Docket #0483 Date Filed: 9/14/2012

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Jointly Administered)
	)	
Debtors.	)	Honorable Pamela S. Hollis

Objection Deadline: September 12, 2012
Hearing Date: September 25, 2012

OBJECTION OF CERTAIN STOCKHOLDERS AND CREDITORS TO CONFIRMATION OF DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS' JOINT PLAN OF LIQUIDATION

ARG Investments ("ARG"), Enable Systems, Inc. ("Enable"), MRR Venture LLC ("MRR"), SKM Equity Fund II, L.P. ("SKM Equity"), and SKM Investment Fund II ("SKM Investment," and collectively with ARG, Enable, MRR and SKM Equity, the "Interested Parties"),[2] by and through their undersigned counsel, hereby object (the "Objection") to the confirmation of the Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Liquidation [Docket No. 399] (the "Motion").[3] In support of the Objection, the Interested Parties respectfully state as follows:

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523) and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] The Interested Parties hold 46.6% of the voting power in Hartford Computer Group, Inc. ("HCG"). ARG and SKM Investment are also unsecured creditors of HCG. MRR is also a secured creditor of HCG.

[3] Each capitalized term used but not defined herein shall have the meaning given to such term in the Plan.

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PRELIMINARY STATEMENT

1. The Plan separately classifies the claims of MRR and HCG Financial Services, Inc. (the "Financial PO Lender") as Class II Subordinate Secured Claims rather than as Class III General Unsecured Claims pursuant to that certain Subordination Agreement, dated as of February 3, 2004, by and among, *inter alia*, MRR, the Financial PO Lender and Delaware Street (as amended, supplemented or otherwise modified at times and from time to time, the "Subordination Agreement"). As will be demonstrated at the hearing before this Court on September 25, 2012 (the "Confirmation Hearing"), the subordination provisions of the Subordination Agreement are unenforceable against the Interested Parties as a result of the inequitable conduct of Delaware Street. As such, the Claims of MRR and the Financial PO Lender should be included as Class III General Unsecured Claims. The separate classification of the Claims of MRR and the Financial PO Lender under the Plan does not comply with section 1129(a)(1) of the Bankruptcy Code.

2. Furthermore, and as will be demonstrated at the Confirmation Hearing, the Interested Parties believe that the Plan fails to meet the requirements of section 1129(a)(7) of the Bankruptcy Code as it undervalues the claims of the Debtors' and their estates at the expense of General Unsecured Creditors.

3. For these reasons, as explained more fully below, the Interested Parties submit that the Court should not confirm the Plan.

BACKGROUND

4. Delaware Street is HCG's largest single stockholder, the Debtors' prepetition secured lender, has controlled the Debtors by designating five of HCG's seven directors (constituting a majority of HCG's board) and is the DIP lender in the Cases. The Interested

Parties constitute all of the stockholders of HCG other than Delaware Street and Brian Mittman, HCG's Chief Executive Officer, who was appointed by Delaware Street and granted a twelve percent (12%) equity interest in the Debtors for $40,000.

5. On August 8, 2011, the Interested Parties filed a Verified Shareholder Individual and Derivative Complaint (the "Complaint") against Delaware Street and Brian Mittman, Subhash Desai, Prashant Gupta, David Heller, Shepherd Pryor IV, and Emily Roynesdal (collectively, the "Delaware Street Director Defendants") in the Delaware Chancery Court. *See ARG Investments v. Delaware Street Capital Master Fund, L.P.*, C.A. No. 6764-VCL (Del. Ch.) (the "Shareholder Suit"). The Complaint alleges that Delaware Street controlled HCG's board of directors; acted as both principal creditor and majority shareholder of HCG; and devised a plan to withhold principal and interest payments on the debt secured by the prepetition credit agreement, drive HCG into bankruptcy and recoup its initial investment, together with approximately $35 million in interest, without any proceeds for the unsecured creditors in the Chapter 11 Cases or the Interested Parties, as shareholders and creditors of HCG. The Complaint further alleges that the conflicted Delaware Street Director Defendants breached their fiduciary duties by doing nothing to pay down, renegotiate or refinance the debt held by Delaware Street, which incurred interest at exorbitant rates of up to twenty-five percent (25%). The Interested Parties allege that this was unjustifiable in a market where interest rates have been at historic lows and HCG's business had otherwise been profitable since 2007. In other words, the Shareholder Suit accuses Delaware Street and the conflicted Delaware Street Director Defendants of, among other things, using accrued but unpaid interest at above market rates to expropriate value from HCG for the benefit of Delaware Street, as if it were an equity holder.

6. On December 12, 2011 (the "Petition Date"), under the control of directors appointed by Delaware Street, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court.

7. On March 9, 2012, the Shareholder Suit was removed to the United States District Court for the District of Delaware. On July 3, 2012, an order granting transfer of venue of the Shareholder Suit to the United States District Court for the Northern District of Illinois was entered.

8. On July 23, 2012, the Debtors filed the Plan.

OBJECTIONS

A. A Plan Must Satisfy Each of the Requirements of Section 1129 of the Bankruptcy Code

9. As proponents of the Plan, the Debtors have the burden of establishing that the Plan satisfies each and every element of section 1129 of the Bankruptcy Code as a prerequisite to the Court's confirmation of the Plan. *See In re Am. Consol. Transp. Cos., Inc.*, 2012 WL 987740, at *4 (Bankr. N.D. Ill. Mar. 22, 2012) (the plan proponent must show by the preponderance of the evidence that all of the requirements of section 1129 of the Bankruptcy Code have been met); *In re Repurchase Corp.*, 332 B.R. 336, 342 (Bankr. N.D. Ill. 2005) (plan proponent has the burden of proving by a preponderance of the evidence that the plan complies with statutory requirements for confirmation). The Court, in turn, has the obligation to independently assess whether the Plan proponent has satisfied all of the elements of section 1129 of the Bankruptcy Code. *See In re Multiut Corp.*, 449 B.R. 323, 333 (Bankr. N.D. Ill. 2011) ("[R]egardless of whether an objection to confirmation has been raised, the court must determine whether the requirements of § 1129 [of the Bankruptcy Code] … have been met.").

B. The Plan Does Not Satisfy Each of the Requirements of Section 1129 of the Bankruptcy Code

I. The Plan Improperly Classifies the Claims of MRR and the Financial PO Lender

10. Pursuant to section 1129(a)(1) of the Bankruptcy Code, a plan must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). In determining whether a plan complies with section 1129(a)(1) of the Bankruptcy Code, the Court "must consider the entire plan in the context of … the particular facts and circumstances [of the case]." *In re D&F Constr. Inc.*, 865 F.2d 673, 675 (5th Cir. 1989). The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that it embodies and incorporates the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and the contents of a plan, respectively. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 214 (1977); S. Rep. No. 989, 9th Cong., 2d Sess. 126 (1978).

11. Section 1122 of the Bankruptcy Code governs the classification of claims in a plan and provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122. Section 1122(a) of the Bankruptcy Code addresses the types of claims that may be placed in the same class and requires that such claims be "substantially similar." 11 U.S.C. § 1122(a). While no specific test or definition of substantially similar claims has been articulated by the Seventh Circuit, *see In re Sentinel Management Group, Inc.*, 398 B.R. 281, 297 (N.D. Ill. 2008) ("Lacking a specific test or definition [of "substantially similar"] from the

Seventh Circuit, the Court turns to other circuits."); *but see In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305, 1321 (7th Cir. 1995) (stating in dicta that disparities between the legal rights of different claims may render the two claims not substantially similar), other circuits have held that substantially similar claims are claims that have the same or similar legal status in relation to the assets of the debtor. *See In re Johnston*, 21 F.3d 323, 327 (9th Cir. 1994) (stating that bankruptcy courts must evaluate "the nature of each claim, i.e., the kind, species, or character of each category of claims"); *In re Frascella Enters.*, 360 B.R. 435, 442 (Bankr. E.D. Pa. 2007) ("The similarity of claims is not judged by comparing creditor claims *inter se.* Rather, the question is whether the claims in a class have the same or similar legal status in relation to the assets of the debtor."); *In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (stating the focus should be on the nature or legal attributes of the claims and not on the status or circumstances of the claimants).

12. The Plan separately classifies the claims of MRR and the Financial PO Lender as Class II Subordinate Secured Claims rather than as Class III General Unsecured Claims pursuant to the Subordination Agreement. As will be demonstrated at the Confirmation Hearing, the subordination provisions in the Subordination Agreement are unenforceable against the Interested Parties as a result of the inequitable conduct of Delaware Street. As a result, there is no justification for the separate classification of the Claims of MRR and the Financial PO Lender and such Claims should be included as Class III General Unsecured Claims entitled to share, *pro rata*, in the Hartford Trust Assets.

II. The Plan Is Not In the "Best Interests" of the Creditors

13. Section 1129(a)(7) of the Bankruptcy Code provides, in part:

> With respect to each impaired class of claims or interests – (A) each holder of a claim or interest of such class … (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the

> amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. 1129(a)(7). Section 1129(a)(7) of the Bankruptcy Code is known as the "best interests" test. It is one of thirteen requirements that a plan proponent must satisfy in order to obtain confirmation of its plan of reorganization, providing that unless it otherwise agrees, each creditor or interest holder will receive at least as much under the plan as it would in a liquidation of the debtor in a chapter 7 case. In other words, it establishes a "floor" with respect to the level of recovery to which creditors and interest holders are entitled pursuant to any confirmed plan of reorganization.

14. As set forth above and as will be demonstrated at the Confirmation Hearing, the Subordination Agreement should not be enforced as a result of the inequitable conduct of Delaware Street, as described in the Complaint, such that the Claims of MRR and the Financial PO Lender against the Debtors shall constitute General Unsecured Claims that, subject to the Plan, share in the Hartford Trust Assets. The inclusion of MRR's and the Financial PO Lender's Claims, approximately $3.1 million in the aggregate, as Class III General Unsecured Claims entitled to share in the Hartford Trust Assets will dramatically reduce the recovery available to the General Unsecured Creditors reflected in the Plan, between forty-seven percent (47%) and fifty-five percent (55%).

15. The Interested Parties assert that the Debtors' Insiders received several million dollars in potential Avoidance Actions and believe that the actions to recover such Avoidance Actions on behalf of the Debtors' estates have meaningful value on their own, let alone in combination with the other causes of action set forth in the Shareholder Suit. The settlement of the claims of the Debtors' and their estates set forth in the Plan greatly undervalues such claims. As will be demonstrated at the Confirmation Hearing, the Plan fails to comply with

section 1129(a)(7) of the Bankruptcy Code as a far greater recovery for General Unsecured Creditors and equity holders can be achieved by pursuing the causes of action in the Shareholder Suit, including the equitable subordination of Delaware Street's claims against the Debtors and/or the recharacterization of Delaware Street's claims against the Debtors as equity, and the Avoidance Actions against the Debtors' Insiders rather than settling such causes of action under the Plan.

16. Furthermore, in the event that the Court determines to uphold the Subordination Agreement and the separate classification of the Claims of MRR and the Financial PO Lender as Class II Subordinate Secured Claims, the Plan fails to satisfy section 1129(a)(7) of the Bankruptcy Code with respect to Class II Claims as holders of Class II Claims receive nothing under the Plan in comparison to some distribution that can be expected in a liquidation on account of, inter alia, the pursuit of Avoidance Action and the causes of action set forth in the Shareholder Suit.

CONCLUSION

WHEREFORE, the Interested Parties respectfully request that this Court (i) not confirm the Plan and (ii) grant such other and further relief as the Court deems just and proper.

Dated: September 12, 2012

Respectfully submitted,

/s/Matthew J. Botica

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