SO ORDERED,

Judge Jamie A. Wilson
United States Bankruptcy Judge
Date Signed: June 6, 2023

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

TUNICA HOSPITALITY & ENTERTAINMENT, LLC,	**CASE NO. 22-01693-JAW**
DEBTOR.	**CHAPTER 11**

ORDER: (A) GRANTING UNITED STATES TRUSTEE'S MOTION TO CONVERT OR DISMISS; (B) RESOLVING SHOW CAUSE ORDER; (C) DISMISSING BANKRUPTCY CASE; AND (D) DENYING CONFIRMATION OF DEBTOR'S SECOND AMENDED SUBCHAPTER V PLAN OF REORGANIZATION AS MOOT

This matter came before the Court for hearing on May 3, 2023 (the "Hearing"), on the United States Trustee's Motion to Dismiss or Convert ("UST's Motion") (Dkt. #101) filed by David W. Asbach, Acting U.S. Trustee for Region 5 (the "UST"); the Answer and Response to Motion to Convert or Dismiss (Dkt. #111) filed by Craig M. Geno, the Subchapter V Trustee; the Response to U.S. Trustee's Motion to Convert or Dismiss (the "Response") (Dkt. #112) filed by the debtor, Tunica Hospitality & Entertainment, LLC (the "Debtor"); and the Order to Show Cause As to Why Case Should Not Be Dismissed (the "Show Cause Order") (Dkt. #98) issued by the Court in the above-referenced bankruptcy case (the "Bankruptcy Case"). The Court issued the Show Cause Order because of the Debtor's failure to: (1) appear at the confirmation hearing on April 11, 2023; (2) file a Ballot Summary and Certification form (Local Form MSSB-LR-3018-1) (Dkt. #82);

and/or (3) file a confirmable plan. Another matter before the Court at the Hearing was the confirmation of the Amended Debtor's Plan of Reorganization Dated January 19, 2023 (the "Second Amended Plan") (Dkt. #79) filed by the Debtor; the Objection to Confirmation (Dkt. #75) filed by TJM Tunica, LLC ("TJM"); the Response to Amended Plan of Reorganization for Small Business Under Chapter 11 (Dkt. #77) filed by the Subchapter V Trustee; and the United States Trustee's Objection to Debtor's Second Amended Subchapter V Plan of Reorganization (Dkt. #91) filed by the UST.

The hearing on confirmation of the Second Amended Plan was supposed to be held on April 11, 2023. Although the Subchapter V Trustee, counsel for TJM, and counsel for the UST were present at the April 11, 2023 hearing, neither the Debtor's counsel nor any representative of the Debtor appeared. Counsel for the Debtor, Herbert J. Irvin, informed the Debtor's corporate representative and his co-counsel, William "Bo" Roland, not to appear but did not file a motion to continue or notify the Court or any of the parties in interest in advance of their absence.[1] The Court reset the confirmation hearing to be heard on May 3, 2023 on the same date as the UST's Motion and the Show Cause Order. (Dkt. #100). For clarity, the Court identified the following contested matters set for rehearing on May 3, 2023 related to the confirmation of the Second Amended Plan:

1. Amended Debtor's Plan of Reorganization (Dkt. #79) filed by the Debtor;
2. United States Trustee's Objection to Debtor's Second Amended Subchapter V Plan of Reorganization (Dkt. #91) filed by the UST;
3. Response to Amended Plan of Reorganization for Small Business Under Chapter 11 (Dkt. #77) filed by the Subchapter V Trustee; and
4. Objection to Confirmation (Dkt. #75) filed by TJM.

[1] The Court issued an Order To Show Cause (Dkt. #99) to counsel for the Debtor to explain why sanctions should not be imposed against them, including the payment of reasonable attorneys' fees and costs incurred by other parties in interest who appeared at the original confirmation hearing on April 11, 2023. After a hearing, counsel for TJM filed a motion seeking reimbursement of their attorneys' fees and expenses. (Dkt. #119). No response was filed, and a separate order was entered granting that motion. (Dkt. #124).

(Dkt. #100).

At the Hearing, Herbert J. Irvin represented the Debtor; Chris Powell and Glenn Williams represented TJM; and Christopher J. Steiskal represented the UST. Craig M. Geno, the Subchapter V Trustee, was also present. Ten exhibits were introduced into evidence without objection,[2] and one witness, the Debtor's sole managing member, Don Hewitt ("Hewitt"), testified.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (L), and (O). Notice of the Hearing was proper under the circumstances.[3]

Introduction

The Debtor has no employees, is not currently engaged in any business activities, lacks any cash flow or income, owns no real property, and as of April 30, 2023 has only $75.03 in its bank account. (Dkt. #123). Yet in the Second Amended Plan, the Debtor proposes an extensive redevelopment and renovation of the former Harrah's Casino & Resort located in Tunica County, Robinsonville, Mississippi (the "Property").[4] To do so, the Debtor must: (1) succeed in a separate but

[2] The UST's composite exhibits are cited as "(UST Ex. #)"; the Debtor's exhibits are cited as "(D. Ex. #)"; and TJM's single exhibit is cited as "(TJM Ex. #)".

[3] Notwithstanding the Court's order (Dkt. #100), at the rescheduled confirmation hearing on May 3, 2023, the Debtor's counsel asked for a continuance of the confirmation Hearing and an opportunity to file a third amended plan. The Court denied his *ore tenus* motion for a continuance because: (1) a copy of the order resetting the confirmation hearing to May 3, 2023 was issued and served on Debtor's counsel on April 11, 2023, but the Debtor did not file a motion to continue the rescheduled hearing; (2) the confirmation hearing had already been reset once because of the failure of the Debtor or its counsel to appear; (3) the Debtor's counsel stated that if he had appeared at the April 11, 2023 hearing, he would have asked for a continuance anyway; (4) the Debtor has not filed a third amended plan; and (5) counsel for other parties had travelled long distances to appear and the Court did not want them to incur the expense of appearing for a third time.

[4] The Property now sits vacant but initially included a casino, two hotels, an RV park, a golf course, a children's arcade, a conference center, a shooting range, three administrative buildings, and a warehouse. The Debtor proposes to operate the Property as a family entertainment complex—without the casino. The main attraction of the resort would be a new twenty-acre waterpark, but the Debtor also proposes to build a new convention and conference center, sports complex, music venue, and beach and boardwalk. The

related adversary proceeding invalidating the foreclosure sale of the Property to TJM and returning title of the Property to Tunica County; (2) negotiate and enter into a new agreement with Tunica County allowing the Debtor to purchase the Property for $12 million; and (3) obtain financing somewhere between $20 million and $150 million for the purchase and development of the Property.

1. The Debtor is not reasonably likely to prevail in the adversary proceeding.

The Debtor does not own, and has never owned, Harrah's Casino & Resort. The current owner, TJM, purchased the Property for $19,792,689.00 in a foreclosure sale after Tunica County, Mississippi, allegedly defaulted on a loan. The Debtor has initiated an adversary proceeding asking the Court to invalidate that foreclosure sale as a violation of the automatic stay, but the Debtor was not a party to the asset purchase agreement, note, or deed of trust and has never owned any interest in the Property. The Debtor acknowledges in the Second Amended Plan that confirmation depends on its success in setting aside the foreclosure sale, otherwise "there will be no assets to satisfy the claims on any of Debtor's creditors; so, Debtor will seek dismissal of its case or elect to convert its case to a Chapter 7 liquidation." (Dkt. #79 at 4). For the reasons set forth herein, the Debtor is not likely to prevail in the adversary proceeding.

2. There is no evidence that Tunica County would agree to sell the Property to the Debtor.

The Second Amended Plan contemplates the Debtor's assumption of a resale agreement, which had a closing date of March 31, 2022, five months before the bankruptcy filing. (Hr'g at 1:28-1:29); *see* Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439,

Debtor would rehabilitate and renovate the existing facilities, including two hotels with a total of 1,164 rooms, an 18-hole golf course and clubhouse, a 200-slot RV park, a family entertainment center, administrative facilities, a warehouse, a sporting clays facility, numerous restaurants and retail outlets, and an upscale spa. (Dkt. #79 at 1). The total cost of the proposed construction and renovation of the Property is approximately $157 million. (Hr'g at 2:04-2:05) (May 3, 2023). The Hearing was not transcribed. All references to the Hearing are to the timestamp of the audio recording.

460 (1973) (defining executory contract under 11 U.S.C. § 365 as a contract on which performance remains due to some extent on both sides prior to the bankruptcy filing). Because the closing date in the resale agreement expired before the bankruptcy filing, the Debtor must re-negotiate a new resale agreement with Tunica County.

3. The Debtor is not reasonably likely to obtain financing to purchase and redevelop the Property.

Assuming that the Debtor succeeds in setting the foreclosure aside, the Property is returned to Tunica County, and the Debtor enters into a new asset purchase agreement with Tunica County, another major obstacle is the Debtor's lack of funds. According to the Debtor, the price to purchase the Property is $12 million and the cost to construct the waterpark and build and renovate the other amenities is more than $150 million. The sole member of the Debtor, Hewitt, does not intend to personally provide any major financial support for the business. In the Second Amended Plan, the Debtor proposes to obtain a $20 million loan from an unnamed "co-developer" to acquire the Property and alludes to other future loans. At the Hearing and for the first time, Hewitt and the Subchapter V Trustee mentioned a potential new investor who wished to remain anonymous, but even he had not committed to provide any financing. Seven months after the filing of the bankruptcy petition, therefore, the Debtor has no commitment for any loan in any amount from any lender.[5]

As explained in detail below, the Second Amended Plan presents, at best, a visionary venture based on multiple assumptions and objectives that were sought but not realized in the past and are not reasonably likely to come to fruition in the near future. This Bankruptcy Case is not what

[5] The Debtor's inability to finance the project is no surprise. Hewitt's search for funds has been ongoing for the past seven years. Notably, the deal was not closed when the parties were cooperating or before Tunica County allegedly defaulted on the note and the purchase price of $12 million was not in dispute.

bankruptcy laws were intended to address. For these reasons, the Court agrees with the UST and TJM that cause exists to dismiss the Bankruptcy Case.

Facts[6]

Hewitt, the Debtor's sole owner, lives in Hinds County, Jackson, Mississippi (about 200 miles from Robinsonville, Mississippi). He has no prior experience in developing or managing a multi-million-dollar resort, but has worked diligently for the past seven years in his quest to own and operate a family entertainment complex on the grounds of the defunct Harrah's Casino & Resort. (Hr'g at 2:02-2:03). Hewitt testified that Tunica County is experiencing a decrease in casino revenue which he attributes to its failure to diversify its offerings to include non-gaming, family-oriented amenities. (Hr'g at 2:40; Dkt. #112 at 2). He seeks to reverse that downward trend by redeveloping the Property.

The facts relevant to the issues here begin in 2016, well after Hewitt's attempts to buy the Property from TJM in a private sale had failed, and one year before Hewitt formed the Debtor as a Mississippi limited liability company. (Dkt. #112 at 3).

Hewitt testified that after Tunica County was plagued by severe storms and flooding, the Property qualified for designation as a major disaster area that would allow for the creation and approval of an urban renewal plan. (Hr'g 12:03-12:07); *see* MISS. CODE ANN. §§ 43-35-3, -13(g). Hewitt saw an opportunity for Advanced Technology Building Solutions, LLC ("ATBS"), a construction company he already owned, to enter into a public-private partnership with Tunica County for that purpose. Hewitt envisioned that Tunica County would acquire the Property from TJM. ATBS, in turn, would purchase the Property from Tunica County and become the developer. At the end of

[6] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, as made applicable by Rule 9014 of the Federal Rules of Bankruptcy Procedure.

the financing term, the ownership of the Property would return to Tunica County through a lease-purchase agreement. Hewitt explained that there were significant tax advantages to bringing Tunica County into the project.[7] (Hr'g at 12:01).

To formulate an urban renewal plan that met the requirements of Mississippi's Urban Renewal Law, Hewitt and/or ATBS incurred significant costs in obtaining market studies, appraisals, architectural and design work, and engineering services. Some, if not all, of these debts remain unpaid today. Hewitt expected these costs to be paid through tax-exempt urban renewal bonds, but as discussed later, those bonds were never purchased.

Hewitt formed the Debtor as a "special purpose entity" on May 17, 2017 to purchase and operate the Property. He confirmed at the Hearing that he did not intend for the Debtor to engage in any business activities until after it acquired the Property. (Hr'g at 12:33). Hewitt continued to use ATBS after he formed the Debtor to attempt to complete the deal. (Hr'g at 12:33).

Urban Renewal Plan

Hewitt, through ATBS, eventually formulated the "Urban Renewal Plan (Southern Celebration Boulevard Project)" that contemplated Tunica County's acquisition, construction, and renovation of 2,200 acres of Property for a convention center, two hotels with a total of 1,168 rooms, an RV park, a shooting range and hunting grounds, an administrative complex, a waterpark, an amphitheater, a golf course, a children's arcade, a lake, fishing pier, and ballfields. (D. Ex. 1 at 37).[8] The urban renewal plan provides: "The owner and operator of the Urban Renewal Project *will be* [the Debtor] or its assignees." (D. Ex. 1 at 38) (emphasis added).

[7] Hewitt testified that Tunica County was prohibited by state law from exempting the Property from taxation, but the Property, if owned or leased by Tunica County, would be exempt from taxation. (Hr'g at 12:01); *see* MISS. CODE ANN. § 27-31-1(b).

[8] Page citations to the Debtor's exhibits are to the page numbers assigned to the documents when they were filed on the docket.

On August 10, 2017, the Board of Supervisors of Tunica County, Mississippi (the "Board") adopted a resolution approving the urban renewal plan and the issuance of county renewal bonds for funding the project. (D. Ex. 1 at 25). On March 19, 2018, the Board adopted a second resolution that approved the purchase of the Property from TJM for $12 million pursuant to a note with a maturity date of 150 days.[9] (D. Ex. 2 at 3-5). According to the resolution, Tunica County's payment of the note would be made from funds obtained from the subsequent sale of the Property to the "developer" before the note became due. (D. Ex. 2 at 3). The Board designated the Debtor and/or ATBS as the developer and authorized Tunica County to sell the Property to the developer for $12 million after acquiring it from TJM "in order that the Developer *will be able* to undertake the Urban Renewal Project." (D. Ex. 2 at 5) (emphasis added).

Asset Purchase Agreement Between TJM and Tunica County

Consistent with the Board's resolutions, Tunica County entered into an asset purchase agreement with TJM on May 10, 2018 to buy the Property for $12 million, plus carrying and maintenance costs. *The Debtor was not, and has never been, a signatory party to the asset purchase agreement between Tunica County and TJM.* (Hr'g at 1:06-1:07, 1:45-1:48). Tunica County signed a promissory note in favor of TJM with a single payment of $12 million due in full on August 16, 2018. (D. Ex. 4 at 1-2). The note was payable without interest, but if Tunica County remained in default for more than five days after the due date, TJM was entitled to interest at the rate of eighteen percent (18%) or the highest legal rate permitted by law. (D. Ex. 4 at 1). Tunica County signed a deed of trust in favor of TJM to secure payment of the loan. (D. Ex. 4 at 3-42). In the event of Tunica County's default, the deed of trust provided the following remedy: "[TJM] may accelerate

[9] According to Hewitt, TJM also obtained certain tax concessions. (Hr'g at 12:23-12:24).

the Secured Debt and foreclose this Security Instrument in a manner provided by law." (D. Ex. 4 at 10).

Resale Agreement Between Tunica County and ATBS

On August 30, 2018, Tunica County signed a resale agreement with ATBS, in which Tunica County agreed to re-sell the Property to ATBS for $12 million. (Hr'g at 12:03, 12:08; Adv. Dkt. #18-2 at 2).[10]

Seven Failed Closings Between Tunica County and ATBS/Debtor from August 2018 to March 2022

At this point, all went according to the urban renewal plan approved by the Board. A problem arose when the sale to ATBS did not close by August 16, 2018, the maturity date of the note. Because ATBS did not pay Tunica County, Tunica County did not pay TJM, and TJM declared Tunica County in default of the note. Hewitt and/or Tunica County convinced TJM to agree in writing not to initiate foreclosure proceedings until October 31, 2019. (Adv. Dkt. #1-3). Tunica County correspondingly amended its resale agreement with ATBS twice to extend the closing date. (Adv. Dkt. #18-2 at 2-3). The sale to ATBS, however, did not close by October 31, 2019, and Tunica County did not pay TJM. Tunica County amended its resale agreement with ATBS to extend the closing date for a third time to January 31, 2020. (Adv. Dkt. #18-2 at 3).

In the meantime, Tunica County issued obligation bonds pursuant to Mississippi's Urban Renewal Law, MISS. CODE ANN. § 43-35-1 *et seq*., and Tunica County paid $5,478,662.00 of those funds to TJM to reimburse TJM for special assessment payments it had made after the sale of the

[10] References to documents filed in related adversary proceeding 22-00026-JAW are cited as "(Adv. Dkt. #)".

Property.[11] According to Hewitt, TJM agreed in writing to extend the foreclosure date from October 31, 2019 until March 1, 2020 because of this payment. (Hr'g at 2:27).

When ATBS again failed to pay Tunica County for the Property by the new deadline of March 1, 2020, Tunica County again failed to pay TJM. TJM did not agree in writing to any further extensions and was entitled to foreclose on the Property as of February 28, 2020. (Hr'g at 1:48-1:49). TJM, however, did not immediately initiate foreclosure proceedings.

Despite ATBS's default attributable to its financial inability to purchase the Property, Hewitt continued his efforts to move the urban renewal project forward. He applied for a Tourism Sales Tax Rebate from the State of Mississippi, which initially denied his application because the Property did not meet the statutory requirements then in existence. (Dkt. #112 at 5). ATBS hired consultants and a lobbyist to secure special legislation to amend Mississippi's Tourism Project Incentive Program law so that the Property would fit within the definition of a "tourism project" eligible for sales tax incentive payments. MISS. CODE ANN. § 57-26-1(d). The resulting amendment, effective July 1, 2020, added the following subsection:

> A tourism attraction, located in a county bordered by the Mississippi River and including Interstate 69 and U.S. Highways 3, 4, and 61, with a minimum investment of One Hundred Million Dollars ($100,000,000.00) and subject to an urban renewal plan that redevelops two (2) hotels, a golf course and clubhouse, a shooting range and a convention center and develops an entertainment center and waterpark, together with other attraction-related amenities, on an area not less than two thousand (2,000) acres.

MISS. CODE ANN. § 57-26-1(d)(viii). The Debtor contends that this special legislation "declared [the Debtor] as Developer, Owner, and Operator of the subject project." (Dkt. #112 at 5). The legislation, however, does not mention the Debtor and refers to "an urban renewal plan" rather than the more specific Renewal Plan for the Southern Celebration Boulevard Project. (Dkt. #112,

[11] The parties dispute whether TJM agreed to apply these funds to a partial payment of the note. (Dkt. #112 at 6-7).

Ex. D). Hewitt testified that after passage of the special legislation, the Mississippi Development Authority allocated $46 million in sales tax rebates to the project. (Hr'g at 12:17; Dkt. #112 at 6).

On June 7, 2021, Tunica County signed an agreement with ATBS in which Tunica County agreed to ATBS's assignment of the resale agreement to the Debtor and also to a fourth extension of the closing date to July 1, 2021. (Adv. Dkt. #18-2 at 2). Thereafter, Tunica County agreed to a fifth extension of the closing date to October 31, 2021. (Adv. Dkt. #18-2 at 3). Tunica County agreed to the assignment and the extensions even in the absence of any written agreement with TJM not to foreclose. The new closing dates expired without a sale to the Debtor.

In November 2021, Tunica County issued $157 million in urban renewal revenue bonds, but the bonds were never purchased. (Hr'g at 1:08-1:09; Dkt. #112 at 6). Then, on December 20, 2021, Tunica County agreed to a sixth extension of the closing date to March 31, 2022. (Adv. Dkt. #18-2 at 2-3). Again, the sale to the Debtor did not close. Tunica County did not agree in writing to any additional extensions of the closing date, and the Debtor's agreement with Tunica County expired on March 31, 2022. (Hr'g at 1:28-1:29). There was no evidence whatsoever that Tunica County has made any attempt to revive the project since then. Counsel for TJM indicated at the Hearing that Tunica County was no longer interested in the project.[12] Hewitt, however, suggested that Tunica County had only temporarily disengaged itself from the project. He testified that Tunica County told him to return if and when the Debtor had financing in place. (Hr'g at 1:29).

ATBS's Purported Construction Lien

At this juncture and after multiple failed attempts to close the sale, Hewitt became concerned about protecting ATBS's financial investment if TJM's foreclosed on the Property. On April 13, 2022, ATBS filed a construction lien against the Property in the amount of $8,607,878.69,

[12] Tunica County has not made any appearance in the Bankruptcy Case. Likewise, counsel for TJM pointed out that Tunica County has not sought to set aside the foreclosure sale of the Property. (Hr'g at 10:29).

representing the total costs ATBS allegedly incurred in developing the urban renewal plan.[13] (D. Ex. 6). According to Hewitt, ATBS filed the lien on the Debtor's behalf, but the lien itself does not mention the Debtor.[14] (Hr'g at 12:32-12:35). The lien sets forth at the top of the second page: "This claim of lien expires and is void 180 days from the date of filing of the claim of lien if a payment action is not filed by the claimant within that time period." (D. Ex. 6 at 2). No evidence was presented showing that ATBS initiated a payment action.

Foreclosure of Tunica County's Property

In late April 2022, TJM commenced a foreclosure action. (D. Ex. 7 at 2). In response, the Debtor filed a lawsuit in the Chancery Court of Tunica County, Mississippi (the "Chancery Court") seeking a preliminary and permanent injunction against TJM to enjoin the foreclosure sale set for May 19, 2022. (Adv. Dkt. #27 at 9). The morning of the foreclosure sale, the Chancery Court entered an order postponing the sale and instructing the Debtor to reimburse TJM $200,000.00 for maintenance costs incurred during the postponement. When the Debtor failed to make those payments, the Chancery Court denied the Debtor's request for a preliminary injunction, and TJM commenced a second foreclosure action. (Adv. Dkt. #27 at 9).

ATBS, as a purported holder of a lien against the Property, requested the "payoff amount" to stop the foreclosure sale.[15] TJM informed both ATBS and Tunica County that Tunica County owed $24,679,104.00 under the note as of April 21, 2022. (D. Ex. 7). That total included the principal amount of $12 million, property upkeep costs of $4,792,502.00, interest of $7,876,602.00, and

[13] TJM has filed a state court action against ATBS to void the construction lien. (Hr'g at 10:25). Hewitt admitted at the Hearing that neither the Debtor nor ATBS has actually built or renovated any facilities on the Property. (Hr'g at 1:09-1:10).

[14] The Court doubts the Debtor could have filed a lien because Mississippi's Construction Lien Law confers lien rights only to contractors, subcontractors, materialmen, and design professionals, a group that would not appear to include the Debtor. *See* MISS. CODE ANN. §§ 85-7-401, 85-7-403.

[15] Under Mississippi law, MISS. CODE ANN. § 89-1-59, "a debtor may stop a foreclosure sale before it comes final, by bringing the debt current." *In re Martin*, 276 B.R. 552, 555 (Bankr. N.D. Miss. 2001).

$10,000.00 in foreclosure fees. Although the Debtor was not a party to the note, Hewitt disputed the payoff amount. He argued that TJM should have deducted $5,478,562.00, the amount Tunica County previously paid TJM, and that TJM should not have charged Tunica County any default interest, or at least not default interest at the rate of 18% per annum. More fundamentally, Hewitt questioned TJM's right to foreclose because he viewed TJM and Tunica County as holding the Property for the benefit of the Debtor. (Hr'g at 12:24). Just prior to the sale date, TJM agreed to reduce the payoff amount by $5,478,562.00. The new payoff amount, according to TJM, was $19,792,689.00. The Debtor, however, did not have these funds available.

Bankruptcy Case

On August 25, 2022, the same day as the scheduled foreclosure sale, the Debtor filed a petition for relief under subchapter V of chapter 11 (the "Petition") (Dkt. #1). The Debtor's stated purpose for the bankruptcy filing was to attempt to halt the foreclosure sale of Tunica County's Property; its unstated, but primary, objective was to force TJM to sell the Property to Tunica County for $12 million, without regard to Tunica County's alleged default of the loan or the Debtor's financial ability to buy the Property for $12 million after Tunica County's six extensions of the closing date.

Although the Petition was filed on the same day, it is unknown whether it was filed before or after the foreclosure sale. Regardless, the Debtor has not proved that it owns any interest in the Property under § 541. TJM did not consider the Property to be an asset of the Debtor's estate subject to the automatic stay and proceeded with the foreclosure sale. (Adv. Dkt. #18 at 3-4); *see* 11 U.S.C. § 362(a). TJM purchased the Property at the foreclosure sale for $19,792,689.00. Under Mississippi law, the foreclosure sale, if valid, ended Tunica County's interest in the Property. *Chase Home Fin., LLC v. Hobson*, 81 So. 3d 1097, 1100-01 (Miss. 2012). The Debtor considered

the foreclosure sale to be invalid because of TJM's alleged failure to provide what it thought was a correct "redemption" amount. (Hr'g at 12:28, 12:51-12:52).

At the Hearing, Hewitt testified that he believed the Debtor has certain rights in the Property arising from the urban renewal plan. The Debtor, nonetheless, did not list the Property, or any interest in the Property, as an asset of the bankruptcy estate in its schedules. (Dkt. #27). In Schedule A/B, the only assets the Debtor listed are: (1) state law claims for breach of contract, fraud, and tortious interference in the amount of $200 million and (2) the statutory lien in the amount of $8,607,899.00. The purported state law claims of $200 million appear to arise out of the failed urban renewal project although it is unclear why the Debtor has standing to bring these claims. The alleged statutory lien of $8,607,899.00 arises out of the construction lien filed by ATBS (not the Debtor), but, again, it is unclear why the Debtor has standing to assert such an interest. Hewitt testified that he understood that the Debtor would be responsible for all expenses incurred for the benefit of the urban renewal plan once the Debtor purchased the Property but that never happened. (Hr'g at 12:33).

Alleged Creditors

In Schedule E/F, the Debtor lists twenty nonpriority unsecured creditors with claims totaling $8,901,535.00. (UST Ex. 1; Dkt. #36 at 2-6). Four of these purported unsecured creditors filed proofs of claim. A quick perusal of the documents attached to two of the four proofs of claim indicates that the debt could be owed by ATBS, not the Debtor. (Cl. #3-1, #4-1). A third claim is for a debt owed by Tunica Hospitality and *Resorts*, LLC," not the Debtor, Tunica Hospitality and *Entertainment*, LLC. (Cl. #2-1). The fourth claim does not include any underlying documents that identify the Debtor. (Cl. #5-1). It is unclear how the Debtor incurred any of these alleged debts. Hewitt admitted that the Debtor has not undertaken any improvements to the Property, nor could

it since it has never owned the Property. (Hr'g at 12:00). Although the lights remain turned on, the Property has sat vacant since 2016 except for security guards who patrol the facilities—paid for by TJM. The Debtor did not object to any of these proofs of claim despite the uncertainty of the Debtor's liability. Indeed, the Debtor seeks to pay some of these claims through the Second Amended Plan.

No Business Operations

The Debtor's monthly operating reports show no business operations. (UST Ex. 2; Dkt. #52, #53, #58). In the first four months, from August to September 2022, the Debtor had no money in its account. (Dkt. #52, #53). In October 2022, the Debtor deposited $200.00 into its bank account. (Dkt. #58). The source of these funds is unknown. No other deposits were made for the next four months from November 2022 to February 2023, and the account dwindled from $200.00 to $125.02. (UST Ex. 2). The only activity in the account during this time were bank fees and interest income. Then, Hewitt deposited $1,000.00 of his personal funds into the Debtor's account on March 22, 2023, and two days later, the Debtor wrote a $1,000.00 check made payable to the Subchapter V Trustee.[16] The bank charged the Debtor a monthly service fee of $25.00 and paid the Debtor $0.01 in interest on March 31, 2023, leaving a balance of $100.03. (UST Ex. 2). The Debtor's net cash flow for March 2023, therefore, was negative $25.00. As of April 30, 2023, the Debtor has only $75.03 in his account. (Dkt. #123).

Adversary Proceeding

Soon after filing bankruptcy, the Debtor initiated an adversary proceeding against TJM challenging the validity of the foreclosure sale. *See Tunica Hospitality & Entertainment, LLC v. TJM*

[16] The Court entered an order requiring the Debtor to begin depositing $1,000 per month with the Subchapter V Trustee to be held in escrow pending approval of the Subchapter V Trustee's application for compensation. (Dkt. #94).

Tunica, LLC (Tunica Hospitality & Entertainment, LLC), Adv. Proc. 22-00026-JAW (Bankr. S.D. Miss. Nov. 8, 2022) (the "Adversary"). The Debtor attached more than 1,400 pages of exhibits to its Complaint to Reinforce Stay, Set Aside Foreclosure, Injunctive and Declaratory Relief, and for Sanctions for Violation of the Automatic Stay (the "Complaint") (Adv. Dkt. #1, #2, #7).

In the Complaint, the Debtor asks the Court to void the foreclosure sale, extend the automatic stay under 11 U.S.C. § 362(a) to Tunica County (which is a non-debtor) and the Property (which is not owned by the Debtor), determine the amount owed TJM pursuant to the note and deed of trust (which the Debtor did not sign) to allow the Debtor to complete its "redemption" of the Property, and award damages to the Debtor for TJM's alleged violation of the automatic stay for foreclosing on Tunica County's Property. The Debtor seeks this relief even though it has never held legal title to the Property. It nevertheless insists that it holds certain "possessory rights" in the Property arising from the following:

1. The agreement between ATBS and Tunica County entered into on August 30, 2018, and assigned to the Debtor on June 7, 2021, in which Tunica County agreed to sell the Property to ATBS. This agreement was amended six times to extend the closing date to March 31, 2022. No closing occurred;

2. Its alleged status as a third-party beneficiary of the asset purchase agreement between TJM and Tunica County;

3. Its right to "redeem" the Property as allegedly recognized by the Chancery Court in its preliminary ruling halting the foreclosure sale;

4. The construction lien filed by ATBS for the costs it incurred related to the urban renewal plan; and

5. Certain unidentified "indemnity" obligations owed by the Debtor to TJM.

(Adv. Dkt. #7 at 2-3, 16). TJM filed a motion to dismiss the Adversary on the ground the Complaint fails to state a claim upon which relief can be granted. (Adv. Dkt. #15). TJM argued that the thousand pages of exhibits attached to the Complaint demonstrated that the Debtor has

no legal or equitable interest in the Property and that the Property is not an asset of the Debtor's bankruptcy estate. (Adv. Dkt. #18 at 2-3). TJM's motion to dismiss the Complaint remains pending.[17]

The Court disagrees with the suggestion that confirmation of the Second Amended Plan cannot proceed before a final ruling in the Adversary regarding the validity of the foreclosure sale.[18] As noted previously, three conditions must exist for the Debtor to implement its proposal, and the Debtor has the burden of proving that all three are reasonably likely to occur. *See, e.g., In re Rust Rebar, Inc.*, 641 B.R. 412, 427 (Bankr. S.D. Fla. 2022) (holding that plan was not feasible because the debtor failed to show that its chances of prevailing in a pending adversary were reasonably likely). Moreover, even if the Debtor prevailed in the Adversary, only one of the conditions necessary for implementation of the Second Amended Plan—the return of the Property to Tunica County—would be met. The Adversary would not determine whether it is reasonably like that Tunica County will sell the Property to the Debtor or that the Debtor will obtain financing to purchase and redevelop the Property.

Three Proposed Plans of Reorganization

The Debtor has filed three plans of reorganization in the Bankruptcy Case. The Debtor submitted its original subchapter V plan of reorganization (the "Original Plan") (Dkt. #59) on November 23, 2022; its first amended subchapter V plan of reorganization (the "First Amended Plan") (Dkt. #65) on December 1, 2022; and its Second Amended Plan (Dkt. #79) on January 20, 2023. The Second Amended Plan was the subject of the confirmation Hearing. The three plans differ in

[17] A hearing on the motion to dismiss the Adversary was initially set for May 3, 2023 but was cancelled and replaced with the rescheduled hearing on the confirmation of the plan, the Show Cause Order and UST's Motion.

[18] As discussed later, the Debtor is not reasonably likely to succeed in the Adversary. *See infra* pp. 29-30.

two major respects: (1) the Debtor's source of financing to fund the urban renewal project and (2) the treatment of general unsecured creditors.

Second Amended Plan

In the Second Amended Plan, as in all previous plans, the Debtor proposes to acquire and renovate the resort Property. The Debtor admits that its success hinges on this Court's favorable decision in the related Adversary setting aside the foreclosure sale and returning the Property to Tunica County.

To finance the purchase of the Property and the development of the project, the Debtor proposes three tranches of financing. The first tranche of $20 million would be used to purchase the Property from Tunica County for $12 million. In the Second Amended Plan, the remaining $8 million would be used to pay certain unsecured creditors identified as "critical vendors" the full amount of their claims and all other unsecured creditors 10% of their claims. The Second Amended Plan provides that other tranches of financing would be obtained to finalize the overall development of the project but includes no other information about these additional loans. This provision differs from the Original Plan and the First Amended Plan. Both of those plans referred to additional loans totaling $121,339.279.00 to complete the project.

As to the source of the initial $20 million loan, the Debtor states in the Second Amended Plan that it is having ongoing discussions with a "co-developer," who it does not name. The Debtor proposes in the Second Amended Plan to provide a Letter of Intent along with Proof of Funds to the Court but agrees to do so only *after* confirmation of the Second Amended Plan. (Dkt. #79 at 1). An exhibit attached to the Second Amended Plan, which was not attached to the other plans, purports to be a summary of key terms of, and conditions for a loan, but it does not appear to relate to the loan from the "co-developer." The term sheet is dated September 23, 2022, well before the

Original Plan was filed. It appears to have been prepared by the potential lender mentioned in the Original Plan that had decided not to make the initial loan "after discovering that its key collateral had been lost in a foreclosure sale." (Dkt. #65). The interest rate, other costs of borrowing, pre-payment penalty, and break-up fee are redacted from the term sheet.

In Article 2, Classification of Claims and Interests, the Second Amended Plan creates four classes of claims: Priority, Secured, General Unsecured, and Equity. The third class consists of general unsecured creditors and is subdivided into Class 3A, made up of "critical vendors," and Class 3B. Attached as Exhibit C to the Second Amended Plan is a list of critical vendors in Class 3A.[19] Critical vendors will receive payment of their claims in full, but all other unsecured creditors will receive only 10% of their claims.

The Debtor proposes to assume certain executory contracts and unexpired leases listed in Exhibit D. At the top of that list are the management agreement between the Debtor and Tunica County and the Board's resolution approving the Debtor as the owner and operator of the urban renewal project. Also included is a management agreement with Aimbridge Hospitality, the entity that would manage the Property after its acquisition and development. Other contracts are with a lobbyist, financial advisory firm, construction advisor, and architecture firm. It is unclear whether these agreements constitute executory contracts or unexpired leases subject to assumption under 11 U.S.C. § 365. Notwithstanding, the key resale agreement between Tunica County and the Debtor expired pre-Petition and cannot be assumed, necessitating the Debtor entering into a new agreement with Tunica County. *See Pyramid Operating Auth., Inc. v. City of Memphis (In re Pyramid Operating Auth., Inc.*, 144 B.R. 795, 808 (Bankr. W.D. Tenn. 1992) ("It is well established that an agreement or contract which is validly terminated prepetition under applicable state law is

[19] The Debtor did not file a motion to designate certain creditors as "critical vendors," and it is unclear whether the "critical vendors" listed by the Debtor are actually vendors of the Debtor, ATBS, or Hewitt.

not assumable under section 365(a)"); *In re Southold Dev. Corp.*, 134 B.R. 705, 710 (E.D.N.Y. 1991) (holding that courts "cannot resuscitate previously extinguished contract rights.").

The Second Amended Plan does not propose to pay any pre-Petition debts from revenue generated by the resort. As part of its liquidation analysis, the Debtor attached to the Second Amended Plan "Schedule 1-EBITDA Valuation," which approximates the potential cash flows that could be generated by the Debtor in 2023, 2024, and 2025. (TJM Ex. 8). Hewitt testified that Aimbridge Hospitality prepared the chart, which he referred to as the "performer project document." (Hr'g at 1:32). The chart shows that for the remaining months of 2023, assuming 31,243 rooms at the Veranda Hotel are sold, the Debtor will incur a loss of $1,709,284, and in 2024, assuming 72,307 rooms are sold, the Debtor will receive net operating income of $636,306.00. (TJM Ex. 8). These numbers are problematic for several reasons. First, it is questionable whether any facilities, including the Veranda Hotel, would be operational before the end of 2023. Hewitt's estimated that renovations to the Veranda Hotel, the convention center, the RV park, shooting range, golf course, and clubhouse would take six months to complete. Also, because Hewitt estimated that construction of the waterpark would require seventeen or eighteen months to complete, it is unlikely that the resort would attract the volume of customers assumed in 2024. (Hr'g at 2:04-2:06). Second, the chart includes the following disclaimer by Aimbridge Hospitality:

> This analysis is based on assumptions made by Aimbridge with respect to current economic conditions in the marketplace and projections of these conditions in the future. While we believe these projects are reasonable, Aimbridge makes no representation or guarantee that the results will be achieved. The projects are only estimates and market conditions and unforeseen circumstances may make adherence to them impractical.

(TJM Ex. 8).

Plan Objections

TJM, the Subchapter V Trustee, and the UST filed objections to the plan. All argue that the Second Amended Plan lacks feasibility. As to the proposed financing, TJM points out that the Debtor has no loans in place, no letters of commitments for such loans, no prospects for such loans, and no history of obtaining such loans. The Subchapter V Trustee describes the feasibility of the Second Amended Plan as, at best, uncertain and speculative. He questions the Debtor's ability to obtain a loan, especially given its silence as to the source of funding for a multi-million-dollar project.

The UST complains that the Debtor's monthly operating reports show no business activity, and the Second Amended Plan is "very speculative." The UST points out that no motion for any debtor-in-possession financing has been filed, and no letter of intent or poof of funding has been provided by the Debtor.

Show Cause Order

After the Defendant filed the Second Amended Plan, an order was issued setting the date of the confirmation hearing for April 11, 2023 and requiring the Debtor's counsel to mail to creditors a copy of the Second Amended Plan and a ballot for voting on the acceptance or rejection of the Second Amended Plan. (Dkt. #81). The order also provided that ballots shall be returned to the Debtor's counsel and not to the Court. The Clerk of the Bankruptcy Court sent a notice to the Debtor's counsel reminding him that pursuant to Local Rule 3018-1(b), the Debtor *must prepare* and file a Ballot Summary and Certification form, along with copies of all ballots, by April 8, 2023. (Dkt. #82). Although votes were cast rejecting the Second Amended Plan, the Debtor did not file a Ballot Summary and Certification form as required.

The Debtor also did not appear at the April 11, 2023 hearing. No reason was given to the Court in advance of the hearing for the absence of the Debtor and Debtor's counsel. The Court issued the Show Cause Order to the Debtor to explain why the Bankruptcy Couse should not be dismissed for failure to: (1) appear at the confirmation hearing on April 11, 2023; (2) file the Ballot Summary and Certification form; and/or (3) file a confirmable plan. The Court rescheduled confirmation of the Second Amended Plan for May 3, 2023 only to learn at the rescheduled Hearing that the Debtor had intended to file a third amended plan as far back as the April 11, 2023 original hearing but had not done so.

The Debtor's failure to comply with Local Rule 3018-1(b) and its unexplained delay in filing yet another plan makes the Court question the Debtor's ability, and even its willingness, to reorganize or otherwise to meet the requirements of the Bankruptcy Code.

UST's Motion to Dismiss or Convert

Before the Hearing on confirmation, the UST filed a motion to dismiss or convert the Bankruptcy Case, reiterating as grounds many of the arguments that appear in its objection to the Second Amended Plan. (Dkt. #91, #101). The UST asserts that cause exists to dismiss the Bankruptcy Case pursuant to 11 U.S.C. § 1112(b). Grounds for cause, according to the UST, include: (1) no current operations; (2) no income; (3) inability to confirm a plan; and (4) absence of a reasonable likelihood of rehabilitation. (Dkt. #101). At the Hearing, the UST expressed his preference for a dismissal rather than conversion of the Bankruptcy Case, largely because of the absence of any assets. (Hr'g at 10:18-10:19).

The Subchapter V Trustee filed an answer agreeing with substantially all of the factual recitations and allegations in the UST's Motion. (Dkt. #111 at 1). He contends in his answer, however, that a "positive development" in the Bankruptcy Case occurred after the continued April 11, 2023

confirmation hearing. He interviewed a "prospective interested party who may very well commit substantial funds to an investment in the Debtor's project." (Dkt. #111 at 1). Although the Subchapter V Trustee communicated this information to TJM, TJM's counsel was emphatic and unequivocal at the Hearing that TJM was not interested in entertaining any such proposal. (Hr'g at 10:24-10-25). The Subchapter V Trustee nevertheless encouraged the Debtor to request a status conference before the confirmation hearing to make this potential investor known to the Court, but the Debtor did not do so. The Subchapter V Trustee expressed his belief that the UST's Motion should be abated pending further developments from the "prospective interested party."

The Debtor filed a response to the UST's Motion. In its Response, the Debtor recounts its earlier attempts to obtain financing for the project, which failed because of its inability to resolve its dispute with TJM. The Debtor alleges, however, that it has moved on to a new potential lender or investor. That potential investor "desires to remain anonymous to the public" because it is "a private enterprise participating in multiple ventures that are being highly scrutinized at this time." (Dkt. #112 at 14). According to the Debtor, the new potential investor has raised two concerns that have yet to be resolved: (1) it refuses to pay TJM more than the "redemption" amount of $12 million and (2) it disagrees that the creditors listed as "critical vendors" in the Second Amended Plan are actually critical. (Dkt. #112 at 12-13; Hr'g at 1:02-1:07). Notwithstanding these concerns, the Debtor states that it has had "fruitful" discussions with the new potential investor over the past two months and is "confident that it will be able to finalize funding to acquire the Property and complete the project." (Dkt. #112 at 13).

Hearing

Only Hewitt testified at the Hearing. No representative from Tunica County or from the new potential investor appeared at the Hearing. At the Hearing, all opposing parties—the UST,

Subchapter V Trustee, and TJM—agreed that the Second Amended Plan is not confirmable. (Hr'g at 10:14, 10:16, 2:45). Even Hewitt stated that the Debtor could not proceed with confirmation of the Second Amended Plan. (Hr'g at 12:58-12:59).

Hewitt testified that sometime after filing the Second Amended Plan on January 20, 2023, the Debtor began negotiating with a new potential investor and drafting a third amended plan. (Hr'g at 1:00). He was unable to complete his draft of a new plan because he was unsure how to proceed given the investor's request to remain anonymous. (Hr'g at 1:00). In addition, certain key provisions of the new plan were unknown. For example, Hewitt revealed that the new potential investor had demanded an ownership interest in the Property but the amount of that interest had yet to be negotiated. Hewitt guessed that this new arrangement might require the formation of a new entity or at least a name change. (Hr'g at 1:11-1:13). In the end, Hewitt's discussion with this new potential investor never materialized into the Debtor filing a third amended plan.

The Subchapter V Trustee stated at the Hearing that he thought the Bankruptcy Case was "dead in the water" until a week ago. (Hr'g at 10:19). His opinion changed after he participated in a Zoom conference call with the new potential investor who he described as a nationally known developer. The Debtor arranged the Zoom call but did not invite either TJM or Tunica County to participate. (Hr'g at 10:29).

According to the Subchapter V Trustee, the new potential investor expressed a preliminary interest in investing in the project but asked to remain anonymous. He gave the Subchapter V Trustee a copy of a plan to purchase and develop the Property. The Subchapter V Trustee believed that the appearance of this new potential investor introduced a "spark of life" to the Bankruptcy Case. (Hr'g at 10:21). According to the Subchapter V Trustee, the new potential developer proposes to submit a letter of intent to the Court after a due diligence period of ninety days but was

not prepared to commit to any loan at this time. (Hr'g at 10:28-10:29). The potential investor did not appear at the Hearing and no letter of intent was introduced or admitted into evidence.

The Court finds these allegations of a new potential investor—disclosed to the Court for the first time at the Hearing—unavailing given they were not supported by testimony from the new potential investor or by any other evidence. Further, the Debtor's lack of more specific information leads the Court to conclude that Hewitt's discussions with the new potential investor were in their infancy and not persuasive to address the concerns raised in the UST's Motion. This purported "spark of life" was simply too speculative and undeveloped to resuscitate Hewitt's plan for development of the Property.

Also, the Court declines the Subchapter V Trustee's suggestion at the Hearing of a possible motion to sell the Property free and clear of any interest pursuant to 11 U.S.C. § 363(f). The Second Amended Plan does not refer to 11 U.S.C. § 363(f), and no evidence was introduced at the Hearing that the Debtor could satisfy any of the conditions set forth in the five subsections of 11 U.S.C. § 363(f). Notably, the UST expressed his view at the Hearing that it was a waste of time to propose a plan to rebuild Property that the Debtor does not own. (Hr'g at 10:14).

Discussion

The UST seeks dismissal of the Bankruptcy Case for two main reasons: (1) the Debtor's inability to confirm a plan and (2) the absence of a reasonable likelihood of rehabilitation. A subchapter V case may be dismissed or converted to a chapter 7 case "for cause" when it is in the best interests of creditors and the estate. 11 U.S.C. § 1112(b). Examples of "cause" set forth in § 1112(b)(4) include "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). The list, however, is not exhaustive. Courts have recognized that other reasons exist for dismissal or conversion of a chapter

11 case, including the debtor's inability to formulate a confirmable plan within a reasonable time. *In re Babayoff*, 445 B.R. 64, 76 (Bankr. E.D.N.Y. 2011); *In re DCNC N. Car. I, LLC*, 407 B.R. 651, 665 (Bankr. E.D. Pa. 2009) (concluding that "the inability to effectuate a plan, by itself, provides cause for dismissal or conversion of a chapter 11 case"); *In re Vincens*, 287 F. App'x 686, 688 (10th Cir. 2008) ("Dismissal is appropriate where the debtor's failure to file an acceptable plan after a reasonable time indicates its inability to do so.") (quotation omitted).

If cause is established under 11 U.S.C. § 1112(b)(1),[20] conversion or dismissal is mandatory unless the court determines that unusual circumstances exist so that conversion or dismissal is not in the best interests of creditors and the estate. 11 U.S.C. § 1112(b)(2). The directive of § 1112(b)(1) may be excused only if the debtor establishes that it is reasonably likely that a plan will be confirmed within the time frames set forth in the Bankruptcy Code or within a reasonable period of time, that the grounds for converting or dismissing "include an act or omission of the debtor" other than "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," and that a "reasonable justification [exists] for the act or omission" demonstrating cause to dismiss or convert and the act or omission "will be cured within a reasonable period of time fixed by the court." 11 U.S.C. § 1112(b)(2)(B)(i),(ii).

The party seeking dismissal or conversion bears the burden of proving cause by a preponderance of the evidence. A bankruptcy court has wide discretion to determine if cause exists, and if cause is present, to decide whether to dismiss the case or convert it to a chapter 7 proceeding. Here, the Court finds that cause exists to dismiss the Bankruptcy Case.

[20] Hereinafter, the "Code" refers to the U.S. Bankruptcy Code found at Title 11 of the U.S. Code, and all code sections refer to the Code unless specifically noted otherwise.

A. The Debtor is unable to confirm a feasible plan within a reasonable time.

Most chapter 11 debtors can effectuate a plan of reorganization in months. Some debtors with more complex debt structures require more time. Despite three attempts over six months, this Debtor has been unable to file an acceptable plan and is unlikely to do so in the near future.

The confirmation of a subchapter V plan is governed by § 1191. That section provides that a bankruptcy court shall approve a plan that complies with all the requirements of § 1129(a)—the section that governs standard chapter 11 confirmation—other than the requirements set forth in paragraph (15). One of the requirements in § 1129(a) is that all impaired classes have accepted the plan. 11 U.S.C. § 1129(a)(8). If a subchapter V plan cannot be confirmed as consensual under § 1191(a), it can only be confirmed if it meets the requirements of § 1191(b). Section 1191(b) permits cramdown confirmation if a plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1191(b).

In order for a plan to be "fair and equitable," it must meet the requirements set forth in § 1191(c). Among them, the plan must demonstrate a "reasonable likelihood that the debtor will be able to make all payments under the plan." 11 U.S.C. § 1191(c)(3)(A)(ii). Courts often refer to this "reasonable likelihood" standard as a requirement that a plan be "feasible."

The Debtor did not file the Ballot Summary and Certification, so a tally of the acceptances and rejections of the Second Amended Plan is unknown.[21] Counsel for TJM represented to the Court that TJM had returned a ballot to the Debtor's counsel rejecting the Second Amended Plan. Counsel for the Debtor confirmed that he had received TJM's ballot rejecting the Second Amended Plan

[21] Counsel for the Debtor stated at the Hearing that he purposefully did not file the Ballot Summary and Certification form for the Second Amended Plan because the Debtor *intended* to file a third amended plan. (Hr'g at 10:12-10:14, 11:55).

and also indicated that Aimbridge Hospitality had returned a ballot rejecting the Second Amended Plan. (Hr'g at 11:55). The Second Amended Plan is thus a non-consensual plan that may be confirmed only if it is "fair and equitable." 11 U.S.C. § 1191(b).

1. The Second Amended Plan lacks feasibility.

"Feasibility is the heart of every Chapter 11 reorganization case." *In re Seasons Partners, LLC*, 439 B.R. 505, 514 (Bankr. N.D. Tex. 2010). Section 1191(c)(3)(A) imposes a more stringent feasibility test than the standard that applies in a traditional chapter 11 case under § 1129(a)(11). *See In re Pearl Res.*, 622 B.R. 236, 269 (Bankr. S.D. Tex. 2020) (recognizing that § 1191(c)(3)(A) "fortifies the more relaxed feasibility test that § 1129(a)(11) contains"). The Fifth Circuit has addressed the more relaxed feasibility standard under § 1129(a)(11). Under that standard, a court should only confirm a plan if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11); *Save Our Springs (S.O.S.) Alliance, Inc. v. WSI (II)-COS, LLC (In re Save Our Springs (S.O.S.) Alliance, Inc.)*, 632 F.3d 168, 172 (5th Cir. 2011).

Feasibility, in short, requires a court to consider whether the plan offers a reasonable probability of success. *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 801 (5th Cir. 1997). "Debtors are not required to view business and economic prospects in the worst possible light." *Id.* at 802. When assessing whether a plan of reorganization is feasible, bankruptcy courts consider factors such as the adequacy of the debtor's capital structure, the earning power of the business, economic conditions, the ability of management, the probability of the continuation of the same management, and any other related matter. *In re Mortg. Inv. Co. of El Paso, Tex.*, 111 B.R. 604, 611 n.8 (Bankr. W.D. Tex. 1990). "[A] court

can weigh (or indeed ignore) various factors as its discretion." *In re Geijsel*, 480 B.R. 238, 257 (Bankr. N.D. Tex. 2012). Feasibility "requires a debtor to show that it can accomplish what it proposes to do, in the time period allowed, on the terms set forth in the plan." *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 266 (Bankr. S.D. Tex. 2015); *see In re CRB Partners, LLC*, No. 11-11924, 2013 WL 796566, at *7 (Bankr. W.D. Tex. Mar. 4, 2013) ("One purpose of the feasibility test is to weed out plans that promise more than debtors can deliver.").

Here, implementation of the Second Amended Plan requires: (1) the Debtor's victory in the Adversary invalidating the foreclosure sale and returning the Property to Tunica County; (2) a new asset purchase agreement between the Debtor and Tunica County; and (3) sufficient financing to fund the acquisition and development of the Property. All three conditions must be reasonably likely to occur for the Second Amended Plan to be feasible. The Court agrees with the objecting parties and the Debtor that the Second Amended Plan is not feasible. *In re 865 Centennial Ave. Assocs. Ltd.*, 200 B.R. 800, 809-10 (Bankr. D.N.J. 1996 (finding that no matter how sincere a debtor may be, the court "is not bound to clog its docket with visionary or impracticable schemes of resuscitation").

The Debtor's chances of prevailing in the Adversary are not reasonably likely. In the Adversary, the Debtor asks the Court to set aside the foreclosure sale as a violation of the stay, but the stay extends only to property of the estate. The purpose of the automatic stay is to "protect the *debtor's* assets, provide temporary relief from creditors and further ensure equality of distribution among creditors by forestalling a race to the courthouse." *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985) (emphasis added). By its terms, the automatic stay bars actions against *debtors in bankruptcy*, not affiliated companies or third parties. *Reliant Energy Servs., Inc. v. Enron Canada Corp*., 349 F.3d 816, 825 (5th Cir. 2003). To prove a violation of the

automatic stay, therefore, the Debtor must show that it had a legal or equitable interest in the Property at the time of the foreclosure sale.

To that end, the Debtor describes itself as a "beneficial owner" of the Property by virtue of the Board's resolutions approving the urban renewal plan. (Hr'g at 12:05; Dkt. #112 at 4). The Debtor did not provide the Court with any legal authority supporting its position, and the Court's own research of Mississippi's urban renewal law found none.[22] At best, the urban renewal plan recognized the Debtor as a *future* owner and *proposed* developer of the Property *if* the Debtor obtained financing and purchased the Property. Clearly, the Board never granted the Debtor any present interest in the Property, and the Debtor never purchased the Property, despite Tunica County's numerous extensions of the closing date.

Moreover, the resale agreement between Tunica County and the Debtor to purchase the Property lapsed more than a year ago on March 31, 2022. (Hr'g at 1:28, 1:55). After extending the closing date six times over a period of four years, the Board allowed the final closing date of March 31, 2022 to pass without taking any action. The Debtor would thus have to negotiate a new resale agreement with Tunica County. Hewitt argued at the Hearing that the Board never formally rescinded the urban renewal plan. (Hr'g at 1:28). Even so, no one on behalf of Tunica County appeared at the Hearing in support of the Second Amended Plan.

Even if the foreclosure sale were set aside, the Debtor still would not own the Property. For the Debtor to own the Property, both Tunica County and TJM must cooperate. Tunica County, however, has not appeared in the Bankruptcy Case, and, according to TJM's counsel, TJM is not interested in entering into any deal with the Debtor. (Hr'g at 10:24-10:25). Hewitt testified that the

[22] No evidence was provided that the note or deed of trust between Tunica County and TJM created third party beneficiary rights in favor of the Debtor. *See Mortera v. State Farm & Cas. Co.*, 561 F. Supp. 3d 684, 694 (S.D. Miss. 2021) (recognizing that third-party beneficiary status "must spring from the terms of the contract itself").

Debtor's intentions in the Second Amended Plan are to acquire the Property and remove TJM from any further involvement in the project. (Hr'g at 1:05).

Even if the Debtor enjoyed the full backing of Tunica County and TJM, what would setting aside the foreclosure sale actually accomplish? Tunica County would still be in alleged default of the note with interest continuing to accrue. Further, although there is still no guarantee the Debtor could obtain a loan (especially given its inability to procure financing before the bankruptcy filing and accrual of interest), what the Debtor actually seeks is to resuscitate the May 18, 2018 asset purchase agreement between Tunica County and TJM and force TJM to sell the Property to Tunica County for $12 million. Yet the Debtor has only $75.03 in its account and no loan commitment from any potential lender. For the seven-month duration of this Bankruptcy Case, the Debtor has not been able to obtain financing, and indeed for the seven years before the bankruptcy filing, Hewitt has been unable to do so even when Tunica County owned the Property and there was full cooperation between Tunica County and TJM.

Whether financing can be acquired requires credible evidence proving that future financing is a reasonable likelihood. The Second Amended Plan lacks any specificity with respect to the un-named "co-developer." It is axiomatic that the identity of any debtor-in-possession lender and the terms of any post-petition obligation must be disclosed to the Court and creditors of the estate with notice and an opportunity for a hearing. *See In re Made in Detroit, Inc.*, 299 B.R. 170, 179-80 (Bankr. E.D. Mich. 2003) (plan not confirmed because of inadequate showing of ability to obtain financing). The Second Amended Plan's mention of an unnamed potential investor is inconsistent with the transparency requirements of the Bankruptcy Code. Likewise, Hewitt's testimony about another new potential investor similarly lacks the required specificity.

2. The Second Amended Plan is not otherwise fair and equitable to creditors.

Nothing in the Second Amended Plan benefits anyone more than Hewitt and ATBS. The Second Amended Plan seeks to pay certain "critical vendors" and other general unsecured creditors. Yet a quick perusal of the proofs of claim indicates that two of the four non-governmental claims are clearly obligations of ATBS, not the Debtor. A third claim is for a different entity with a similar name; the fourth claim is unsupported by documents indicating that the Debtor owes the obligation. The Court is not convinced that the Debtor, as opposed to Hewitt and/or ATBS, has any legitimate creditors. In that regard, Hewitt's testimony was inconsistent. Although Hewitt testified that the debts incurred by ATBS were also the debts of the Debtor, he also testified that he formed the Debtor as a special purpose entity to insulate it from ATBS's debts and obligations. The Second Amended Plan, and perhaps this Bankruptcy Case, is not about paying legitimate creditors but about giving Hewitt another chance to revive his quest to own and operate the Property. It is also patently unfair to TJM, who is not a creditor of the estate, to be trapped in the Bankruptcy Case while Hewitt attempts to breathe life into this unrealized project.

3. There are numerous other deficiencies in the Second Amended Plan.

Although the matters above justify cause to dismiss the Bankruptcy Case, the Court notes that there are other deficiencies in the Second Amended Plan, namely: (1) motions to assume executory contracts and unexpired leases, to designate certain general unsecured creditors as critical vendors, and to incur debt are mentioned in the Second Amended Plan but have not yet been filed (Dkt. #79 at 7); (2) the liquidation analysis attached as Exhibit A to the Second Amended Plan includes assets that do not belong to the Debtor (Dkt. #79 at 13); (3) the Debtor attempts to assume the resale agreement with Tunica County that lapsed pre-Petition (Dkt. #79 at 8, 21); (4) two of the designated "critical vendors" appear to be professionals, whose employment by the estate would require

approval from the Court but which has not been sought (Dkt. #79 at 8, 19); and (5) essential to the implementation of the Second Amended Plan is Tunica County's cooperation, but Tunica County has made no appearance in the Bankruptcy Case (Dkt. #79 at 1-4). These issues, in the Court's view, were not rectified or remedied by the Debtor at the Hearing.

B. There is a continuing loss to, or diminution of, the bankruptcy estate, and no reasonable likelihood of the Debtor's rehabilitation.

Alternatively, the Court finds that cause exists to dismiss the Bankruptcy Case because of a continuing loss or diminution of the bankruptcy estate coupled with the absence of a reasonable likelihood of rehabilitation. 11 U.S.C. § 1112(b)(4)(A). The Debtor is not now, and has never been, operational and has never generated any income. Only three deposits totaling $1,200.00 have been made into the Debtor's account since the Debtor filed bankruptcy seven months ago on August 25, 2022. The source of the first two deposits totaling $200.00 is unknown, but the source of the third deposit of $1,000.00 came from Hewitt's personal funds. All but $75.03 has been spent on the Subchapter V Trustee's fees and bank charges. The Debtor's counsel has not yet filed a fee application. The Debtor has no ability to pay these ongoing fees in the absence of any positive cash flow.

Further, there is an absence of a reasonable likelihood of rehabilitation because the Second Amended Plan cannot be confirmed on feasibility grounds for the reasons discussed above. The Debtor must "do more than manifest unsubstantiated hopes for a successful reorganization." *In re Canal Place, Ltd. P'ship*, 921 F.2d 569, 577 (5th Cir. 1991); *see In re Irasel Sand, LLC*, 569 B.R. 433, 442 (Bankr. S.D. Tex. 2017) (analyzing two cases where courts found that rehabilitation was not likely because the debtor could not operate profitably without outside financing and no prospects of outside financing was presented to the court); *In re Hyperion Found, Inc.*, No. 08-51288,

2009 WL 2477392, at *4 (Bankr. S.D. Miss. Aug. 11, 2009) (rehabilitation involves the ability of a debtor to meet current obligations from a positive cash flow).

The Debtor's inability to confirm a feasible plan indicates its negative cash flow will continue. The expenditure of more cash by this Debtor would be wasted if the confirmation process, which would likely never be successful, were allowed to continue.

C. The Debtor has been unable to advance the Bankruptcy Case.

The Debtor has been unable to advance this Bankruptcy Case during its pendency. Three unfeasible plans have been filed. The Debtor failed to provide any evidence that a third amended plan would not be futile based on the circumstances.

D. The appropriate remedy is to dismiss the Bankruptcy Case.

Having found that cause exists to dismiss or convert the Bankruptcy Case, the Court next considers which remedy is in the best interests of creditors and the estate. At the conclusion of the Hearing, the UST asked this poignant question, "What is the purpose of bankruptcy for *this* Debtor?" (Hr'g at 2:56). After all, the Debtor does not engage in any operations until the project is funded, but even if funding becomes available, the Debtor will not actually hire any employees or otherwise manage the facilities. Those tasks would be performed by Aimbridge Hospitality. In the end, the UST expressed his preference for a dismissal of the Bankruptcy Case. The Court agrees with the UST's analysis and finds that the Bankruptcy Case should be dismissed.

Conclusion

As proposed, the Second Amended Plan is not only highly speculative but is also predicated on legal theories that are not reasonably likely to succeed. Hewitt has admitted pursuing various versions of the Second Amended Plan inside and outside of bankruptcy since 2017. While the Court is sympathetic to the Debtor's plight and does not doubt that Hewitt has devoted tremendous

time and effort to the project, bankruptcy laws are designed to give a failing business a breathing spell while it attempts to work out its financial problems, not to provide a framework within which a debtor may operate indefinitely. *United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs, Ltd. (In re Timbers of Inwood Forrest Assocs., Ltd.*, 808 F.2d 363, 370 (5th Cir. 1987). Here, the Debtor has had years of breathing space to get the project done but has not succeeded.

Because the Second Amended Plan is not feasible; it is not fair and equitable to creditors; it has numerous other deficiencies; the estate is incurring continuing losses; and rehabilitation of the Debtor is unlikely, the Court finds that the Bankruptcy Case should be dismissed. The substantial legal obstacles—exacerbated by the passage of time, the disintegration of the relationship between the Debtor and TJM, and the failure of the Debtor to advance a new feasible way forward—have sounded the death knell for this Bankruptcy Case. The dismissal of the Bankruptcy Case renders confirmation of the Second Amended Plan moot.

IT IS, THEREFORE, ORDERED that the Bankruptcy Case is hereby dismissed.

##END OF ORDER##