UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: The Hacienda Company, LLC, Debtor(s)	Case No.: 2:22-bk-15163-NB Chapter: 11 **MEMORANDUM DECISION CONFIRMING DEBTOR'S AMENDED PLAN** Hearing Date: Date: July 11, 2023 Time: 2:00 p.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012 (or via Zoomgov per posted procedures)

This Court will confirm Debtor's Second Amended Chapter 11 Liquidating Plan Dated March 30, 2023 (dkt. 129, the "Plan"). The reasons are as set forth below and in this Bankruptcy Court's concurrently issued Opinion Denying Second Motion to Dismiss Case Based on Connections with Cannabis the "Opinion Denying Second MTD").

1. Background

The confirmation hearing took place at the above-captioned date and time. Appearances are as noted in the record.

The relevant facts, including defined terms, are set forth in the Opinion Denying Second MTD. Briefly, Debtor ceased its cannabis-related business approximately 18

months before the Petition Date, but Debtor holds a roughly 9.4% equity interest in a Canadian company, Lowell Farms, which continues to conduct cannabis-related business, including in the United States. That business appears to be legal under Canadian and California law. The United States operations probably are illegal under federal law, but federal prosecutors apparently have not pursued any action against Lowell Farms.

The UST has filed two motions to dismiss this case, based on Debtor's proximity to cannabis. This Bankruptcy Court has now denied both motions.

Debtor's Plan proposes to:

> sell [Debtor's] shares [of Lowell Farms] on the [Canadian Securities Exchange] or in any other orderly manner, and distribute the funds received from the sale to its creditors on a pro rata basis, with any amounts obtained in excess of the total amount required to pay all allowed claims in full being distributed to the holders of equity interests in the Debtor. [Plan (docket no. 129), p. 5:22-25, as modified by docket no. 178, pp. 3:21-4:7].

The Plan has only one voting class: its nonpriority unsecured claims. Debtor's ballot summary (docket no. 176) reports that the overwhelming majority of claims voted in favor of the Plan, both by dollar amount and by number of claims. The UST is the only party objecting to confirmation of the Plan.

2. Jurisdiction, authority, and venue

This Bankruptcy Court has jurisdiction to rule on plan confirmation, and venue is proper under 28 U.S.C. §§ 1334 and 1408. This is a "core" proceeding in which this Bankruptcy Court has the authority to enter a final judgment or order under 28 U.S.C. § 157(b)(2)(A) and (L). *See also Stern v. Marshall*, 131 S. Ct. 2594 (2011).

3. Findings of fact and conclusions of law

This Bankruptcy Court finds and concludes that the Plan satisfies all applicable provisions of §§ 1129 and 1191. Therefore this Bankruptcy Court will issue a separate order confirming the Plan.

a. Section 1191(a)

Section 1191(a) provides that the "court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section" are met.

b. Section 1129(a)(1)

Section 1129(a)(1) requires that the "plan compl[y] with the applicable provisions of this title." According to the leading treatise, the "legislative history suggests that the applicable provisions are those governing the plan's internal structure and drafting: 'Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of a plan.'" 7 *Collier on Bankruptcy* ¶ 1129.01[1] (16th rev'd ed.) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978)).

i. Section 1122(a)

Section 1122(a) addresses classification. There is no dispute that the Plan has properly classified all general unsecured creditors in Class 1 and all equity holders in Class 2. *See generally, e.g., In re Rexford Props., LLC*, 558 B.R. 352, 361 (Bankr. C.D. Cal. 2016).

ii. Section 1122(b)

Section 1122(b) relates to "convenience" classes, but the Plan does not designate any such class so this section does not apply.

iii. Section 1123(a)(1)

Section 1123(a)(1) requires that a plan "designate … classes of claims, other than claims of a kind specified in section 507(a)(2) [administrative expense claims], 507(a)(3) [claims arising during the gap period in an involuntary case], or 507(a)(8) [priority tax claims], and classes of interest."

There are no involuntary gap claims because this is a voluntary chapter 11 case. The Plan provides specified treatment for administrative expense claims and priority tax claims, rather than placing them in classes, so the Plan satisfies § 1123(a)(1).

iv. Section 1123(a)(2)

Section 1123(a)(2) requires that the Plan "specify any class of claims or interests that is not impaired under the Plan." The Plan appropriately specifies that Class 2 is unimpaired. The Plan satisfies § 1123(a)(2).

v. Section 1123(a)(3)

Section 1123(a)(3) requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the Plan." The Plan appropriately specifies the treatment of Class 1, which is impaired. The Plan satisfies § 1123(a)(3).

vi. Section 1123(a)(4)

Section 1123(a)(4) requires that the Plan "provide the same treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." The Plan provides the same treatment to claims of the same class. The Plan satisfies § 1123(a)(4).

vii. Section 1123(a)(5)

Section 1123(a)(5) requires that the Plan "provide adequate means for the plan's implementation." The Plan provides for the orderly liquidation of Debtor's shares of stock in Lowell Farms, over time, and distribution of the cash proceeds to creditors. The Plan satisfies § 1123(a)(5).

viii. Section 1123(a)(6)

Section 1123(a)(6) provides: "[A] plan shall provide for the inclusion in the charter of the debtor, if the debtor is a corporation …, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends."

The Plan (p. 14:13-16) represents that Debtor will amend its charter, bylaws, and/or operating agreement as necessary to satisfy § 1123(a)(6). The Plan satisfies § 1123(a)(6).

ix. Section 1123(a)(7)

Section 1123(a)(7) requires that the Plan's provisions with respect to the selection of officers and directors be consistent with public policy and the interests of creditors and equity security holders.

The Plan contains no provisions which violate public policy with respect to the selection of any officer, director, or trustee. The Plan satisfies § 1123(a)(7).

x. Section 1123(a)(8)

Section 1123(a)(8) requires that in a case in which the debtor is an individual, the Plan "provide for the payment to creditors … of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan."

Debtor is a corporation, so § 1123(a)(8) does not apply.

xi. Section 1123(b)

Section 1123(b) sets forth provisions that are permitted, but not required, in a plan. The Plan contains certain of § 1123(b)'s optional provisions. The Plan is consistent with § 1123(b).

xii. Section 1123(c) and (d)

Section 1123(c) pertains to individuals, and Debtor is not an individual, so that section is inapplicable. Section 1123(d) regards cures of defaults, but the Plan does not provide for cures of any defaults so § 1123(d) is inapplicable.

c. Section 1129(a)(2)

Section 1129(a)(2) requires that the "proponent of the plan compl[y] with the applicable provisions of this title." Debtor is the proponent of the Plan, and Debtor has complied with applicable provisions of the Code, including for example obtaining this Bankruptcy Court's approval of the employment of professional persons, and soliciting

votes on the Plan in accordance with the Code as ordered by this Bankruptcy Court. The Debtor has satisfied the requirements of § 1129(a)(2).

d. Section 1129(a)(3)

Section 1129(a)(3) requires that the "plan has been proposed in good faith and not by any means forbidden by law." "[T]he plain text of § 1129(a)(3) … directs bankruptcy courts to police the means of a reorganization plan's *proposal*, not its substantive provisions." *In re Garvin*, 922 F.3d 1031 (9th Cir. 2019) (emphasis in original).

On the other hand, if there were to be any abuse of the bankruptcy process, that could establish that the plan has not been proposed in good faith. *See, e.g., In re Sylmar Plaza*, 314 F.3d 1070, 1074 (9th Cir. 2002) (cited in *Garvin*, 922 F.3d 1031, 1036 n. 3). As one court has explained:

> The term "good faith" in the context of 11 U.S.C. § 1129(a)(3) is not statutorily defined but has been interpreted by case law as referring to a plan that "achieves a result consistent with the objectives and purposes of the Code. The requisite good faith determination is based on the totality of the circumstances. [*In re Melcher*, 329 B.R. 865, 876 (Bankr. N.D. Cal. 2005) (cleaned up)].

The UST argues that the Plan was not filed in good faith because of Debtor's ongoing connection to cannabis and its proposal to liquidate shares of Lowell Farms and distribute the cash proceeds to creditors. Opposition (dkt. 163), pp. 12:5-15:9. This Bankruptcy Court is not persuaded.

First, the UST has not identified any basis for this Bankruptcy Court to conclude that the Plan itself has been *proposed* in bad faith or by any means forbidden by law. For example, the UST does not argue that Debtor has attempted to "Gerrymander" a consenting impaired class. Therefore, no grounds exist to find a violation of § 1129(a)(3) in the Debtor's proposal of the Plan and/or solicitation of votes.

Second, as set forth in more detail in this Bankruptcy Court's Opinion Denying Second MTD, Debtor's orderly liquidation of its stock in Lowell Farms, and distribution of

the proceeds to creditors, is entirely consistent with the objectives and purposes of the Code. Debtor's temporary retention of such stock, while divesting itself of that connection to cannabis, does not foster a single sale of any cannabis products, nor does it add a single dollar to any cannabis-related enterprise. Although Debtor's payments to creditors may include distribution of "ill gotten gains" (to the extent that proceeds from U.S. operations violate federal law), such distribution to creditors is what criminal law itself provides.

In sum, this Bankruptcy Court is not persuaded that such payments are inconsistent with the objectives and purposes of the Code. The Plan has been "proposed in good faith and not by any means forbidden by law," and thus satisfies § 1129(a)(3).

e. Section 1129(a)(4)

Section 1129(a)(4) requires that "[a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."

The Plan provides that all professional fees and expenses are subject to review by this Bankruptcy Court. The Plan satisfies § 1129(a)(4).

f. Section 1129(a)(5)

Section 1129(a)(5) requires that the Plan disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the Plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint Plan with the debtor, or a successor to the debtor under the Plan." Section 1129(a)(5)(A)(ii) requires that the appointment to or continuation in office of a director or officer be consistent with the interests of creditors, equity security holders, and public policy. Section 1129(a)(5)(B) requires the Plan proponent to disclose the identity of any insider to be employed by the reorganized debtor.

Debtor has ceased to operate, so it appears that its only "director, officer, or voting trustee" is its current manager, Hannah Buchan, who will remain the Reorganized Debtor's manager and shall serve as the disbursing agent for all obligations of the Reorganized Debtor. Ms. Buchan will not charge any disbursing agent fee for making the Plan distributions. The Plan satisfies § 1129(a)(5).

g. Section 1129(a)(6)

Section 1129(a)(6), which requires that a governmental regulatory commission with jurisdiction over rates charged by a debtor approve any rate changes provided for in the plan, does not apply.

h. Section 1129(a)(7)

Section 1129(a)(7), known as the "best interests of creditors test," provides in relevant part: "With respect to each impaired class of claims or interests, each holder of a claim or interest of such class has accepted the plan; or 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."

Although stock prices fluctuate, Debtor has provided evidence that the best interests of creditors test is satisfied. As of the date of Debtor's calculations, general unsecured creditors would receive an estimated 16% distribution on account of their claims in a hypothetical Chapter 7 liquidation. In contrast, Debtor has projected that as of the same date general unsecured creditors are projected to received approximately 24% of their allowed claims under the Plan, and possibly up to 100% depending upon the price of the Lowell Farms shares at the time of liquidation. Neither the UST nor any other party in interest has presented any contrary evidence. The Plan satisfies § 1129(a)(7).

i. Section 1129(a)(8)

Section 1129(a)(8) requires each class to accept the Plan, unless the class is not impaired. Class 1, the only impaired class, has voted to accept the Plan. The Plan

satisfies § 1129(a)(8).

j. Section 1129(a)(9)

Section 1129(a)(9) requires that holders of certain administrative and priority claims receive cash equal to the allowed claim amount of their claims on the effective date of the plan, unless the claimant agrees to different treatment.

Administrative expense claims will be paid in full on the Effective Date, unless those claims have yet to be allowed, in which event the Plan provides that they will be paid on the date on which this Bankruptcy Court enters an order allowing such fees and expenses. Priority tax claims will be paid in full on the later of the Effective Date or as soon thereafter as is practical or, if there is an objection to any priority tax claim, within (5) business days' after the entry of an order allowing such priority tax claim.

No holder of any administrative expense or priority tax claim has objected to the proposed treatment in the Plan, and accordingly any such objections are deemed waived, or alternatively are forfeited. *See In re Hamer*, 138 S. Ct. 13, 17 n.1, 199 L. Ed. 2d 249 (2017) (distinguishing forfeiture and waiver). In addition, the terms in the Plan are typical of many chapter 11 plans that have been confirmed by this Court. Accordingly, the Plan satisfies § 1129(a)(9).

k. Section 1129(a)(10)

Section 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

Class 1 is impaired and has voted to accept the Plan. The Plan satisfies § 1129(a)(10).

l. Section 1129(a)(11)

Section 1129(a)(11), known as the "feasibility requirement," requires this Bankruptcy Court to find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is

proposed in the plan." In the Ninth Circuit, a plan is feasible under § 1129(a)(11) if the plan proponent demonstrates that the plan has a reasonable probability of success." *In re Curiel*, 651 B.R. 548, 560-61 (9th Cir. BAP 2023) (internal quotation marks and citation omitted). A "debtor is not required to prove that success is inevitable." *Id.* (internal quotation marks and citations omitted).

The UST argues that the Plan is infeasible because the timing of any distribution to Class 1 general unsecured creditors is illusory. Opposition (dkt. 163), pp. 25:16-27:4. The Plan provides:

> (2) In the event that the Debtor decides to retain the [Lowell Farms] stock and sell it on the [Canadian Stock Exchange], or in any other commercially reasonable manner, in order to generate cash to pay allowed claims, the Debtor shall sell a sufficient portion of the [Lowell Farms] stock to pay all allowed claims in full in an orderly fashion over a reasonable period of time; provided, however, that the Debtor shall not be compelled to sell any portion of the [Lowell Farms] stock unless the stock price exceeds $1.74 per share (with appropriate adjustments to reflect any stock split, stock dividend, material corporate action or similar change in the shares which may occur after date of the Effective Date); and (b) notwithstanding the foregoing, at the expiration of three (3) years following the Effective Date, the Debtor shall proceed in a prompt manner to engage in sales of its shares of [Lowell Farms] at then-prevailing market prices. The cash proceeds of any sale of the [Lowell Farms] shares shall be distributed to holders of allowed claims on a pro rata basis if and when received. The Debtor may also enter into an agreement for a private sale of the shares of [Lowell Farms] to a third-party purchaser (which could include [Lowell Farms]). In any event, any sale of the [Lowell Farms] stock would be subject to market conditions, and the Debtor shall sell its shares in a commercially reasonable manner that does not negatively affect the share price in any material way. [Plan (dkt. 129), p. 12:8-13:9]

This Bankruptcy Court agrees with Debtor that this provision is sufficiently clear. The Plan provides that Debtor will use commercially reasonable efforts to sell or liquidate its Lowell Farms shares over a period of three years following the Effective Date, provided that the price of the stock exceeds $1.74 per share and, in the event some or all of the shares have not been sold with that three year period, Debtor will "proceed in a prompt manner to engage in sales of its shares" at whatever the then-

prevailing market price is. Three years is well within the normal duration of most chapter 11 plans, which often last for five years. *See, e.g.,* § 1129(a)(15) (applicable in usual chapter 11 cases) *and* § 1192 (applicable in Subchapter V cases).

The UST also argues that any sale of Lowell Farms shares on the open market will be difficult, if not impossible, and there is no contingency if there is no market for the shares after the three-year period expires. Opposition (dkt. 163), p. 26:11-17. True, the Plan does not spell out what exactly Debtor intends by "proceed[ing] in a prompt manner." But (x) Debtor is only required to demonstrate that the Plan has a reasonable probability of success, which this Bankruptcy Court finds is satisfied on this record, and (y) all rights are reserved for creditors to assert that Debtor's failure to sell its remaining shares within a reasonable amount of time after the three-year period has expired constitutes a material default and seek appropriate relief, *e.g.,* under § 1112(b)(4)(N) or other applicable provisions of the Bankruptcy Code and Rules.

The Plan is feasible and satisfies § 1129(a)(11).

m. Section 1129(a)(12)

Section 1129(a)(12) requires that all fees assessed under 28 U.S.C. § 1930 be paid prior to confirmation, unless the Plan provides for the payment of such fees on the effective date. Since this is a case under Subchapter V, no fees are owed under 28 U.S.C. § 1930, and § 1129(a)(12) does not apply.

n. Section 1129(a)(13)

Section 1129(a)(13), which contains requirements pertaining to the payment of retirement benefits, does not apply.

o. Section 1129(a)(14)

Section 1129(a)(14), which contains requirements pertaining to the payment of domestic support obligations, does not apply.

p. Section 1129(a)(15)

Section 1129(a)(15) pertains to individuals, and in any event it is inapplicable in Subchapter V cases such as this one. *See* § 1191(a).

q. Section 1129(a)(16)

Section 1129(a)(16) provides: "All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust." No party in interest has objected that any proposed transfer violates this section, so any such objection is waived or forfeited, and in any the stock of Lowell Farms is publicly and legally traded on the Canadian Stock Exchange, so § 1129(a)(16) is satisfied.

r. Section 1129(d)

Section 1129(d) provides: "Notwithstanding any other provisions of this section, on request of a party in interest that is a governmental unit, the court may not confirm a Plan if the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."

No governmental unit has requested that this Bankruptcy Court deny confirmation on these grounds, nor is this Court aware of any such grounds. The Plan satisfies § 1129(d).

s. The Plan includes adequate disclosures of risk

The UST argues that the Plan's section on risk factors does not adequately disclose the Plan's risk to creditors because it fails to advise creditors of the possibility of criminal liability in receiving a distribution of the actual shares of Lowell Farms (which Debtor originally included as an option, as distinguished from Debtor selling the shares and distributing the proceeds). Opposition (dkt. 163), pp. 23:4-24:2; *see also* §§ 1125(a)(1) and 1190.

Those arguments are moot because Debtor has agreed not to distribute shares to creditors and instead will use commercially reasonable efforts to sell or liquidate its Lowell Farms shares over a period of approximately three years or slightly longer. More broadly, as to all risks under the current version of the Plan, this Bankruptcy Court agrees with Debtor that Section III.B.2 of the Plan (dkt. 129, pp. 15:5-16:26) sufficiently

describes the Plan's risk factors.

Accordingly, this Bankruptcy Court finds that the Plan includes adequate disclosures of risk.

t. The Plan can be confirmed with limited changes to Debtor's proposed exculpation provisions

Section 1125(e) limits the liability of a broad array of persons for acts related to soliciting votes for a plan. Additionally, while the Court of Appeals for the Ninth Circuit previously held that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors (*In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995)), the Ninth Circuit recently clarified that this prohibition does not extend to certain "tailored" exculpation clauses relating to the bankruptcy process itself, provided that such clauses are narrow in scope and time. *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1081-83 (9th Cir. 2020) (distinguishing exculpation provisions from third party releases).

The Plan's exculpation provision provides that:

> To the maximum extent permitted by law, neither the Debtor, the Reorganized Debtor, their management, nor any of their professionals employed or retained by any of them, whether or not by Bankruptcy Court order, shall have or incur any liability to any person or entity for any act taken or omission made in good faith in connection with or related to the formulation and implementation of the Plan, or a contract, instrument, release, or other agreement or document created in connection therewith, the solicitation of acceptances for or confirmation of the Plan, or the consummation and implementation of the Plan and the transactions contemplated therein, including the distribution of estate funds. [Plan (dkt. 129), p. 21:8-15 (emphasis added).]

The UST argues that the above-cited exculpation clause is overly broad and impermissible because there is no carve out for fraud, criminal liability, or government actions. Opposition (dkt. 163), pp. 24:4-25:14. This Bankruptcy Court agrees. Unlike the exculpation clause in *Blixseth*, which was limited to releasing the parties from negligence claims, Debtor's proposed exculpation clause purports to release third parties from "any liability." Such language is too broad.

Nevertheless, this Bankruptcy Court finds and concludes that the Plan can be confirmed, including the exculpation provisions of the Plan set forth above, except as to (a) any distributions under the Plan, as to which liability even for negligence continues to apply (e.g., if the distribution agent negligently pays the wrong person, they are not protected by the exculpation clause), (b) for any fraud or intentional wrongdoing, or (c) as stated in the Opinion Denying Second MTD with respect to federal prosecutors' future ability to pursue Lowell Farms for alleged criminal activity or seek recovery of any distributions to Debtor's equity owners, should the prosecutors elect to pursue such remedies.

This Bankruptcy Court's reasoning is that a broader release is not consistent with this Court's understanding of Ninth Circuit precedent. Alternatively, exonerating the bankruptcy estate's fiduciaries for of all liability, including any fraud or intentional wrongdoing, would be antithetical to the "good faith" requirement of 11 U.S.C. § 1129(a)(3).

In contrast, during the course of administration of the bankruptcy case and consummation and implementation of the Plan it is appropriate to provide exoneration, because of the very nature of bankruptcy. Any exculpation for acts or omissions during the case and in connection with the Plan are less likely to cause harm to any parties in interest, for numerous reasons.

This case has included requirements for notice, a hearing, and approval by this Bankruptcy Court for the Plan and many steps leading up to the plan; there are requirements for transparency, including monthly operating reports; there is the availability of discovery to protect any against and uncover any wrongdoing; there is the ability of any party in interest to be heard in opposition to whatever the debtor proposes and in favor of some alternative course of action; and there is oversight by the UST, creditors, and this Bankruptcy Court. All of these things make any exculpation during the bankruptcy case and in connection with the Plan far less prone to cause harm.

Another reason why exculpation is appropriate is that the bankruptcy process

can expose Debtor, its employees, and others to intense litigation, at great cost in personal time, expense, and stress to individuals. It is generally in everyone's interest that such persons be able to focus on reorganization, rather than being excessively concerned about any especially litigious creditors who might pursue actions even after what is supposed to be the finality of a confirmed Plan.

In other words, this Bankruptcy Court concludes that it is acceptable to approve the exoneration provisions as applied to matters that have been under the microscope of the bankruptcy process; but it is inappropriate to approve provisions that would extend beyond the limits set forth above.

4. Conclusion

For all of the foregoing reasons, Debtor is directed to lodge a proposed order confirming the Plan, subject to the foregoing limitations and for the reasons stated in this Memorandum Decision.

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Date: September 20, 2023

Neil W. Bason
United States Bankruptcy Judge