Docket #0543 Date Filed: 04/30/2021

Mark Stromberg
State Bar No. 19408830
STROMBERG STOCK, PLLC
8350 N. Central Expressway, Suite 1225
Dallas, Texas 75206
Telephone: (972) 458-5335
Facsimile: (972) 861-5339
E-mail: mark@strombergstock.com

Attorneys for Stearns Bank, N. A.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	'	**Chapter 11**
HI-CRUSH, LLC, *et al.*	'	**CASE NO. 20-33495 (DRJ)**
	'	
Debtors.	'	

REPONSE TO DEBTOR'S TWELFTH OMNIBUS OBJECTION TO CERTAIN CLAIMS (EQUIPMENT FINANCE CLAIMS) DATED APRIL 8, 2021

COMES NOW, STEARNS BANK, N. A. ("Stearns"), who files this its Response to Debtor's "Twelfth Omnibus Objection to Certain Claims (Equipment Finance Claims)" (hereafter, the "Objection") served on or about April 8, 2021 filed by **HI-CRUSH, LLC, *et al.*** (collectively, the "Debtor"), and in support thereof, would show unto this Court the following:

Jurisdiction

1. This Court has jurisdiction over the Objection and Stearns' response thereto in accordance with 11 U.S.C. §§1101 and 365, and 28 U.S.C. §§157,1334, and 2075. This is a core matter in accordance with 28 U.S.C. §157.

Background Facts

2. On July 12, 2020, the Debtor and a number of its affiliates filed this voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

3. Stearns is the owner and holder of those certain Equipment Finance Agreements dated as of October 17, 2019, October 24, 2019, November 14, 2019 and December 23, 2019, which are secured by Debtor's interest in forty-eight (48) trailers, consisting of eighteen (18) 2019 Cheetah Propant II Trailers and thirty (30) 2020 Triple E Hopper Trailers (collectively, the "Trailers"). On or about August 11, 2020, Stearns filed a timely, secured proof of claim in this case in the sum of $1,932,358.27, Claim No. 15-1 on the Claims Register (the "Stearns Claim"), representing the total amounts due from Debtor to Stearns under the Equipment Finance Agreements as of the inception of these bankruptcy cases, pursuant to which Debtor financed the acquisition of the Trailers.

4. On or about August 15, 2020, Debtor filed its Joint Plan of Reorganization, Docket No. 289 (hereafter, the "Plan"). The Plan provided that creditors holding secured claims were "unimpaired" by the Plan. Under the Plan, depending on its treatment, which would be unilaterally selected by the Debtor, Stearns potentially held claims in two (2) classes: (a) Stearns was treated by the Plan in Class 2 as an unimpaired secured creditor with no voting rights; and, (b) Stearns was a general unsecured creditor with respect to any deficiency on the Stearns Claim in Class 5, where the unsecured portion of Stearns Claim was impaired, entitling Stearns to vote on the Plan. The Plan provided only that the ***claims in Class 2*** were unimpaired, stating that the holders of secured claims will receive any one of a number of different treatments in pertinent part as follows:

> [E]ach Holder of an Allowed Class 2 Claim shall receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 2 Claim, at the election of the Debtors or Reorganized Debtors, as applicable (with the consent of the Required Consenting Noteholders):
>
> (A) Cash equal to the amount of such Allowed Class 2 Claim;
> (B) such other less favorable treatment as to which the Debtors or Reorganized Debtors, as applicable, and the Holder of such Allowed Class 2 Claim shall have

> agreed upon in writing;
> (C) the Collateral securing such Allowed Class 2 Claim;
> (D) such other treatment such that it will not be impaired pursuant to section 1124 of the Bankruptcy Code; or
> (E) such other treatment necessary to satisfy section 1129 of the Bankruptcy Code;
>
> provided, however, that Class 2 Claims incurred by any Debtor in the ordinary course of business may be paid in the ordinary course of business by such applicable Debtor or Reorganized Debtor in accordance with the terms and conditions of any agreements relating thereto without further notice to or order of the Bankruptcy Court.

Plan @ pp. 24 - 25.

5. Neither the Plan nor the Disclosure Statement identified which of any of the above potential unimpaired treatments would be provided to any given creditor, Stearns included; regardless, Stearns did not agree in writing to receive an "impaired" or "less favorable treatment" for its claims than was provided in the Bankruptcy Code (Option (B) above). Also, nowhere in the Plan did Debtor state that if any secured creditor in Class 2 received its collateral "securing such Allowed Class 2 Claim" it would simultaneously or automatically forfeit any unsecured claim for the difference between the amount of the total claim and the value of the collateral securing that claim. If the Plan had so stated, ***secured creditors would not in fact have been unimpaired***, and Stearns would in all probability have objected to confirmation of the Plan.

6. Shortly before (or close to the time of) the September 23, 2020 confirmation hearing on the Debtor's Plan, Stearns first learned from Debtor's counsel that the Debtor had unilaterally decided to surrender, and did in fact surrender, the Trailers to Stearns in accordance with Option (C) above. Stearns then proceeded to take possession of, and sell, the Trailers in accordance with its security agreements with the Debtors. These sales resulted in net sale proceeds, for which Debtor received credit, in the sum of $984,960.00, which resulted in an unsecured "deficiency claim" in the total sum of $997,398.27, which constitutes a general

unsecured claim against the Debtor's estate (a claim entitled to be treated equally with those who held claims in Class 5). Stearns maintains that its unsecured claim after the disposition of the Trailers was not compromised or "satisfied" as a result of the "satisfaction" of the secured claim in Class 2 by the Debtor's surrender of the Trailers in accordance with the Plan.

7. After the Objection was filed but before it was known to Stearns, Stearns filed an amended proof of claim, this one fully unsecured, with supporting documentation, in the sum of $997,398.27.

Negation of Stearns' Under-Secured Claim Is Inconsistent With, and Thus Violates, the Plan.

8. Stearns, a secured creditor who was "under-secured" when this case was filed and at the time its treatment under the Plan was decided, was entitled to rely on the language of the Plan that provided for the satisfaction ***of only its secured claims in Class 2*** via the surrender of collateral. It is well established that a confirmed plan constitutes a new arrangement for repayment between ***a debtor*** and its creditors. *See Coho Oil & Gas, Inc. v. Finley Res., Inc. (In re Coho Energy, Inc.)*, 309 B.R. 217, 219 (Bankr. N. D. Tex. 2004); *U. S. Brass Corp. v. Travelers Ins. Group (In re U. S. Brass Corp.)*, 301 F.3d 296, 307 (5th Cir. 2002), quoting LAWRENCE P. KING et al., COLLIER ON BANKRUPTCY, n. 14, P 1142.04[2], at 1142-8 (15th ed. rev. 2001) ("After confirmation, the plan essentially functions as a contract between the debtor and the other entities affected by the plan . . . ."); *U. S. v. Ramirez*, 291 B.R. 386, 392 (N. D. Tex. 2002) (holding that a "confirmed Chapter 11 plan constitute[s] a binding contract"); *National Gypsum Corp. v. Prostok*, 2000 U. S. Dist. LEXIS 16174 at 17, 47 (N. D. Tex. 2000), citing *McFarland v. Leyh (In re Texas General Petroleum Corp.)*, 52 F.3d 1330, 1335-36 (5th Cir. 1995), and *In re Page*, 118 B.R. 456, 460 (Bankr. N. D. Tex. 1990). When interpreting a bankruptcy plan, rules of contract interpretation are applicable in construing the plan and its meaning. *National Gypsum Corp. v.*

Prostok, *id*. at 48 (applying Texas case law and rules of contract construction); *In re Texas General Petroleum Corp.*, *supra* at 1335, citing *In re Stratford of Tex., Inc.*, 635 F.2d 365, 368 (5th Cir. 1981).

9. "The interpretation of an unambiguous contract is a question of law for the court." *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex. 2014). "[C]ontract rights generally arise from the contract language; they do not derive their validity from principles of equity but directly from the parties' agreement," and Texas courts are "loathe to judicially rewrite the parties' contract," and "it remains the 'better policy'" not to contravene the express language of a contract with equitable considerations. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647, 649-50 and n. 41 (Tex. 2007). The "primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Moayedi v. Interstate 35/Chisam Rd., L.P.*, *supra* at 7; *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). A contract is not ambiguous merely because parties disagree over its meaning, *FLP Energy, LLC v. TXU Portfolio Mgmt. Co., L. P.*, 426 S.W.3d 59, 63 (Tex. 2014), or even where there is uncertainty or a lack of clarity in the language used in the contract. *Pham v. Mongiello*, 58 S.W.3d 294, 288 (Tex. App. - Austin 2001, pet. denied). Rather, if an instrument "is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Coker v. Coker*, *supra*; *J. M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

10. In the case *sub judice*, the language of the Plan does not expressly purport, and cannot be fairly construed to have, at once left the rights of secured creditors "unimpaired" and, at the same time, to have eradicated their rights to any deficiency on the disposition of their collateral in a separate class. Any such inconsistent treatment, which is at odds with the most basic tenets

of the Bankruptcy Code and its treatment of under-secured creditors, would have had to have been plainly spelled out for the creditors if it were to have been applied to their claims so that the allegedly "unimpaired" secured creditors would have had some idea that a vote for (or a failure to object to) the Plan would be accompanied by a massive curtailment of their substantive rights. In contrast, it was not addressed at all in the Plan.

11. The only reasonable interpretation of the Plan is that it separately treated Stearns secured and unsecured claims in two different classes, and that the only on satisfied by the return or surrender of the collateral was the secured claim in Class 2.

Negation of Stearns' Under-Secured Claim Violates the Policies in the Bankruptcy Code.

12. If surrender of collateral to an under-secured creditor fully satisfied not only the secured debt supported by the value of the collateral, but also the unsecured or deficiency claims, it would disrupt basic, long-standing policies of creditor treatment undergirding the reorganization process and embodied in the Bankruptcy Code, specifically including and without limitation:

> (i) 11 U.S.C. § 502(b) (which mandates allowance of claims under exceptions that do not apply to secured creditors' timely-filed deficiency claims);
>
> (ii) 11 U.S.C. § 506(a)(1) (which limits the amount of a secured claim to "the value of such creditor's interest in the estate's interest" in property on which the secured creditor was granted a lien, and mandates that such claim "is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed [secured] claim");
>
> (iii) 11 U.S.C. § 1123(a)(4) (which requires "the same treatment for each claim or interest of a particular class" preventing discrimination against the deficiency claims of under-secured creditors);
>
> (iv) 11 U.S.C. § 1124, which defines "impairment;" and
> (v) 11 U.S.C. § 1129(b)(2)(A) and (B) (providing the requirements for the equitable treatment of secured and unsecured claims).

And although most of the bankruptcy court opinions pertaining to the effect of "surrender" are decided in the Chapter 13 context,[1] these principles are applied in substantially the same way, and have the same effect, in both Chapter 13 and Chapter 11 cases - - surrender can only have the effect of "satisfying" the full debt when the collateral value is determined to be in excess of the debt. *See, e.g., Bartee v. Tara Colony Homeowners' Assn. (In re Bartee)*, 212 F.3d 277, 280 at n. 2 (5th Cir. 2000); *In re Dennett*, 548 B.R. 733, 736-42 (Bankr. N. D. Tex. 2016); *In re Ramos*, 540 B.R. 580, 584-85 and 592-93 (Bankr. N. D. Tex. 2015); *In re Davis*, 404 B.R. 183, 192 (Bankr. S. D. Tex. 2009); *In re Hernandez*, 282 B.R. 200, 206-07 (Bankr. S. D. Tex. 2002); *In re Rincon*, 133 B.R. 594, 596-98 (Bankr. N. D. Tex. 1991) (all Chapter 13 cases). As pertains to Stearns' collateral, the Trailers did not come close to satisfying Stearns claim.

13. Quite the opposite, the Trailers' proceeds in liquidation were barely 50% of the total indebtedness they secured, and the Debtor has not contended otherwise. Accordingly, the surrender of the Trailers *can* only satisfy the secured claims, but not the unsecured claims, of Stearns as a matter of law. If the Debtor were going to contest the value of the Trailers or the amounts for which they sold, which they have not done in the Objection, they would need to make a separate request for a valuation hearing to determine the value of the Trailers. For the foregoing reasons, Stearns maintains that the Objection is not well founded in law or in fact, and should be in all things denied.

WHEREFORE, PREMISES CONSIDERED, Stearns prays that the Court deny the Debtor's objection to Stearns' amended Proof of Claim.

---

1 This is the case because, apart from the applicability of the "indubitable equivalence" provision in 11 U.S.C. § 1129(b)(2)(A)(iii), unlike in Chapter 13 there is no express provision in Chapter 11 cases for "surrender," *and* because "surrender" is simply less-often used, or contested, in Chapter 11 cases.

Respectfully submitted,

STROMBERG STOCK, P.L.L.C.

By: */s/Mark Stromberg*
Mark Stromberg
State Bar No. 19408830

Campbell Centre I
8350 North Central Expressway
Suite 1225
Dallas, Texas 75206
Telephone: (972) 458-5353
Facsimile: (972) 861-5339
E-mail: mark@strombergstock.com
Attorneys for Stearns Bank, N. A.

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021 the foregoing was served upon counsel for the Debtor, the United States Trustee, and those persons entitled to notice via ECF filing.

/s/Mark Stromberg
Mark Stromberg