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AUGUST B. LANDIS

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re)	Case No. BK-S-12-12349-MKN
)	
American West Development, Inc.)	Chapter 11
)	Date: September 25, 2012
)	Time: 10:00 a.m. (PT)
)	Place: Foley Courtroom 2 (Third Floor)
)	
<u>Debtor.</u>)	

THE ACTING UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION [DOCKET NO. 263]

To the Honorable Mike K. Nakagawa, Chief United States Bankruptcy Judge:

August B. Landis, Acting United States Trustee for Region 17 (the "Acting United States Trustee"), hereby objects (the "Objection") to the *Debtor's Chapter 11 Plan of Reorganization [Docket No. 263]* (the "Plan") filed by captioned debtor American West Development, Inc. (the "Debtor").

The Acting United States Trustee requests that the Court take judicial notice of the pleadings and documents filed in these jointly administered bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9017 and Federal Rule of Evidence 201. To the extent that this Objection contains factual assertions predicated upon statements made by Debtor, the Acting United States Trustee submits that such factual assertions are supported by admissible evidence

1 in the form of admissions of a party opponent under Federal Rule of Bankruptcy Procedure 9017
2 and Federal Rule of Evidence 801(d)(2).

3 The Objection is supported by the following memorandum of points and authorities and
4 any argument the Court may permit on the Objection.
5

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 1. On March 1, 2012, Debtor commenced the captioned case by filing a voluntary petition
8 for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as
9 amended, the "Bankruptcy Code"). [Docket No. 1].
10

11 2. Debtor filed the Plan on May 29, 2012. [Docket No. 263].

12 3. On July 16, 2012, the United States Bankruptcy Court for the District of Nevada (the
13 "Bankruptcy Court") entered an order approving the disclosure statement submitted by Debtor in
14 connection with the Plan, as well as related solicitation procedures (the "Disclosure Statement
15 Order"). [Docket No. 366].

16 4. The Acting United States Trustee hereby files the Objection in response to several
17 aspects of the Plan that are not consistent with the requirements of the Bankruptcy Code, the
18 Federal Rules of Bankruptcy Procedure and governing circuit law. As presently before the
19 Bankruptcy Court, the Acting United States Trustee respectfully submits that the Plan cannot be
20 confirmed in its present form.
21

22 **ARGUMENT**

23 *Plan severability and section 13.7 of the Plan*
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25 5. First, as a preface to the objections that follow, it is not clear that the Plan is, by its terms,
26 severable. [Docket No. 263; pg. 55 of 76; § 13.7]. If the Court finds the Plan is not severable as
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1 the last sentence of section 13.7 of the Plan suggests, then the Plan must rise or fall in its entirety.
2 If, on the other hand, the Bankruptcy Court finds that the Plan is severable, then the
3 objectionable provisions of the Plan identified immediately below may either be severed from
4 the Plan, leaving the remainder of the Plan intact; or, the objectionable provisions can be
5 modified to reach an acceptable accommodation, if possible, as envisioned by the first part of
6 section 13.7 of the Plan.
7

8 6. Given the expense and cost associated with prosecuting Debtor's bankruptcy case,
9 soliciting acceptance of the Plan and the yet-to-be-incurred costs and expenses associated with
10 the hearing on confirmation of Debtor's Plan, finding the Plan to be severable is certainly the
11 more cost-effective alternative; but, as Debtor drafted the Plan and acts here as plan proponent,
12 the Acting United States Trustee reserves the right to argue at the confirmation hearing that the
13 Plan should be construed against Debtor on all matters, including on the issue of severability.
14

15 *The Plan's treatment of fees payable under 28 U.S.C. § 1930(a)(6) indiscriminately as ordinary*
16 *expenses of administration is not consistent with governing circuit law and 11 U.S.C. §*
17 *1129(a)(12).*

18 7. Fees assessed pursuant to 28 U.S.C. § 1930(a)(6) are not synonymous with administrative
19 expenses allowed pursuant to 11 U.S.C. § 503(b). *See U.S. Trustee v. Endy (In re Endy)*, 104
20 F.3d 1154, 1157 (9th Cir. 1997); *Huisinga v. Carter (In re Juhl Enters.)*, 921 F.2d 800, 803 (8th
21 Cir. 1990). Therefore, such fees are not subject to an allowance procedure similar to that
22 contemplated by the Plan. [Docket No. 263; pg. 58 of 76; Definitions 3 & 4]. To the extent that
23 the Plan seeks to subject such fees to an allowance procedure, the Acting United States Trustee
24 objects.
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26 8. In addition, pursuant to 11 U.S.C. § 1129(a)(12), Debtor bears the burden at
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1 confirmation to demonstrate that any and all fees assessed pursuant to 28 U.S.C. § 1930(a)(6)
2 have either been paid or will be paid on the effective date of the Plan. To the extent that Debtor
3 cannot satisfy its assigned burden under 11 U.S.C. § 1129(a) at confirmation, the Acting United
4 States Trustee respectfully submits that confirmation of the Plan should be denied.
5

6 9. While other provisions of the Plan more closely track the requirements of the Bankruptcy
7 Code and section 1930(a)(6) of the Judicial Code, the Acting United States Trustee hereby
8 objects to those provisions of the Plan that can be read to subject fees determined to be payable
9 under 28 U.S.C. § 1930(a)(6) to allowance procedure like that contemplated in, among other
10 sections of the Bankruptcy Code, 11 U.S.C. § 503(b).
11

12 *The filing of the Plan Supplement following passage of the deadline to object to confirmation*
13 *of the Plan is (i) inconsistent with the terms of the Plan itself, (ii) presents significant due*
14 *process concerns and (iii) is inconsistent with the requirements of 11 U.S.C. § 1129(a)(2).*

15 10. By its terms, the Plan recognizes the significance of the Plan Supplement in the overall
16 implementation and operation of the Plan. First, the Plan includes the defined term “Plan
17 Supplement” within the definitions of “Key Transaction Documents” and “Operative
18 Documents.” [Docket No. 263; pgs. 69-70 of 76; Definition Nos. 81 & 95]. In section 10.1 of
19 the Plan, filing of the Plan Supplement by the Plan Supplement Filing Date (defined in the Plan
20 in the Glossary of Terms as September 11, 2012) as a condition to the occurrence of the
21 Effective Date of the Plan. Section 5.1 of the Plan contemplates that the Plan will be
22 implemented in a manner consistent with the “Operative Documents,” including the Plan
23 Supplement. [Docket No. 263; pg. 21 of 76; § 5.1]. Finally, section 1.3 of the Plan incorporates
24 the “Operative Documents,” including the Plan Supplement, into and as part of the Plan as if set
25 forth in full therein. [Docket No. 263; pg. 9 of 76; § 1.3].
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1 11. A review of the Bankruptcy Court's official docket in this case did not disclose the filing
2 of the Plan Supplement in accordance with section 10.1 of the Plan. This may be because the
3 Disclosure Statement Order contemplates that the Plan Supplement will be filed no later than
4 September 14, 2012. [Docket No. 366; pg. 10 of 33; ¶ 7].
5

6 12. Notwithstanding the entry of the Disclosure Statement Order, the Acting United States
7 Trustee respectfully submits that the absence of the Plan Supplement from the solicitation and
8 plan objections processes does not comport with the requirements of 11 U.S.C. § 1129(a)(2) and
9 related case law governing due process. *See, e.g., Mullane v. Central Hanover Bank & Trust*
10 *Co.*, 339 U.S. 306, 314 (1950) (stating, "An elementary and fundamental requirement of due
11 process in any proceeding which is to be accorded finality is notice reasonably calculated, under
12 all the circumstances, to apprise interested parties of the pendency of the action *and afford them*
13 *an opportunity to present their objections.*") (emphasis added).
14

15 13. Section 1129(a)(2) is concerned chiefly with the plan proponent's duty to comply with
16 11 U.S.C. § 1125. At the outset of its case, Debtor sought the appointment of a future claims
17 representative. [Docket No. 34]. In that motion, Debtor stated, "Likewise, in this
18 reorganization, Future Construction Defect Claims represent *significant liability which the Plan*
19 *must confront and address.*" [Docket No. 34; pg. 7 of 13; lines 9-10] (emphasis added).
20

21 14. Given the number of Plan provisions that hinge on the treatment of future claims, the
22 inclusion of the Construction Defect Trust documents, including the Construction Defect Trust
23 Declaration and TDP, in the definition of the Plan Supplement, and the overall importance of
24 those documents in terms of providing interested parties with adequate information to determine
25 whether to vote to accept the Plan or, if they so desired, file objections to the Plan's
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1 confirmation, the Acting United States Trustee respectfully submits that Debtor as plan
2 proponent has not met the requirements of 11 U.S.C. § 1129(a)(2) and related case law
3 governing related due process concerns. The importance of the Plan Supplement and its
4 apparent absence from the current record necessarily means that parties in interest simply have
5 not been given a meaningful opportunity to present any objections they may have.
6

7 15. Nevertheless, the Acting United States Trustee hereby reserves the right to supplement
8 the Objection based upon documents filed by Debtor as part of the Plan Supplement or
9 otherwise.
10

11 *The Plan's definition of Construction Defect Claim attempts to treat potential administration*
12 *expenses as prepetition claims and raises concerns regarding Debtor's ability to meet the*
requirements of 11 U.S.C. § 1129(a)(9)(A) and plan feasibility under 11 U.S.C. § 1129(a)(11).

13 16. The Plan defines construction defect claims by reference to ownership on the
14 Confirmation Date. Debtor's Plan, however, is one of reorganization, and Debtor has continued
15 to operate following the petition date. [Docket No. 263; pg. 63 of 76; Definition No. 39]. To the
16 extent any building defects or torts are attributable to the Debtor during the post-petition, pre-
17 confirmation period, such building defects or torts would likely give rise to an expense of
18 administration of Debtor's bankruptcy estate. *See, e.g., Reading Co. v. Brown*, 391 U.S. 471
19 (1968).
20

21 17. As Debtor's Plan does not seem to contemplate this possibility, serious concerns exist
22 whether Debtor can meet the requirements of 11 U.S.C. §§ 1129(a)(9)(A) and 1129(a)(11). To
23 the extent Debtor attempts to address this potential problem by treating such expenses as
24 prepetition claims, the Acting United States Trustee hereby objects. Otherwise, the Acting
25 United States Trustee expects Debtor's confirmation briefing and proof to address this matter.
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1 To the extent that potential expenses of administration are not properly accounted for in Debtor's
2 Plan, the Acting United States Trustee hereby objects to the Plan's confirmation under 11 U.S.C.
3 §§ 1129(a)(9)(A) and 1129(a)(11).

4 *The Plan impermissibly seeks to discharge dates postdating confirmation of the Plan in violation*
5 *of 11 U.S.C. § 1129(a)(1) and 1141(d)(1)(A).*

6 18. By statute, any discharge entered in Debtor's bankruptcy case, at most, could arguably
7 apply to debts arising prior to the date of the Plan's confirmation. 11 U.S.C. § 1141(d)(1)(A). In
8 several instances, Debtor's Plan seeks to sweep within the ambit of any discharge Debtor may
9 obtain in this case all debts arising prior to the Effective Date of the Plan, including a period of
10 time that necessarily postdates entry of the confirmation order. [See, e.g., Docket No. 263; pg.
11 41 of 76; § 12.1]. The Acting United States Trustee objects to the Plan to the extent it seeks to
12 discharge debts that do not fall within the terms of 11 U.S.C. § 1141.
13

14 *The Plan impermissibly seeks to release third-party, non-debtor entities from liability, as well as*
15 *the issuance of channeling injunctions, in contravention of governing circuit law and 11 U.S.C.*
16 *§§ 524(e) and 1129(a)(1).*

17 19. By its terms, section 524(e) of the Bankruptcy Code provides, "Except as provided in
18 subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of
19 any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).
20

21 20. On no fewer than three occasions, the Ninth Circuit has construed that statutory provision
22 to bar approval of releases like those sought by Debtor in the Plan. *Resorts Int'l, Inc. v.*
23 *Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995) (stating, "This court has
24 repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging
25 the liabilities of nondebtors."); *In re American Hardwoods, Inc.*, 885 F.2d at 626 (stating,
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1 "Section 524(e), therefore, limits the court's equitable power under section 105 to order the
2 discharge of the liabilities of nondebtors, such as the Keelers."); *Underhill v. Royal*, 769 F.2d
3 1426 1432 (9th Cir. 1985) *rejected on other grounds by Reves v. Ernst & Young*, 494 U.S. 56, 64
4 (1990).

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6 21. In the Ninth Circuit's view, there is not any meaningful difference between a release of
7 liability in favor of a non-debtor third party backed by a permanent injunction and a bankruptcy
8 discharge of that same third party's liability. *Gillman v. Continental Airlines (In re Continental*
9 *Airlines)*, 203 F.3d 203, 212 (3d Cir. 2000) (describing the authorities issued by the Courts of
10 Appeals for the Ninth and Tenth Circuits on the issue of non-debtor releases by stating, "These
11 courts find a release and permanent injunction to be indistinguishable from a bankruptcy
12 discharge.").

13
14 22. . In addition, the Ninth Circuit reads 11 U.S.C. § 524(e) to limit the Bankruptcy Court's
15 authority to enter injunctions under the Bankruptcy Code's more general source of equitable
16 power set forth in section 105(a) of the Bankruptcy Code. "Noting that section 105 does not
17 authorize relief inconsistent with more specific law, we concluded *the specific provisions of*
18 *section 524 displace the court's equitable powers under section 105 to order permanent relief*
19 *[against a non-debtor] sought by [the debtor]."* *In re Lowenschuss*, 67 F.3d at 1402 (internal
20 quotation marks omitted) (citation omitted) (emphasis added).

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23 23. In the view of the Ninth Circuit, therefore, section 524(e) of the Bankruptcy Code
24 occupies the field and displaces the more general provisions of section 105.

25 24. Against these background legal principles, the release, exculpation and channeling
26 injunction provisions set forth in Article XII of the Plan, including those set forth in section 12.2
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1 through 12.5 of the Plan, do not pass muster under governing case law and 11 U.S.C. §§ 524(e)
2 and 1129(a)(1). These Plan provisions should not, therefore, be approved as part of any order
3 confirming Debtor's Plan.
4

5 25. Finally, to the extent that Debtor seeks approval of such releases on the theory of consent,
6 the Acting United States Trustee respectfully submits that the future claims representative
7 appointed in this case should not, on the theory of consent, be released or otherwise exculpated
8 from liability on the basis of any ballot he casts for others, essentially voting to release and
9 exculpate himself from liability.
10

11 WHEREFORE, the Acting United States Trustee prays for entry of an order (i) sustaining the
12 Objection and (ii) either denying confirmation of the Plan in its entirety or severing objectionable
13 provisions from the Plan prior to its confirmation.
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15 Dated: September 11, 2012
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18 Respectfully submitted,

19 August B. Landis
20 The Acting United States Trustee

21 By: /s/ Athanasios E. Agelakopoulos
22 Athanasios E. Agelakopoulos
23 Attorney for the Acting United States Trustee
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify and declare that I deposited a true and correct copy of this objection in first class mail, postage fully prepaid, on this date to the parties listed below:

State of Nevada Dept. of Motor Vehicles Attn: Legal Division 555 Wright Way Carson City, Nevada 89711	Internal Revenue Service P.O. Box 7346 Philadelphia, PA 19101-7346
Dept. of Employment, Training & Rehab Employment Security Division 500 East Third Street Carson City, NV 89713	Nevada Department of Taxation, Bankruptcy Section 555 E. Washington Ave., #1300 Las Vegas, NV 89101
Texas Workforce Commission Regulatory Integrity Division - SAU Room 556 101 E. 15th Street Austin, TX 78778-0001	Clark County Treasurer c/o Bankruptcy Clerk 500 S Grand Central Pkwy Box 551220 Las Vegas, NV 89155-1220
Clark County Assessor c/o Bankruptcy Clerk 500 S Grand Central Pkwy Box 551401 Las Vegas, NV 89155-1401	Chief Counsel Franchise Tax Board Legal Department P.O. Box 1720, MS A-260 Rancho Cordova, CA 95741-1720
Franchise Tax Board Bankruptcy Section, MS A340 P.O. Box 2952 Sacramento, CA 95812-2952	Franchise Tax Board Bankruptcy Section, MS A340 P.O. Box 2952 Sacramento, CA 95812-2952
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18 Dated September 11, 2012

21 Office of the United States Trustee

22 By: */s/ Athanasios E. Agelakopoulos*

23 An Authorized employee of the Acting United States Trustee