to the plan presently on file with the
7 bankruptcy court (dkt. #263).

8 2. Confirmation of the plan is governed by 11 U.S.C. §
9 1129. The bankruptcy court has "an affirmative duty to ensure
10 that the [p]lan satisfie[s] all ... requirements for confirmation."
11 *Liberty Nat'l Enters. V. Ambanc La Mesa Ltd. P'ship (In re Ambanc*
12 *La Mesa Ltd. P'ship)*, 115 F.3d 650, 653 (9th Cir. 1997)(citations
13 omitted). "The burden of proposing a plan that satisfies the
14 requirements of the Code always falls on the party proposing it,
15 but it falls particularly heavily on the debtor-in-possession or
16 trustee since they stand in a fiduciary relationship to the
17 estate's creditors." *Everett v. Perez (In re Perez)*, 30 F.3d
18 1209, 1214 (9th Cir. 1994).

19 3. In a consensual plan confirmation, the plan proponent
20 must show that all sixteen requirements of section 1129(a) have
21 been satisfied. In a nonconsensual plan confirmation, the plan
22 proponent must satisfy "15 of the 16 section 1129(a) requirements
23 (omitting only the requirement that all classes consent or be
24 unimpaired)" plus the requirements of section 1129(b). *Collier*
25 *on Bankruptcy* P 1129.01 (Alan N. Resnick & Henry J. Sommer eds.,
26 16th ed.).

1 4. The plan fails to comply with the requirement of 11
2 U.S.C. § 1129(a)(1) in that it does not comply with other
3 provisions of the Bankruptcy Code. It violates other provisions
4 of the Bankruptcy Code in the following respects:

- 5 • The plan establishes an administrative claim bar date that
6 violates 11 U.S.C. § 503(b)(1)(D) concerning administrative
7 claims of governmental units. The plan sets a bar date for
8 administrative claims in general; and the plan contains no
9 exception for administrative claims asserted by governmental
10 units(plan at ¶ 2.2(a)(1)).¹ The plan defines the term
11 "Administrative Claim Bar Date" as "thirty (30) days after
12 the Effective Date" (Exhibit A, Glossary of Defined Terms at
13 ¶ 4). The plan further provides that failure to satisfy
14 that bar date "shall result in the Administrative Claim
15 being forever barred and discharged" (plan at ¶ 2.2(a)(1)).
16 Under 11 U.S.C. § 503(b)(1)(D), governmental units are not
17 required to file an administrative claim as a condition of
18 its being an allowed administrative expense. Therefore,
19 unless the plan is clarified to provide that the
20 administrative claim bar date provisions do not apply to
21 administrative expenses of governmental units, the plan
22 violates the provisions of section 503(b)(1)(D).

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24
25 ¹ The plan contains an exception to the bar date for "a liability incurred and
26 paid in the ordinary course of business by the Debtor" (plan at ¶ 2.2(a)(1)).
However, it is not clear whether that exception is intended to apply to
administrative expenses of governmental units.

1 • The plan establishes a discharge for the debtor that
2 violates 11 U.S.C. §§ 1141 and 524. The discharge
3 provisions of the plan begin with the phrase "IN CONJUNCTION
4 WITH BANKRUPTCY CODE SECTION 1141" and then continue with
5 three paragraphs, all in capital letters, describing the
6 scope of the debtor's discharge (plan at ¶ 12.1). Clearly,
7 these provisions are intended to expand the effect of
8 confirmation, as established by section 1141, and to expand
9 the effect of discharge, as established by section 524. If
10 not, what is the point of this part of the debtor's plan and
11 why does not the plan merely quote the governing statutory
12 provisions? Most noticeably:

- 13 o the plan description of the debtor's discharge omits
14 the exceptions to discharge under 11 U.S.C. §
15 1141(d)(6);
- 16 o the plan description of the debtor's discharge includes
17 a discharge of postpetition interest on all claims;
- 18 o the plan description of the debtor's discharge covers
19 all claims that arose prior to the Effective Date, not
20 just that arose prior to the date of confirmation; and,
- 21 o the plan description of the debtor's discharge includes
22 "SUCCESSORS" to the debtor within the scope of the
23 discharge.

24 The use of plan provisions to expand the effect of
25 confirmation violates section 1141 and section 524.

26 Moreover, the debtor cannot use the plan confirmation

1 process as a method to obtain an advance declaration of the
2 scope of its discharge with respect to taxes. 28 U.S.C. §
3 2201. See also, Fed. R. Bankr. Proc. 7001(6) and (9)
4 (declaratory judgments to determine dischargeability of
5 debts should be pursued as adversary proceedings). Nor can
6 the debtor use the plan confirmation process to obtain
7 relief for nondebtors, especially with respect to the
8 enforcement of federal tax laws. See *American Bicycle Ass'n*
9 *v. United States (In re American Bicycle Ass'n)*, 895 F.2d
10 1277 (9th Cir. Ariz. 1990) (The Anti-Injunction Act
11 precludes a bankruptcy court from enjoining the IRS from
12 collecting a 100% penalty against the responsible officer of
13 the debtor corporation); *In re John Renton Young*, 87 B.R.
14 635 (Bankr. D. Nev. 1988).

15 WHEREFORE, the United States requests that the court deny
16 confirmation of the DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION.

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18 DANIEL G. BOGDEN
19 United States Attorney

20 Date: September 6, 2012 By: /s/ Rollin G. Thorley
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following parties are listed as Filing Users who will receive notice of the foregoing document by electronic transmission of a Notice of Filing. If the following parties are not listed on a Notice of Electronic Filing, a separate certificate will be filed indicating the form of service on such parties:

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Dated: September 6, 2012

/s/ Rollin Thorley