UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
JOONKO DIVERSITY INC.,[1]	)	Case No. 24-11007 (MFW)
	)	Re: Docket Nos. 39, 40, 41, 79, 80, and 86
Debtor.	)	**Obj. Deadline: 8/23/24 at 4:00 p.m. (ET)**
	)	**Hrg. Date: 09/12/2024 at 10:30 a.m. (ET)**

PRELIMINARY OBJECTION AND RESERVATION OF RIGHTS BY CERTAIN SHAREHOLDERS TO THE DEBTOR'S PLAN OF LIQUIDATION

Timberline Holdings III, LLC, Timberline TMG, LLC, Martin and Heidi Damsky, BHM Venture Investments, LLC, First Avenue Ventures, LLC, Kapor Enterprise, Kapor Capital, and Bronze Valley Corp. (collectively the "Objecting Shareholders"), hereby object (the "Objection") to the Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code Proposed by the Debtor [Docket No. 79] (as may be amended, supplemented, or otherwise modified, the "Plan") filed by Joonko Diversity Inc., the debtor and debtor-in-possession in the above-captioned chapter 11 case (the "Debtor" or "Company") and requests that the Court grant the relief described below. In support thereof, the Objecting Shareholders respectfully represent as follows:

I. INTRODUCTION

1. This is a highly unusual chapter 11 case. The Debtor has only a token amount of secured and priority debt and almost no unsecured debt. No official committee of unsecured creditors or shareholders has been appointed. The Company never had any legitimate business operations, but rather engaged in fundamental fraud and deception from its inception. The Company has admitted that its

[1] The last four digits of Joonko Diversity Inc.'s federal tax identification number are 8337. Joonko Diversity Inc.'s service address is 157 Columbus Ave., 4th Floor, New York, NY 10023.

former CEO, who is now under federal criminal indictment and is the subject of a SEC enforcement action, defrauded the Company and its investors by, among other things, actively forging documents (including bank statements and customer contracts) to create a mirage of business success. There has never been any "business" to salvage in chapter 11. Save for causes of action and modest cash, the Debtor had no material assets when it filed this case. Accordingly, the Company's shareholders are the primary stakeholders in the bankruptcy process. *See generally* the *Declaration of Ilan Band in Support of Chapter 11 Petition and First Day Pleadings*, Docket No. 9, ¶¶10-25.

2. Notwithstanding the fact that the shareholders are the impaired class in the bankruptcy, the Debtor has not meaningfully engaged with the shareholders, to whom it owes fiduciary duties. Instead, the Debtors have relied upon the fact that two of the largest shareholders have direct representation on the Debtor's board of directors. These two shareholders are clearly not independent as it is plausible that they and their agents either knew or should have known of the fraud. All of these facts support the fact that there has been no independent shareholder voice or discourse involving independent shareholders in this chapter 11 to date.

3. The Debtor's proposed Plan makes this case even more unusual. The Plan inexplicably provides for releases of the Debtor's current officers and directors – some of whom served on the Debtor's Board while the Debtor's past management actively defrauded the Debtor, its creditors, and investors – without any consideration being given to the Debtor's estate and without any independent investigation being done by the Debtor to assess the value of the claims and causes of action being released. These gratuitous releases do not provide any benefit to the Debtor's creditors or equity holders, but rather inure solely to the benefit of the Debtor's existing officers and directors.

4. There is no justifiable basis for gifting the Debtor's officers and directors any releases – especially given the Debtor's history of fraud that occurred under the Board's watch. The Plan should

not be confirmed unless, among other things, it is modified to remove any such releases and to provide that any and all claims and causes of action against the Debtor's former and current officers and directors be retained and investigated properly by an independent oversight committee of investors. In addition, all shareholder rights and defenses must be preserved, including the rights of setoff and recoupment.

5. The Plan is not confirmable unless it is amended to address the deficiencies noted herein, such that all shareholder rights and defenses are preserved, including curtailing the Plan injunction, removing the improper discharge, and revising the releases in accordance with applicable law.

BACKGROUND

II. The Chapter 11 Case

6. On May 14, 2024 (the "Petition Date"), the Debtor commenced a case the ("Chapter 11 Case") by filing a petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") .

7. The Debtor continues to operate its businesses and manage its properties as a debtor and debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

8. To date, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") has not appointed an official committee in the Chapter 11 Case, nor has any trustee or examiner been appointed.

OBJECTION

9. Each Objecting Shareholder is a shareholder of the Debtor. Section 1128(b) of the Bankruptcy Code provides that "[a] party in interest may object to confirmation of a plan." Section 1109(b) of the Bankruptcy Code defines a party in interest to *include* the debtor, a trustee, a creditor, an equity security holder, a creditors' or equity security holders' committee, or an indenture trustee. This

list is not by any means exclusive; instead, courts broadly define a party in interest to include anyone with a financial interest in the case, or, in some cases, a legal interest.

10. The Supreme Court held recently that Section 1109(b) is animated by the principle that "[b]road participation promotes a fair and equitable reorganization process." *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1425 (2024) (Congress intended to "allow a broad range of individual and minority interests to intervene in Chapter 11 cases."); *see also In re Teligent, Inc.,* 640 F.3d 53, 60 (2d Cir. 2011) (the parties listed in Section 1109 are not exclusive); *see also In re Global Indus. Techs., Inc.*, 645 F.3d 201, 210-15 (3d Cir. 2011) (holding that this term should be defined broadly). A shareholder of a debtor is unquestionably a party interest under this broad definition.

I. The Plan Fails the Best Interest Test

11. Section 1129(a)(7)(A) has been described as the "cornerstone" of chapter 11 practice. *In re Best Prods. Co.*, 168 B.R. 35, 71-72 (Bankr.S.D.N.Y.1994). Pursuant to this provision, a chapter 11 plan cannot be confirmed unless each holder of a claim or interest of an impaired class receives at least as much in chapter 11 reorganization as it would in chapter 7 liquidation. This is called the "best interest principle." The Plan does not satisfy section 1129(a)(7)(A) with respect to any of the Objecting Shareholder because the Plan proposes for each shareholder to receive on account of its interest property with a value, as of the Plan's Effective Date, that is less than amount such a shareholder would receive on account of its interests in a chapter 7 case. The Objecting Shareholders contend that for at least the two following reasons, they are likely to receive a higher recovery in a chapter 7 liquidation than under the Plan as currently written.

A. The Plan Inappropriately Releases Directors and Officers for No Consideration

12. Notwithstanding the fact that the Company was unmistakably brought down by egregious fraud from within, the Plan (Section X.C.1) proposes to release, for ***no consideration***

whatsoever, causes of action that the Debtor has against its officers and directors with respect to that fraud. The events leading up to the collapse of the Company create a strong inference that the directors and officers may be liable for permitting fraud to go undetected for so long. Yet the Debtor wants to relinquish this potential source of recovery without conducting even an independent investigation of the claims that it possesses.

13. The Objecting Shareholders understand that there is sufficient D & O insurance coverage to satisfy at least in part such liability. They further understand that at least some of the Board members of the Debtors have personal assets to satisfy potential judgments. Yet after failing to conduct an impartial investigation, the Debtor proposes to give up these potentially valuable claims for no consideration and without any justification. The Objecting Shareholders submit those claims have potential significant value that would be realized in a chapter 7 bankruptcy under the auspices of a chapter 7 trustee. Given these circumstances, the liquidation analysis should have include an estimate for the recovery on those claims in chapter 7 liquidation. The omission of this analysis by itself renders the Plan unconfirmable at this stage.

B. The Debtor Implausibly Says that Fees Would Be Less in Chapter 11

14. In the liquidation analysis submitted to support its claim that the impaired classes would receive less in chapter 7 liquidation, the Debtor makes the extraordinary assertion that professional fees and expenses under chapter 11 would be less than in chapter 7. Docket No. 80, Am. Discl. Stmt., Ex. B. The comparative professional fee estimates are the only basis asserted supporting the Debtor's decision for favoring chapter 11 over chapter 7. *Id*. The Debtor gives no support for its assessment, which entirely lacks credibility in light of the disclosed billing rates of Debtor's counsel.

15. Debtor's chapter 11 counsel is one of the nation's largest law firms. McDermott, Will & Emery LLP charges rates at the very top of the market. It already billed close to $180,000 in the

month of June alone. These fees are likely to escalate as the case goes forward. The billing rates set forth in the first fee application illustrate this point. The most senior partner for the engagement charges $2,080 an hour. The hourly rates for other partners range from $1375 to $1,830. The hourly rate for the most senior associate is $925. The hourly blended rate is almost $1,400. By contrast, it is widely known that chapter 7 trustees typically retain law firms with much lower billing rates to handle their work. Frankly the Debtor fails to offer any support to substantiate the assertion that the professional fees in a chapter 11 case would be lower than in a chapter 7 case.

III. The Plan Is Not Proposed in Good Faith.

16. The Plan is not proposed in good faith as required by 11 U.S.C. section 1129(a)(3). *In re W.R. Grace & Co.*, 729 F.3d 332, 346 (3d Cir. 2013) (noting that to pass this good-faith test the plan must "fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."). As the Third Circuit has explained, good faith for purposes confirmation equals to "honesty, good intentions, and a reasonable expectation of success," with arms-length negotiation leading to a result under a plan that is not "fundamentally unfair." *Id.* at 347. The Third Circuit quoted with approval to a Delaware Bankruptcy Court decision holding that a plan was not proposed in good faith when it was "drafted primarily for the benefit of a pre-petition committee and memorialized a pre-petition settlement to the detriment of other claimants." *Id.* at 348 (quoting *In re ACandS, Inc.*, 311 B.R. 36, 43 (Bankr.D.Del.2004)).

17. This is exactly what happens here. The existing board of directors of the Debtor has proposed a Plan that inequitably provides for a wide-sweeping release of Debtor's claims against them, without any consideration flowing to bankruptcy estate for the gratuitous releases and without having conducted an independent investigation which is customary in situations like this.

18. As discussed above, the Debtor is likely have potentially valuable claims against these directors, many of whom served on the Debtor's board of directors during the time that past management was actively defrauding the Company, its investors, and its creditors. Those directors may have breached their duties to the Debtor by allowing such mismanagement and fraud to have occurred under their watch. As in many chapter 11 cases of this nature, claims against directors and officers may be a significant source of recovery. Such potentially valuable causes of action should not be gratuitously released under any circumstances and certainly not, whereas here, there has been no independent investigation of those claims. Therefore, the Plan must be amended to retain these causes of actions. Investigation and pursuit of potential claims against directors and D&O coverage should be under control of an independent group of investors – not the proposed Plan Administrator who was selected by the Board members who have proposed to gift themselves a release of the Debtor's claims against them.

IV. The Proposed Releases of Officer and Directors Fail the Applicable Legal Test

19. The proposed releases of officers and directors are not necessary to the Debtor's liquidation and are legally impermissible.

20. Releases granted under a plan must be "fair, reasonable, and in the best interests of the estate." *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (citing *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009)). Courts evaluating whether a debtor's release of claims against a non-debtor is appropriate analyze specific factors. *See e.g., In re Wash. Mut., Inc.,* 442 B.R. 314, 346 (Bankr. D. Del. 2011). The relevant factors are: the identity of the interest between the debtor the persons to be released, the substantial contributions to the plan by the released party, the necessity of the release, the acceptance of the release by the creditors and interest holders and the extent to which

creditors and claims holders are paid. Factor four is unknown at this point because the ballots are still being cast but all other factors overwhelmingly counsel against the approval of the releases. *Id.*

21. *First,* an "identity of interest" exists only when claims "will deplete the estate's resources" if not released or where a suit against the released party would be, in essence, a suit against the debtor. *Wash. Mut.*, 442 B.R. at 346. No such identify of interest exists with the directors and officers because the Objecting Shareholders have been informed by Mr. Band, the Debtor's CEO, that D & O insurance coverage exists. See Exhibit A. To the extent that D & O coverage is inadequate, that is because the directors and officers failed to purchase adequate coverage in a new and risky venture involving artificial intelligence and then failed to timely detect signs of blatant fraud. Any unsecured claims from the directors and officers based on any purported indemnification provisions should be equitably subordinated in light of the fraud that permeated the Debtor's activities.

22. *Second*, the Debtors' directors and officers have not made any contribution to the Debtors' Estate outside of work for which they have already been compensated. There is no evidence that they did anything beyond what a board member is ordinarily expected to do during a company's liquidation process. *In re Boomerang Tube, LLC*, No. 15-11247-MFW (Bankr D. Del. Nov. 9, 2015) [Dkt. No. 688] (noting that "negotiating a plan is not a sufficient substantial contribution by a director and officer, such as to warrant a release").

23. *Third*, because this is a liquidation and the debtor will not continue in business, there can be no argument that the releases are necessary. *In re Nickels Midway Pier, LLC,* Case No. 03-49462 (GMB), 2010 WL 2034542, at *13 (Bankr. D.N.J. May 21, 2010) (denying releases that parties in interest objected to because the debtor was liquidating); *Cf. In re Zenith Elecs. Corp*., 241 B.R. 92, 110 (Bankr. D. Del. 1999) (released parties' future work was necessary for a successful reorganization).

24. *Fourth*, the final factor, anticipated payments under the plan to creditors and interests holders, favors the granting of releases only when "all or substantially all" the amount due is paid. *See Zenith*, 241 B.R. at 110. This is not even close to being true. Under the proposed Plan, Class 4, Class 5, Class 7 and Class 9 receive no recovery. Class 5 will receive no more than a 10 percent recovery. Because most interest holders will receive no recovery or only very modest recovery, the fiduciaries who failed to detect the fraud that brought down the Company cannot receive blanket releases without having to any consideration in return.

25. Application of the aforementioned factors strongly militates against granting the releases to the officers and directors.

V. The Injunction in Favor of the Debtor Is Not Allowed under the Bankruptcy Code

26. It is black letter law that only a true plan of r*eorganization* can grant a discharge. Section 1141(d)(3) of the Bankruptcy Code does not permit a plan to grant a discharge if the plan is a plan of *liquidation*. 11 U.S.C. § 1141(d)(3); *see also Orange Cty. Water Dist. v. Fairchild Corp.* (*In re Fairchild Corp.*), 2014 U.S. Dist. LEXIS 174022, at *7 (D. Del. Dec. 17, 2014)("the confirmation of a plan does not discharge a debtor if—the plan provides for the liquidation of all or substantially all of the property of the estate."); *Teamsters Pension Tr. Fund of Philadelphia & Vicinity v. Malone Realty Co.*, 82 B.R. 346, 349 (E.D. Pa. 1988) ("Under § 1141(d)(3), a corporate or partnership debtor that is both liquidating and discontinuing its business does not receive a discharge when its plan is confirmed.").

27. The Plan is indisputably a plan of liquidation, as shown by its title. Yet it purports enjoin actions against the Debtor. This is a clear violation of Section 1141(d)(3) and renders the Plan non-confirmable.

VI. The Injunction Provisions in the Plan Violate Bankruptcy Rule 3016(c)

28. Even assuming that the Plan could provide for an injunction (which it cannot, as discussed above) it still does not satisfy Bankruptcy Rule 3016(c) which requires that "the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction." Article X, Section D of the Plan plainly does not comply with this requirement.

VII. The Plan Fails to Preserve the Objecting Shareholders' Setoff and Recoupment Rights

29. The Plan provides at Art. X ¶ D that the Objecting Shareholders may not "assert[any right of setoff, directly or indirectly, against any obligation due the Debtor." [Plan, Art. X ¶ D.] The Debtor and the Liquidating Trust, however, arrogate for themselves the right to setoff. Plan, Art. VI ¶ G. In the Third Circuit, the right to setoff, and arguably, recoupment, must be expressly preserved or it is waived. The Debtors cannot preserve the right to setoff and recoupment for itself and extinguish those rights for other parties.

30. The Bankruptcy Code preserves those setoff rights that otherwise exist under applicable non-bankruptcy law. *Citizen's Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995). The U.S. Supreme Court has explained that interest holders may "apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 239 (1947). The Debtor's attempt to deprive shareholders of their set-off rights cannot be squared with this principle.

31. This Plan provision denying the right of the shareholders to a setoff plainly violates section 553 of the Bankruptcy Code which provides that the right of setoff in bankruptcy is preserved as it exists outside bankruptcy. *United States of America v. Continental Airlines (In re Continental Airlines*), 134 F.3d 536, 541 (3d Cir. 1998) ("We recognize that a right of set-off is

preserved under § 553 in a bankruptcy proceeding"); *In re Alta+Cast, LLC*, 2004 Bankr. LEXIS 222, at *18 (Bankr. D. Del. Mar. 2, 2004).

32. Pursuant to Section 1129(a) of the Bankruptcy Code, this Court may not confirm a plan that does not "compl[y] with the applicable provisions of this title." Because the Plan does not comply with Section 553, confirmation must be denied.

33. The Plan does not expressly purport to bar recoupment against the Debtor which would not be permissible because such right exists independent of the Bankruptcy Code. *See In re Davidovich*, 901 F.2d 1533 (10th Cir. 1990). The Plan must be clarified to make it clear that no right to recoupment is impaired by it.

VIII. The Debtor Neglects to Consider the Potential Value of NOLs

34. The Debtor have incurred significant net operating losses, given its admission that its entire business operation was a charade. Its schedules do say that it has incurred more than $7,00,000 in federal NOL for 2023. But it has provided no data for other tax years. NOLs can be potentially utilized in a chapter 11 plan to generate meaningful value for the estate. *Litig. Tr. for the Tr. Beneficiaries of SNTL Corp. v. JP Morgan Chase* (*In re Superior Nat'l Ins. Group*), 518 B.R. 562, 565 (Bankr. C.D. Cal. 2014) (for a debtor that otherwise had no asset, the chapter 11 plan revolved the use of $1 billion of NOLs with Chase Bank). But the Plan on its face proposes to do nothing to attempt to realize value from the NOLs that the Debtor must have. It appears that the NOL issue has never been considered by Debtor in the context of a chapter 11 plan, which begs the question of why the Debtor has not engaged in this basic task. According to the Internal Revenue Service, *see* Docket 127, ¶¶ 3-5. the Debtor has not even filed its tax returns.[2] The confirmation of a plan should be deferred until the Debtor has filed its overdue tax returns. At that point the Debtor will be required to provide a reasonable elaboration of its NOLs and, as appropriate, amend the Plan to use the NOLs for the benefit of the estate.

VI. An Oversight Committee Should Be Appointed.

35. The Debtor has throughout this Chapter 11 Case all but ignored the shareholders, to which it owes primary fiduciary responsibilities starting no later than the Petition Date. There has been at best sporadic and irregular communication with some individual shareholders. But shareholders as a whole have not been able to speak with one voice, through an equity committee or otherwise. Their views and input have been ignored. The Objecting Shareholders believe that this deficiency has contributed to the issues identified in this Objection, including the improper proposed granting of releases to the officers and directors of the Debtor and the failure to consider whether NOLs may be

[2] The Objecting Shareholders expressly reserve the right to challenge the IRS's priority claims once the Debtor has filed its tax returns.

utilized in a way that benefits the estate. The Objecting Shareholders request that an oversight committee of independent shareholders be a requirement in the Plan.

36. The Plan designates Ilan Band, who has been the CEO of the Debtor since before the Petition Date as the Plan Administrator. With all due respect to Mr. Band, the Objecting Shareholders believe that providing primary and largely unchecked authority to Mr. Band would lead to post-confirmation continuation of the pattern of conduct where input from shareholders is ignored. The appointment of an oversight committee consisting of shareholders not affiliated with Mr. Band or the Board is therefore critical to protecting the rights of shareholders and upholding the integrity of the Chapter 11 process by avoiding the appearance of impropriety. Again, frankly, Mr. Band should welcome oversight to reduce and help mitigate direct liability on himself.

RESERVATION OF RIGHTS

37. The Objecting Shareholders expressly reserve the right to amend, modify, or supplement the Objection. The Objecting Shareholders reserve their respective rights to object to any further amendments or modifications proposed to the Plan, based upon any new information provided by Debtor or any other party or upon any different relief requested by Debtor.

NOTICE

38. The Objecting Shareholders will provide notice of the Objection to: (a) the Debtor, (b) the U.S. Trustee; (c) the parties included on the Debtor's list of its 20 largest unsecured creditors; (d) counsel to Raz; and (e) all parties entitled to notice pursuant to Local Rule 2002-1(b). The Objecting Shareholders submit that no other or further notice is required.

CONCLUSION

WHEREFORE, the Objecting Shareholders respectfully request that the Court enter the Proposed Order (i) denying confirmation, (ii) sustaining the Objection, (iii) requiring an Oversight

Committee consisting of representative shareholders in the Plan, (iv) deferring the confirmation hearing until the issues identified herein can be addressed, (vi) authorizing discovery to determine whether conversion to chapter 7 or the appointment of a chapter 11 trustee is warranted, and (vii) granting such other and further relief as may be just and proper.

Dated: August 23, 2024

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