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Attorneys for Hillcrest Bank, N.A.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

IN RE:

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CHAPTER 11

WHITESTONE HOUSTON LAND, LTD.,

CASE NO. 11-42400

Debtor.

**HILLCREST BANK, N.A.'S OBJECTION TO CONFIRMATION OF
DEBTOR'S FIRST PLAN OF REORGANIZATION DATED OCTOBER 28, 2011**

Hillcrest, N.A. ("Hillcrest"),¹ secured creditor and party in interest herein, files this Objection to Confirmation of Debtor's First Plan of Reorganization Dated October 28, 2011 ("Objection"), and in support thereof would show the Court the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This Objection is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. § 1409.

¹ On November 7, 2011, Hillcrest Bank, N.A. merged with Bank Midwest, N.A., and now operates under the name Bankr Midwest, N.A.

RELEVANT BACKGROUND

A. Debtor's Bankruptcy Filing

1. On August 1, 2011 (the "Petition Date"), Whitestone Houston Land, Ltd. ("Whitestone" or "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the Eastern District of Texas, Plano Division (the "Bankruptcy Court"), Cause No. 11-42400. This is a Single Asset Real Estate case.

2. On October 28, 2011, the Debtor filed its First Disclosure Statement Dated October 28, 2011 [Dkt. No. 15] ("Disclosure Statement") and its Chapter 11 Plan of Reorganization Dated October 28, 2011 [Dkt. No. 14] ("Plan"). The Debtor filed its First Modification to Disclosure Statement on December 11, 2011 ("Disclosure Statement Modification"). [Dkt. No. 24]. On December 20, 2011, the Court entered an Order Approving First Disclosure Statement Dated October 28, 2011 as Modified. [Dkt. No. 27].

B. Hillcrest Bank's Secured Claim

3. On or about July 31, 2007, Hillcrest and Whitestone entered into a secured loan agreement (the "Loan Agreement") whereby Hillcrest agreed to loan Whitestone up to \$19,600,000.00 in connection with the acquisition of real property located in New Caney, Montgomery County, Texas (the "Property"). Pursuant to the terms of the Loan Agreement, and contemporaneously therewith, Whitestone executed a Promissory Note (the "Note") for the principal sum of \$19,600,000.00 in favor of Hillcrest. The Note was secured by a Deed of Trust granted by Whitestone in favor of Hillcrest, which provided Hillcrest a security interest in the Property (the "Deed of Trust").

4. The initial maturity date of the Note, for full repayment of the entire principal balance and unpaid interest to Hillcrest by Whitestone, was January 1, 2009. The maturity date was subsequently modified twice via agreement, so that the maturity date under the Note was November 1, 2010. However, Whitestone defaulted under the Loan Agreement and Note, and Hillcrest notified Whitestone of the events of default on November 1, 2010. Whitestone failed to cure the default, and on November 19, 2010, Hillcrest accelerated the outstanding indebtedness (the “Indebtedness”) under the Note and Loan Agreement. The Indebtedness remains unpaid, and as of August 1, 2011, the approximate amount due and owing by Whitestone under the Note and Loan Agreement, including principal and accrued interest, was \$21,377,520.24. Interest and fees continue to accrue on this amount.

BASIS FOR OBJECTIONS

C. The Debtor Bears the Burden of Proof for Confirmation

2. A debtor in bankruptcy bears the burden of proving each and every element of § 1129(a) by a preponderance of the evidence in order to attain confirmation of its plan. *In re Cajun Electric Power Cooperative, Inc.*, 230 B.R. 715, 728 (Bankr. M.D. La. 1999); *In re Barnes*, 309 B.R. 888, 895 (Bankr. N.D. Tex. 2004) (citing *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997)); *In re 8315 Fourth Avenue Corp.*, 172 B.R. 725, 735 (Bankr. E.D.N.Y. 1994). Furthermore, the court has a mandatory duty to determine whether the plan has met all of the requirements for confirmation, whether specifically raised by dissenting creditors or not. *Williams v. Hibernia National Bank*, 850 F.2d 250, 253 (5th Cir. 1988). The Debtor in this case is unable to meet its burden for confirmation.

B. The Plan Violates § 1123(a)(5) Because it Does Not Provide Adequate Means For Its Implementation

3. The Court cannot confirm a plan unless it complies with the applicable provisions of title 11. *See* 11 U.S.C. § 1129(a)(1). A debtor’s plan must provide adequate means for the plan’s implementation. *See* 11 U.S.C. § 1123(a)(5). Whitestone’s Plan does not provide adequate means for the Plan’s implementation; therefore, the Plan cannot be confirmed.

4. The only information in the Plan regarding its implementation is in Article II, Concept of the Plan, Generally, and Article VI, Means for Implementation of Plan. The Concept of the Plan is merely a “plan of reorganization.” *See* Plan, 2.01. The Plan “envisions a new third party debt facility,” and the Plan will be implemented through “the revenue from the Debtor’s future business operations and an equity investment put in by the New Capital Partner.” *Id.* The alleged New Capital Partner is not identified, disclosed, or defined. *Id.* The Debtor’s future business operations and “development” are not explained or supported. *Id.* In addition, there is no support for the Plan’s feasibility, likely because, as discussed *infra*, the Plan is not feasible. The Means for Implementation of Plan simply states that the “Plan will be implemented pursuant to § 1123(a)(5) of the Code, by the commencement of payments as called for above.” *See* Plan, 6.01. Further, the Plan “relies on the revenues generated from the Debtor’s property and the Equity Investment.” *Id.* Similar to New Capital Partner, the Equity Investment is not defined, explained, or identified. Therefore, the Plan does not provide any means for implementation other than the baseless and conclusory statements that it will be implemented. The Plan does not comply with the provisions in section 1123(a)(5) and, as a result, should not be confirmed.

C. The Plan Violates 11 U.S.C. § 1129(a)(7) Because Hillcrest Receives Less Under the Plan Than it Would in a Chapter 7 Liquidation

5. Pursuant to 11 U.S.C. § 1129(a)(7), impaired classes of claims under the Plan must receive property on account of their claim that is not less than the amount they would

receive in a case under chapter 7. The Plan is not confirmable because the Debtor has failed to meet its burden under § 1129(a)(7). The Debtor bears the burden of proving § 1129(a)(7) by a preponderance of the evidence. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1060 (5th Cir. 1993).

6. There is nothing in the Plan regarding liquidation, and in its Disclosure Statement Modification, the Debtor merely states that “in a liquidation the property would sell for less than the secured debts given today’s market conditions and the costs of sale.” Disclosure Statement Modification, ¶ 6. The Debtor states the Whitestone Houston Property Value is \$25,000,000.00 (reduced by \$2,000,000.00 for a liquidation) and its secured debt is listed as \$21,377,520.24. *Id.* Therefore, the Debtor’s statement that the property would sell for less than the secured debts is incorrect, even with a \$2,000,000.00 reduction in property value. There is no evidence that the impaired classes will not receive less through the Plan than they would in a liquidation. The Debtor has not met its burden to prove the requirements under § 1129(a)(7).

7. Further, Hillcrest will receive less under the Plan than it would under a chapter 7 liquidation. Under a liquidation, Hillcrest will receive the value of its secured claim immediately.² However, under the Plan, Hillcrest must wait 120 days after confirmation before it will receive payment of its secured claim, and will not be paid a market or otherwise appropriate rate of interest. Further, it is unclear how Debtor intends to pay Hillcrest’s \$19,389,607.91 claim (plus continued accrued fees and interest) when there is no indication of who the New Equity Investor is or how the Debtor will implement the Plan. Accordingly,

²Debtor contends the Property is worth 27,400,00.00, which would allow Hillcrest to receive the full amount of its secured claim through liquidation. However, even if the Property value is \$9,880,000.00, as Hillcrest contends based on its certified appraisal, Hillcrest will still receive more through a liquidation than it would under the Debtor’s Plan.

Hillcrest will receive less than it would under a chapter 7 liquidation and confirmation of the plan should be denied under § 1129(a)(7).

D. The Plan Violates § 1129(a)(11) Because it is Not Feasible

8. Whitestone's Plan is not feasible and cannot be confirmed under section 1129(a)(11). Courts must scrutinize the plan carefully to determine whether it offers a reasonably prospect of success and is workable. *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003). Whitestone has failed to offer anything other than hope and speculation regarding its ability to satisfy the obligations of creditors. *See, e.g., In re M&S Assocs., Ltd.*, 138 B.R. 845, 852 (Bankr. W.D. Tex. 1992) ("Confirmation of the Plan would merely allow the Debtor to postpone the inevitable, and to gamble, with the [secured creditor's] money, on the long shot possibility of a drastic improvement in the real estate market"); *In re Pelham St. Assocs.*, 134 B.R. 700, 701 (Bankr. D.R.I. 1991) (denying confirmation of plan predicated on a 5-year balloon payment to the secured creditor, concluding that the plan was "pure pie in the sky, and no secured creditor should be required to depend on such illusory pie."). Whitestone has no equity in the Property, and this is a Single Asset Real Estate bankruptcy.

9. The proposed Plan does not have a reasonable probability of success because it requires Whitestone to enter into a new third party debt facility and receive an equity investment from a New Capital Partner in order to fund the reorganization. *See* Plan, 2,01. Simultaneously with the refinancing, Whitestone will also place the Property for sale on the market. *Id.* However, Whitestone does not explain how it will obtain a New Equity Partner and a new debt financing facility when it intends to sell the Property, and Whitestone has no equity in the Property.

10. Neither the Disclosure Statement nor the Plan provides any concrete explanation for how creditors in this case will receive the value of their claims. Whitestone has no equity in the Property, and this is a Single Asset Real Estate bankruptcy. More specifically, this case involves more than 1,564.55 acres of raw/undeveloped land located in New Caney, Texas that the Debtor purchased in 2005 and plans (at least in 2005) to develop into a mixed-use multifamily, commercial, and retail development, a segment of the economy that is notoriously struggling. *See* Disclosure Statement, Exhibit B, Development Overview. However, upon information and belief, the Debtor actually intends to develop the majority of the Property into an amusement park.

11. The only support for the Plan's success is contained in the Metrostudy Market Overview and Development Feasibility Proforma sections of Exhibit B of the Disclosure Statement. However, the Market Overview is merely a conclusory summary of a pie in the sky hope for what may happen to the real estate market, and there is no support for the Development Feasibility of the Debtor's Plan. Speculative and unrealistic projections are not sufficient to prove the feasibility of a plan of reorganization. *In re Canal Place Ltd. P'ship*, 921 F.2d 569, 579 (5th Cir. 1991). Moreover, it is unclear when the Development Feasibility Proforma was prepared (although it appears to be years ago), who prepared it, how the figures contained in the Proforma were determined, what assumptions were made, etc. Notably, the proposed Plan relies on revenues generated from the Property (which, to date, amount to zero) and additional financing. "Section 1129(a)(11) requires the plan proponent to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan." *See In re 8315 Fourth Ave. Corp.*, 172 B.R. 725, 735 (Bankr. E.D.N.Y. 1994); *In re SM 104 Ltd.*, 160 B.R. 202, 234 (Bankr. S.D. Fla. 1993). Plans often fail on feasibility grounds where the

assets needed to fund the Plan are speculative. *See In re 8315 Fourth Ave. Corp.*, 172 B.R. at 735; *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506-09 (Bankr. S.D. Tex. 1989).

12. Further, where a plan relies on operating revenues, “a debtor’s past and present financial history are probative of the plan’s feasibility.” *Id.* The Debtor effectively has no history – this is a start-up venture in bankruptcy. Considering the Debtor’s prior inadequate performance in regards to developing the property (Whitestone has owned the Property since 2005, yet no development has taken place), the current state of the new home market (and the speculative nature of an amusement park) and the conjectural and speculative projections in support of the Debtor’s proposed Plan, the Plan is not feasible and cannot be confirmed as a matter of law.

PRAYER

For the foregoing reasons, Hillcrest respectfully requests that the Court deny confirmation of the Plan and grant Hillcrest such other and further relief as is just and proper.

Dated: January 13, 2012

Respectfully submitted,

BRACEWELL & GIULIANI LLP

By: /s/ Brian C. Mitchell

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ATTORNEYS FOR HILLCREST BANK, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been served electronically via the Court's ECF noticing system on those parties who receive notice from that system, on the 13th day of January, 2012.

/s/ Brian C. Mitchell

Brian C. Mitchell