IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	)	Chapter 11
	)	
GROEB FARMS, INC.,	)	Case No. 13-58200
Debtor.	)	
	)	Honorable Walter Shapero
	)	
	)	
	)	

OBJECTION OF ERNEST L. GROEB, TROY L. GROEB AND THE E. JEANNE LIVING TRUST TO DISCLOSURE STATEMENT FILED BY GROEB FARMS, INC. [1]

Ernest L. Groeb, Troy L. Groeb and E. Jeanne Groeb, as Trustee of the E. Jeanne Living Trust (jointly, the "**Groeb Creditors**"), creditors in the above-captioned Chapter 11 case of Groeb Farms, Inc. (the "**Debtor**"), by and through their attorneys and pursuant to Section 1125 of Title 11 of the United States Code (the "Bankruptcy Code") and Rule 3017 of the Federal Rules of Bankruptcy Procedure (the "Rules"), hereby object to the *Disclosure Statement for the Plan of Reorganization of Groeb Farms, Inc. Pursuant to Chapter 11 of the Bankruptcy Code Dated October 1, 2013* (the "**Disclosure Statement**"). In support of their objections, the Groeb Creditors state as follows:

I. Introduction

Three key facts stand at the heart of why the Debtor's Disclosure Statement is not sufficient: (i) the extent and justification for the disparate treatment of similarily situated creditors is not provided, (ii) information related to the value of the Reorganized Debtor was omitted, and (iii) information pertaining to the broad releases by the Debtor, Third Party releases and an exculpation of the Debtor and non-Debtor parties is missing. As discussed herein, this

[1] Capitalized terms undefined but used in this Objection shall have the same meaning as prescribed in the Disclosure Statement.

Disclosure Statement fails to provide "adequate information," within the meaning of section 1125(a)(1) the Bankruptcy Code. The proposed elements and provisions of the Groeb Plan described by the Disclosure Statement make the plan unconfirmable, specifically the discrimination of similar classes of creditors and the impermissible attempt at broad based releases and exculpations. The Debtor should be required to draft and distribute a disclosure statement that provides adequate information to creditors and describes a plan of reorganization that complies with the provisions of the Bankruptcy Code and is confirmable.

II. Standard of Review

1. Section 1125 of the Bankruptcy Code governs the requirements for disclosure statements in Chapter 11 cases. Section 1125(b) provides:

> (b) An acceptance or rejection of a plan may not be solicited after commencement of the case under this title from the holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

2. "Adequate information" is defined in 11 U.S.C. §1125(a)(1) to mean:

> . . . information of a kind, and in sufficient detail, as far as reasonably practical in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims and interest of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan.

3. The Debtor's Disclosure Statement is confusing, unclear and incomplete. As a result, it fails to provide "adequate information" within the meaning of Section 1125(a)(1). Among the Disclosure Statement's failures are the following:

II. Objections

A. The Dislosure Statement is Missing Information Concerning the Extent and Justification of the Disparate Treatment of Similarly Situated Creditors

4. The Plan of Reorganization of Groeb Farms, Inc. (the "**Groeb Plan**") is structured into seven classes. Class 5, which describes the treatment of Debtor's unsecured creditors, is itself broken out into three subclasses with Class 5A encompassing "Trade Claims," Class 5B "Other General Unsecured Claims" and Class 5C "Unsecured Convenience Class Claims." None of these subclasses are treated in a similar fashion. Each receives radically disparate treatment, resulting in arguably different returns. Each subclass also endures different risks which directly impact the likelihood of a recovery. As a result, the Groeb Plan appears to unfairly discriminate between otherwise similarly situated creditors and, as a result, is unconfirmable under Section 1129(b)(1) of the Bankruptcy Code.

5. Pursuant to the Groeb Plan as currently drafted, Class 5A Trade Claims will receive one of two distributions, dependent solely on whether the creditor enters into a New Trade Agreement with the Debtor. If a creditor enters into such an agreement, it will receive its "Trade Claim Distribution," defined as forty percent (40%) of its Allowed Trade Claim, payable no later than eighteen (18) months after the Effective Date, and satisfied by the Reorganized Debtor paying the claimant 110% on each invoice for products ordered post-Effective Date. If a Class 5A Trade claimant fails or refuses to execute a New Trade Agreement, it will receive, in the alternative, its pro rata share of the proceeds from the General Unsecured Claims Litigation Trust. Under either scenario, this subclass of unsecured creditors will be released from all potential Avoidance Actions as defined in the Groeb Plan.

6. Class 5B encompasses "Other General Unsecured Claims," defined as "Allowed General Unsecured Claims" other than Trade Claims and, presumably, Unsecured Convenience

Class Claims. Class 5B Allowed Other General Unsecured Claims are deemed satisfied, settled and released once the affected creditors receive their pro rata share of the proceeds from the General Unsecured Claims Litigation Trust. These creditors are not provided a definitive payout date, nor are they guarantied any return. These unsecured creditors are **not** being released from Avoidance Actions.

7. Class 5C Unsecured Convenient Class Claims are Allowed General Unsecured Claims, other than Trade claims, in the amount of $7,500.00 or less. These unsecured creditors will receive 100% of their claims, unless a cap of $250,000 is exceeded.

8. The Disclosure Statement, and the Groeb Plan as a whole, fails to provide a meaningful explanation for the proposed disparate treatment among unsecured creditors. It lacks critical data or information from which a Class 5B Claimant can evaluate its possible distribution or return. A Class 5A creditor is guaranteed that it will receive 40% of its claim, plus a release from Avoidance Action exposure, within a date no later than 18 months of the Effective Date. Class 5C creditors will receive 100% of their claims on the Effective Date, subject to a $250,000 cap. Class 5B creditors, on the other hand, will simply receive their pro rata share of the proceeds of the General Unsecured Claims Litigation Trust, if and only if such litigation is initiated and proceeds are actually generated. Few if any details of the Causes of Action comprising the res of the Trust are provided, and no discussion concerning possible defenses or an estimate concerning the likely net or gross proceeds from any such litigation is given.

9. In paragraph 7 of page 27 of the Disclosure Statement, the Debtor provides limited detail with respect to the Preference Actions which might be assets of the Bankruptcy Estate (if not released pursuant to the Groeb Plan) by simple reference to the Debtor's Statement of Financial Affairs. While the Disclosure Statement does state that "[t]he Debtor estimates that

the value for such Causes of Action is approximately $23 million, and the estimated recovery is 25%, or $5.98 million," no detail is provided as to how many of these claims will be released pursuant to the Groeb Plan (for example, how many encompass Trade Claims), nor whether the $5.8 million is a gross recovery or one net of litigation costs. No explanation is provided concerning the basis of the estimation, nor is a statement provided concerning the timeframe in which any recovery might be expected. No statement addresses the fact that the targets of this litigation might be the very creditors who encompass Class 5B, nor the effect of recoveries on the size of Class 5B, due to the recapture provisions set forth in Rule 3002(c)(3).

10. With respect to other Causes of Action, the Debtor in one sentence references potential claims for breaches of fiduciary duty against certain officers and directors in connection with facts set forth in the Deferred Prosecution Agreement concerning the transshipping of honey. The Debtor then states that it believes the Insurance Policy will cover the claims consisting of the Fiduciary Duty Causes of Action, if sufficient proceeds remain after payment of defense costs. No further detail is provided as to the likelihood that counsel can be found to pursue the litigation, the costs to obtain such legal services, likely defenses that might be raised, estimated gross or net recoveries, or the time frame during which any such recovery may be expected.

11. The foregoing deficiencies are exacerbated by the fact that the Bankruptcy Code prohibits "unfair discrimination" among similarly situated classes, such as Classes 5A and 5B. The prevailing view is that a rational or legitimate basis must exist for such discrimination, and the discrimination must be necessary for reorganization. See, e.g., *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (Bankr. D. Del. 2006). In *In re Snyder's Drug Stores, Inc.*, 307 B.R. 889, 894-95 (Bankr. N.D. Ohio 2004) the court stated that discrimination is only

appropriate when (a) the discrimination is supported by a reasonable basis; (b) the discrimination is necessary for re-organization; (c) the discrimination is proposed in good faith; and (d) the degree of the discrimination is directly related to the basis or rationale for the discrimination. In *In re Dow Corning Corp.,* 244 B.R. 705, 710 (Bankr. E.D. Mich. 1999), *aff'd* 255 B.R. 445 (E.D. Mich. 2000), this Court held that:

> [A] rebuttable presumption that a plan is unfairly discriminatory will arise when there is: (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage of recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.

12. In the instant case, the Disclosure Statement utterly fails to provide any information, let alone adequate information, pursuant to which any of the above referenced factors can be evaluated. In the instant case, not only do the distribution dates vary among the similarly situated subclasses, but so will, arguably, their percentage return, with Trades receiving a guaranteed return in excess 40% return (when released avoidance actions are considered), while other general unsecured creditors receive an indeterminate, (and possibly no) return. Furthermore, the risk components for the two classes differ dramatically, as Trade Claims are paid automatically from post-Effective Date invoices, but in any case within 18 months, while other general unsecured creditors bare the risk and uncertainty of success and the certain delay associated with litigation, assuming such litigation is ever initiated.

13. Absent explanation and justification of the different treatments of Classes 5A and 5B, in the event of a cramdown, the Groeb Plan will not meet the requirement of Section 1129(b)(1) of the Bankruptcy Code that such a plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, or has not accepted, the plan."

14. In summary, the Disclosure Statement does not provide adequate information, and as a result, does not comply with Section 1125(b) of the Bankruptcy Code due to the fact that the Disclosure Statement (i) fails to provide a meaningful explanation or rationale and legitimate basis for the proposed disparate treatment among unsecured creditors; (ii) lacks critical data or information from which a Class 5B Claimant can evaluate its possible distributions or return; (iii) fails to provide any details concerning (a) the Causes of Action comprising the *res* of the Trust, (b) possible defenses and costs associated with such litigation (c) the likely net or gross proceeds arising from any such litigation, and (d) the timeframe in which any recovery might be expected..

B. The Disclosure Statement Does Not Provide Any Information Concerning the Exit Value of the Reorganized Debtor or the Extent to Which Classes 3 and 4 are Secured

15. The Disclosure Statement is also deficient in failing to provide information or detail concerning the Effective Date value of the Reorganized Debtor. Such information is critical as the Groeb Plan cancels and extinguishes prepetition equity interests and issues new stock to the Class 3 Senior Loan Claims and the DIP Facility Claims.

16. Pursuant to the Groeb Plan, "in no event shall more than $10 million of DIP Facility Claims and Senior Loan Claims in the aggregate be satisfied with the New Equity." (Disclosure Statement, page 30, section B.2.) Such statement suggests that the value of the Reorganized Debtor is, in fact, only $10 million. If the actual value of the Reorganized Debtor is in excess of that sum, the Senior Loan Claims and DIP Facility Claims will receive an improper premium. Notwithstanding this fact, no meaningful information is given as to how the $10 million value was established. The Disclosure Statement provides truncated Projected Statements of Operations, Working Capital and Cash Flow, without detail or explanation as to how those projections might tie into the Reorganized Debtor's exit value.

17. Furthermore, the aforementioned problem is compounded by the fact that neither the Disclosure Statement, nor the Groeb Plan, state whether the Class 3 Senior Loan Claims or the Class 4 Senior Subordinated Note Claims are under or over-secured. Because of this, it is impossible to determine whether plan treatment of these classes is compliant with Section 1129 of the Bankruptcy Code. For example, Class 4 Senior Subordinated Note Claims, which comprise $7.0 million of Senior Subordinated Notes, are satisfied with $3.0 million in New Subordinated Notes and New Warrants equal to 13% of the New Equity. What is the value of this distribution? How does such distribution match up with Class 4 creditor's prepetition claims? No answer is provided.

C. The Reorganized Debtor's Release Provision Fails to Provide Adequate Information Regarding Releases

18. The Groeb Plan contains broad releases by the Debtor, third party releases and an exculpation of the Debtor and non-Debtor parties. However, the Disclosure Statement does not contain any information, other than an in passing mention of releases and "Released Parties." The identities of the "Released Parties" or the scope of the release is simply not provided. The Disclosure Statement also fails to provide the most basic information necessary for Holders of Claims and Interests to make an informed judgment about the nature or value of the claims intended to be released or waived through the releases and exculpation, the status of the Debtor's investigation of such claims, settlement possibilities and the financial ability of each releasee or exculpated party to satisfy any judgment if the claims were successfully pursued. Likewise, no information is provided concerning the availability of insurance coverage applicable to such claims. No articulation of the need for any particular third party release is offered. Without such information, Holders of Claims cannot make the informed judgment required by Section 1125(b) of the Bankruptcy Code with respect to the proposed releases and exculpation. Since the Plan

does not contemplate paying unsecured claims against the Debtor in full, each dollar not recovered by actions against Released Parties and exculpated entities decreases the distribution to holders of unsecured claims against the Debtor.

D. Conclusion

19. The Debtor's Disclosure Statement does contain "adequate information" as required pursuant to Section 1125 of the Bankruptcy Code as critical information pertaining to the disparate treatment of creditors, the assets comprising the *res* of the General Unsecured Claims Litigation Trust, the value of the Reorganized Debtor, and the scope and parties receiving releases and exculpation, including third parties is simply not provided.

WHEREFORE, Ernest L. Groeb, Troy L. Groeb and E. Jeanne Groeb, as Trustee of the E. Jeanne Living Trust respectfully request that this Court deny approval of the Disclosure Statement and grant such other and further relief as is just and appropriate under the circumstances.

Dated: November 6, 2013

ERNEST L. GROEB, TROY L. GROEB and E. JEANNE GROEB, AS TRUSTEE OF THE E. JEANNE LIVING TRUST

By /s/ Matthew T. Gensburg
One of Their Attorneys