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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re	:	Chapter 11
	:	
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	:	Case No. 19-34054-sgj11
	:	
Debtor.	:	

OBJECTION OF UBS TO DEBTOR'S MOTION FOR APPROVAL OF THE DEBTOR'S PROPOSED DISCLOSURE STATEMENT AND CERTAIN SOLICITATION AND NOTICE PROCEDURES

[1] The Debtor's last four digits of its taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Bankruptcy Court, Suite 700, Dallas, TX 75201.

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UBS Securities LLC and UBS AG, London Branch (together "**UBS**"), by and through their undersigned counsel, hereby submit this objection (the "**Objection**") to (a) the *Disclosure Statement for the First Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1080] (as may be amended, supplemented, or modified, the "**Disclosure Statement**")[2] and (b) the *Debtor's Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Scheduling a Hearing to Confirm the First Amended Plan of Reorganization; (C) Establishing Deadline for Filing Objections to Confirmation of Plan; (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures; and (E) Approving Form and Manner of Notice* [Docket No. 1108] (the "**Motion**"), and, in support of the Objection, state as follows:

PRELIMINARY STATEMENT

1. Pursuant to the Motion, the Debtor seeks, among other things, approval of a Disclosure Statement that lacks the disclosures required by section 1125(b) of the Bankruptcy Code and describes a Plan that, on its face, is patently unconfirmable. For these reasons alone, the relief sought in the Motion, including the Debtor's request that the Court approve the adequacy of the Disclosure Statement, should be denied. Proceeding with solicitation of a fatally flawed Plan, which does not have the support of the members of the Committee, would be futile and require the Debtor to incur unnecessary administrative costs to the detriment of all the Debtor's stakeholders.

2. Courts have long acknowledged that solicitation of a plan that is unconfirmable on its face would be a waste of estate resources and, in such instances, have not authorized solicitation of such plans. Here, the Plan is patently unconfirmable for multiple reasons.

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[2] Capitalized terms used herein, but not defined have the meanings ascribed to such terms in the *First Amended Plan of Reorganization of Highland Capital Management, L.P.*[Docket No. 1079] (as may be further amended, supplemented, or modified, the "**Plan**") or the Disclosure Statement, as applicable.

3. First, the Disclosure Statement, as filed, did not include any information or evidence to support the Debtor's conclusory assertion that the Plan meets the feasibility test set forth in section 1129(a)(11) of the Bankruptcy Code. The Debtor's financial projections, which were supposed to be attached as Exhibit D to the Disclosure Statement, were instead filed with the liquidation analysis [Docket No. 1173] (collectively, the "**DS Projections**") five days ago. But, the late-filed financial projections do not support a feasibility finding because they rely on several questionable assumptions and lack sufficient detail regarding the Debtor's plan to monetize its assets. As such, it remains unclear whether the Debtor will have sufficient funding to make all of the payments required by the Plan timely. The Plan appears to contemplate the payment in Cash of more than $25 million on or shortly after the Effective Date to satisfy in whole or in part a number of Claims, including Administrative Claims. But, the Disclosure Statement and financial projections do not describe how the Debtor intends to satisfy such Claims in compliance with the Plan. Further, beyond the vaguely described Disputed Claims Reserve, the Plan contains no mechanism to ensure that Holders of currently unliquidated or disputed claims will receive the same pro rata distribution as other Holders of Allowed Claims in the same Class.

4. Second, there are serious flaws in the Debtor's attempt to show that the Plan satisfies the "best interests" test of section 1129(a)(7) of the Bankruptcy Code. The Debtor's recently filed DS Projections contain several unexplained assumptions (including the assumption that UBS's claims against the Debtor (the "**UBS Claims**") have zero value) that severely undermine the Debtor's blanket statement that "confirmation of the Plan will provide each Holder of a Claim with a greater recovery than such Holder would receive pursuant to the liquidation of the Debtor under chapter 7 of the Bankruptcy Code." *See* Disclosure Statement at p. 68.

5. Third, the Plan unfairly discriminates against certain of the Debtor's general unsecured creditors. The Plan places such creditors into five separate classes without any real explanation for doing so other than with respect to the class of Subordinated Claims. In addition to placing such creditors in separate classes, the Debtor also seeks to treat them inequitably. Although the Debtor has now provided a cursory payout schedule for creditors in Class 7, the Debtor's estimates are misleading because they assume that several large disputed Claims, including the UBS Claims, will receive no recovery at all. Meanwhile, the Plan provides that general unsecured creditors with Allowed Claims in Class 4, 5 and 6 will receive a 75% to 100% recovery. If even a significantly reduced value is assigned to the UBS Claims, Holders of Allowed General Unsecured Claims in Class 7 stand to recover far less than 75%. Thus, the Plan unfairly discriminates against Class 7 and because the Debtor is aware that the members of the Committee do not support the Plan, this deficiency cannot be rectified through voting. The Plan also unfairly discriminates against Holders of Disputed Claims in Class 7 because there is no clear mechanism established to quickly and fairly resolve or estimate such Claims to ensure that such Holders receive the same pro rata recovery as all other Holders of Class 7 Claims on account of their Allowed Claims.

6. Finally, the Plan contains improper release and exculpation provisions. Specifically, the release and exculpation provisions of the Plan are overbroad and purport to release claims against a number of parties, including insiders against whom the Debtor and third parties may have claims, despite the fact that the Debtor has not provided any indication of what those claims may be or any justification for releasing them.

7. UBS recognizes that challenges to the proposed Plan are ordinarily left to resolution at the confirmation hearing. Nevertheless, where, as here, the Plan is unconfirmable on its face

and runs afoul of the basic rules of priority provided for in the Bankruptcy Code, solicitation should not proceed until these errors are resolved.

8. In any event, the Disclosure Statement itself also contains critical deficiencies, including:

(a) inadequate disclosures regarding the Debtor's ability to fulfill its obligations under the Plan;

(b) failure to include any disclosures regarding the steps the Debtor has taken to investigate any of the claims or causes of action that the Plan purports to release;

(c) failure to include adequate disclosures with respect to: (1) estimated claim amounts in each Class; (2) estimated recoveries for all Classes; (3) the Redeemer Committee settlement and the Debtor's agreement to permit the Redeemer Committee to retain all of its shares in Cornerstone Healthcare Group ("**Cornerstone**"), which have significant value; (4) the Debtor's defenses to the IFA, Hunter Mountain and HarbourVest Entities Claims and how such Claims may affect the Plan and the potential recovery of other creditors if deemed Allowed by the Court; (5) Plan Supplement documents – which may not be disclosed until November 26 – 6 days ***after*** the Voting Deadline; (6) why the Debtor's assets declined in value by over $210 million (over 35%) between the Petition Date and June 30, 2020 and are expected to decline by an additional $40 million or more in the last six months of 2020; and (7) a description of the Debtor's assets that will be liquidated by the Claimant Trust; and

(d) a lack of meaningful disclosures regarding the UBS Claims and the decade-plus of litigation underlying them, and a failure to explain how and when the Debtor or the Claimant Trustee intends to resolve or estimate the UBS Claims (or the related ramifications with respect to the consummation of the Plan) or to disclose that if the UBS Claims are Allowed anywhere near their face amount, then such Claims will dwarf the other Claims in Class 7 and substantially affect the recovery of other stakeholders.

9. For each of the foregoing reasons, the Disclosure Statement should not be approved until the Debtor has adequately addressed its extensive deficiencies and the patently unconfirmable aspects of the Plan. As it has since the beginning of this Chapter 11 Case, UBS remains willing to work cooperatively with the Debtor to try to resolve these disclosure issues to the extent possible so as to allow solicitation of the (revised) Plan to proceed in due course.

BACKGROUND

10. On October 16, 2019 (the "**Petition Date**"), the Debtor filed a voluntary petition for chapter 11 relief in the Bankruptcy Court for the District of Delaware. Pursuant to an order dated December 4, 2019, the Debtor's bankruptcy proceedings were transferred to this Court under the above-captioned case number (the "**Chapter 11 Case**").

11. The Debtor continues to operate its business and manage its assets as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

12. On August 12, 2020, the Debtor filed the heavily redacted *Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 944] and *Disclosure Statement for the Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 945] concurrently with a motion to seal both documents. Following several weeks of mediation ordered by the Court, on September 21, 2020, the Debtor filed the current Plan and Disclosure Statement.

13. The UBS Claims derive from a state court action initiated in 2009 against the Debtor and several of its affiliates (amongst other parties) (the "**State Court Action**"). The underlying facts and procedural history of the State Court Action are complex and set forth in detail in *UBS's Motion for Relief From the Automatic Stay to Proceed with State Court Action* [Docket No. 644]. On November 14, 2019, the Supreme Court of the State of New York (the "**State Court**") entered a Decision and Order on the first phase of the State Court Action ("**Phase I**"), ruling in favor of UBS on almost every issue presented in Phase I and granting UBS over $1 billion in damages against certain of the Debtor's affiliated funds. The second phase of the State Court Action, which includes UBS's direct claims against the Debtor, is currently stayed by the automatic stay imposed by section 362 of the Bankruptcy Code.

14. On August 7, 2020, the Debtor filed the *Debtor's Objection to Proofs of Claim 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [Docket No. 928] and on September

25, 2020, UBS filed *UBS's Omnibus Response to Objections to the UBS Proofs of Claim* [Docket No. 1105]. The litigation regarding the UBS Claims is scheduled to proceed in parallel with the Debtor's proposed solicitation schedule.

OBJECTION

I. Approval of the Disclosure Statement Should Be Denied Because the Plan is Patently Unconfirmable

15. Bankruptcy Courts have routinely found that if a plan is not confirmable as a matter of law the related disclosure statement should not be approved. *See In re Felicity Assocs. Inc.*, 197 B.R. 12, 14 (Bankr. D.R.I. 1996) (noting that "[i]t has become standard Chapter 11 practice that 'when an objection raises substantive plan issues that are normally addressed at confirmation, it is proper to consider and rule upon such issues prior to confirmation, where the proposed plan is arguably unconfirmable on its face'") (citation omitted); *In re Am. Capital Equip., LLC*, 688 F.3d 145 (3d Cir. 2012) (holding that it was proper for the bankruptcy court to find a plan patently unconfirmable at the disclosure statement hearing); *In re Sanders*, No. 14-02271-NPO, 2015 Bankr. LEXIS 3987, at *16 (Bankr. S.D. Miss. Nov. 23, 2015) ("[I]t is well settled that a bankruptcy court may disapprove a disclosure statement, even if it contains adequate information, if there is a defect that renders a proposed plan 'inherently or patently unconfirmable.'") (citing *In re United States Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996)); *In re Quigley Co., Inc.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007) (stating that if a plan is "patently unconfirmable on its face" then solicitation of votes on the plan would be futile); *In re Criimi Mae, Inc.*, 251 B.R. 796, 799 (Bankr. D. Md. 2000) ("[I]t is now well accepted that a court may disapprove of a disclosure statement, even if it provides adequate information about a proposed plan, if the plan could not possibly be confirmed.").

16. The rationale for denying approval of a disclosure statement is as follows:

> If, on the face of the plan, the plan could not be confirmed, then the Bankruptcy Court will not subject the estate to the expense of soliciting votes and seeking confirmation . . . . If the Bankruptcy Court can determine from a reading of the plan that it does not comply with [Bankruptcy Code §] 1129, then it is incumbent upon the Bankruptcy Court to decline approval of the disclosure statement and prevent diminution of the estate.

In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986); *see also In re E. Maine Elec. Coop., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) (disapproving the disclosure statement where the proposed plan did not comport with the absolute priority rule and noting that the burden and expense of distributing the plan and soliciting votes thereon is "unwise and inappropriate" if the plan is unconfirmable). Bankruptcy courts should not approve a disclosure statement and engage in the "wasteful and fruitless exercise of sending the disclosure statement to creditors . . . when the plan is unconfirmable on its face." *In re Atlanta W. VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988) ("A court may refuse to approve a disclosure statement when it is apparent that the plan which accompanies the disclosure statement is not confirmable."). "[S]uch an exercise in futility only serves to further delay a debtor's attempts to reorganize." *Id.*[3]

A. The Plan is Patently Unconfirmable Because the Debtor Cannot Show That It is Feasible.

17. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). The "good faith" requirement has been interpreted to require that a plan have a reasonable likelihood of achieving its goals. *See In re Paige*, 685 F.3d 1160, 1178-79 (10th Cir. 2012) ("The test of good

[33] It is worth noting that the same rationale with respect to futility and unnecessary expense applies with respect to a Plan that cannot possibly be approved because it does not have the support of creditors such that it is not possible for the plan to be approved. UBS incorporates by reference Section II of the *Objection of the Official Committee of Unsecured Creditors to the Debtor's Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Scheduling a Hearing to Confirm the First Amended Plan of Reorganization; (C) Establishing Deadline for Filing Objections to Confirmation of Plan; (D) Approving Form of Ballots, Voting Deadline, and Solicitation Procedures; and (E) Approving Form and Manner of Notice* filed contemporaneously herewith (the "**Committee Objection**") (arguing that the Disclosure Statement should not be approved because the Plan is practically not confirmable because the Debtor's largest creditors have indicated they will vote to reject it).

faith is met if there is a reasonable likelihood that the plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code, that is, is the plan feasible, practical, and would it enable the company to continue its business and pay its debts in accordance with the plan provisions."). Section 1129(a)(11) of the Bankruptcy Code further requires that a chapter 11 plan be feasible, *i.e.* that the plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Courts have held that "'[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.' In determining whether a plan meets the requirements of § 1129(a)(11), …. 'the bankruptcy court has an obligation to scrutinize the plan carefully to determine whether it offers a reasonable prospect of success and is workable.'" *Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.)*, 779 F.2d 1456, 1460 (10th Cir. 1985) (quoting *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382, 12 C.B.C.2d 1227, 1237 (9th Cir. 1985)).

18. The fact that a plan is ostensibly a liquidating plan does not relieve a debtor from its obligation to show that the liquidation proposed by the plan is feasible. *See Holmes v. United States (In re Holmes)*, 301 B.R. 911, 915 (Bankr. M.D. Ga. 2003) (court found liquidation plan did not satisfy section 1129(a)(11) because it assumed that IRS would accept offer in compromise, and plan proponent did not satisfy court that IRS would so accept such an offer); *In re Yates Dev.*, 258 B.R. 36, 44 (Bankr. M.D. Fla. 2000) (plan did not satisfy section 1129(a)(11) because essential economic assumption of plan was that another court would invalidate a penalty clause in a contract

held by the debtor). A debtor must demonstrate that its plan is feasible by a preponderance of the evidence. *See In re T-H New Orleans Ltd. P'Ship*, 116 F.3d 790, 801-02 (5th Cir. 1997).

19. Here, the Debtor has provided only a modicum of information with respect to its assertion that the Plan is feasible and such information is woefully inadequate and lacking in specificity. Thus, the Debtor has failed to provide sufficient information to support the feasibility of the Plan's proposed distribution scheme and brings into question whether the Plan has been proposed in good faith.

20. The Plan contemplates the payment of all or a portion of certain Claims in Cash on or shortly after the Effective Date of the Plan including on account of: (a) Professional Fee Claims; (b) Administrative Expense Claims; (c) Priority Tax Claims; (d) the Jefferies Secured Claim; (e) the Frontier Secured Claim; (f) Convenience Claims; and (g) Unpaid Employee Claims.[4] But, the Plan and Disclosure Statement contain limited information regarding how much Cash will be required to pay such Claims. The Disclosure Statement also lacks sufficient disclosures regarding the sources of such Cash and how the Debtor intends to ensure that any Claims that become Allowed after the Effective Date will be paid their pro rata share. In the absence of this information, the Debtor cannot meet its burden of showing that it has the ability to timely make all required Cash disbursements.[5] Bankruptcy courts have held that a debtor must offer more than "mere speculation about the source of funding for the plan." *In re Briscoe Enters., Ltd.*, 138 B.R. 795, 807 (N.D. Tex. 1992).

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[4] It is unclear when Retained Employee Claims will be paid. The Plan provides no estimate of the magnitude of such Claims or when they will come due. The Plan notes only the such unidentified Claims are Unimpaired and will be Reinstated.

[5] The Debtors filed the DS Projections on October 15, 2020, four days before Disclosure Statement objections were due. Accordingly, parties in interest have had a limited opportunity to analyze this information under Federal Rule of Bankruptcy Procedure 3017, which requires that parties in interest be provided with 28 days to consider and object to a proposed disclosure statement.

21. Although the Debtor has (finally) presented financial projections, they forecast that the Debtor will have about $5.3 million in Cash at the end of September 2020, but will need to distribute more than $33.5 million in Cash to creditors under the Plan on or around the Effective Date.[6] The same projections forecast approximately $26.5 million in Cash by year end (without an explanation for this $21.2 million Cash increase in the next two and a half months), but even that is not sufficient to cover the Claims required to be paid by the Plan so the Debtor attempts to skirt the clear feasibility problem by indicating that: (a) the Debtor will pay Claims in Classes 1, 3, and 4 within 30 days after the Effective Date; (b) approximately $2.4 million in post-petition liabilities will remain outstanding as of March 31, 2021; and (c) the Frontier Secured Claim will be capitalized and not paid off until after March 31, 2021. The dubiousness of the Debtor's plan to pay Claims that the Bankruptcy Code requires to be paid on the Effective Date up to three months thereafter, as well as the Debtor's apparent intent to treat the Frontier Secured Claim differently than as is indicated in the Plan,[7] contribute to UBS's significant concerns regarding the Plan's feasibility.

22. Given the Cash shortfall indicated in the DS Projections, the projections suggest that the Debtor will attempt to liquidate certain unidentified investment assets to generate Cash to pay these Claims. However, the Debtor has not identified the assets that it intends to liquidate, nor

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[6] The DS Projections indicate that as of December 31, 2020, the Debtor estimates that there will be: (a) $10,533,000 in Post-petition Liabilities; (b) $1,237,000 in Jefferies Secured Claims; (c) 5,560,000 in Frontier Secured Claims; (d) $16,000 in Priority Non-Tax Claims; (e) $13,455,000 in Convenience Claims; and (f) $2,955,000 in Unpaid Employee Claims.

[7] Article III.H.2 of the Plan provides that that, "On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 2 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 2 Claim, at the election of the Debtor: (A) Cash equal to the amount of such Allowed Class 2 Claim; (B) such other less favorable treatment as to which the Debtor and the Holder of such Allowed Class 2 Claim will have agreed upon in writing; or (C) such other treatment rendering such Claim Unimpaired. Except with respect to Claims that are treated in accordance with the preceding clause (C), each Holder of an Allowed Class 2 Claim will retain the Liens securing its Allowed Class 2 Claim as of the Effective Date until full and final payment of such Allowed Class 2 Claim is made as provided herein." *See* Plan at Art.III.H.

the basis for the conclusion that the liquidation of such assets will provide sufficient Cash within the timeframe mandated for distributions as specified in the Plan. Absent such information, especially in a case such as this where many of the Debtor's assets are by the Debtor's own admission illiquid,[8] and the Debtor has a history of misleading parties regarding the value of those assets,[9] the DS Projections in their current state do not rise above the level of "mere speculation" as to the sources of funding for the Plan and significant questions about feasibility remain.

23. Even more unclear is how the Debtor intends to treat Holders of General Unsecured Claims. On its face the Plan is relatively simple, Holders of Allowed General Unsecured Claims are to receive their Pro Rata share of interests in the Claimant Trust, which will hold certain assets of the Debtor and pursue preserved causes of action. However, once the surface is scratched, the feasibility of the Claimant Trust construct become dubious at best. The Plan provides that only Holders of Allowed General Unsecured Claims shall receive Claimant Trust Interests. And, while the Plan contemplates a Disputed Claims Reserve, the details regarding such reserve are extremely minimal. Importantly, the Plan provides no details regarding how the Debtor plans to reserve beneficial interests in a trust, notwithstanding the question of whether such a reserve is legally permissible. Nor does the Plan or Disclosure Statement provide any information regarding the size of such reserve, how the Debtor intends to determine the amount to be reserved on account of disputed claims, whether (and when) the Debtor intends to seek to estimate such claims for reserve purposes so as to allow distributions to be made to other creditors under the Plan, and what assets

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[8] *See Declaration of Frank Waterhouse in Support of First Day Motions*, Case No. 19-12239 (CSS) (Bankr. D. Del. October 16, 2019) [Docket No. 9] at ¶ 33 ("[t]he Debtor believes it has substantial liquid and illiquid assets… the Debtor filed this chapter 11 case because it does not have sufficient liquidity…").

[9] The Disclosure Statement states that the value of the Debtor's Assets totaled approximately $566.5 million on the Petition Date and approximately $351.7 million on June 30, 2020. *See* Disclosure Statement at p. 17. The DS Projections forecast that the value of the Debtor's Assets will total approximately $332.7 million as of September 30, 2020 and approximately $311.3 million by December 31, 2020. In addition, the DS Projections provide that the Debtor expects to be able to distribute only $225.2 million to creditors pursuant to the Plan Analysis.

the Debtor intends to use to fund such reserve. The Plan and Disclosure Statement are also silent with respect to how distributions made by the Claimant Trust will be treated vis-à-vis Claims that remain disputed, contingent, or unliquidated as of the Effective Date to ensure that all Claims in the same Class ultimately receive the same pro rata treatment. All of these threshold questions must be addressed before the Debtor can show that the Plan is feasible.

B. The Plan is Patently Unconfirmable Because the Debtor Has Not Provided Sufficient Evidence to Satisfy the "Best Interests" Test

24. Section 1129(a)(7) of the Bankruptcy Code provides that in order for a plan to be confirmed, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class must either vote to accept the plan or "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7). Notwithstanding the fact that the Plan is ostensibly a liquidating plan, the Debtor must still show that the best interests test is satisfied. And, the Debtor has thus far failed to do so.

25. The Debtor filed the DS Projections on October 15, 2020. Accordingly, as of the filing of this Objection, UBS has only had a short time to evaluate its substance. However, even a cursory review reveals severe flaws in its methodology. First, the DS Projections assign no value to several large Claims against the Estate including those of UBS, IFA, the HarbourVest Entities, and Hunter Mountain. UBS has no current opinion as to the likely value of any Claims other than its own, but the Debtor cannot in good faith represent to all parties-in-interest that the UBS Claims, without any doubt, have no value at all. This position necessarily assumes that the Debtor has a 100% likelihood of success in defeating the entirety of the UBS Claims even though, to date, it has articulated a specious defense to only a portion of the UBS Claims, which, as UBS has

explained in *UBS's Omnibus Response to Objections to the UBS Proofs of Claim* [Docket No. 1105], should be summarily rejected by this Court.

26. The DS Projections also provide no justification for the assumption that a chapter 7 trustee will generate approximately $48 million less in proceeds from the liquidation of the Debtor's assets than current management or that a chapter 7 trustee's professionals will generate approximately $4 million *more* in professional fees than the Debtor's current professionals. Accordingly, the DS Projections offer conclusory assertions without support or explanation and, thus, provides no real evidence that the best interests test is satisfied.

27. In any event, it is unclear whether the current Plan construct could ever satisfy the best interests test because the Plan contemplates both the release of potentially valuable claims and causes of action against insiders and the payment of bonuses to insiders. Under section 502(d) of the Bankruptcy Code, a chapter 7 trustee must disallow the claim of an insider against the estate if the estate has a cause of action against the insider. At least one bankruptcy court has held that "[i]n computing the hypothetical chapter 7 liquidation, the court is entitled to view the entire record of the case and to engage in rational speculation about what would occur in a chapter 7 liquidation. Among other things, the court can hypothesize that certain claims would evoke the objection of a chapter 7 trustee and can speculate about the likely fate of such objections, bearing in mind the protective purpose of the 'best interests' test." *In re Sierra-Cal*, 210 B.R. 168, 174 (Bankr. E.D. Cal. 1997). Here, the Plan purports to pay insiders that are retained by the Reorganized Debtor or the Claimant Trust 100% of their pre-petition claims as "Retained Employee Claims" and, for those that are not retained, up to 75% of their incentive compensation as "Unpaid Employee Claims" -- distributions that could otherwise be made to General Unsecured Creditors. And, as discussed in further detail below, the value of the Claimant Trust Interests that General Unsecured

Creditors will receive is inherently speculative. The Court should not approve the Disclosure Statement and allow the Debtor to commence solicitation due to these significant deficiencies.

C. The Plan is Patently Unconfirmable Because it Unfairly Discriminates Against Holders of General Unsecured Claims.

28. Section 1129(b)(1) of the Bankruptcy Code provides that a plan may only be confirmed as to a dissenting creditor class if it does not discriminate unfairly and is fair and equitable. 11 U.S.C. § 1129(b)(1). The unfair discrimination standard "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." *In re Genco Shipping & Trading Ltd.*, 513 B.R. at 241 (quoting *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986)). Under this standard, claims of equal dignity cannot be provided disparate treatment under a plan of reorganization:

> Unfair discrimination is best viewed as a horizontal limit on nonconsensual confirmation . . . . Just as the fair and equitable requirement regulates priority among classes of creditors having higher and lower priorities, creating inter-priority fairness, so the unfair discrimination provision promotes intra-priority fairness, assuring equitable treatment among creditors who have the same level of priority.

Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 AM. BANKR. L.J. 227, 227-28 (1998).

29. The Plan fails the unfair discrimination test because it provides for two convenience classes (Class 5 and Class 6, together, collectively the "**Convenience Classes**") which consist of Claims that would otherwise not be entitled to priority ahead of General Unsecured Claims and are (according to the current Plan) to receive 75% of the amount of their Allowed Claims. The Convenience Classes are problematic for a few reasons.

30. The Debtor has presented no reason why Unpaid Employee Claims should be classified separately from other General Unsecured Claims and provided with an entirely separate cash pool for funding purposes. Nor has the Debtor provided any justification for the payment in

full of Retained Employee Claims, which otherwise appear to be General Unsecured Claims. Although the Disclosure Statement indicates that the Holders of Convenience Class Claims will receive identical recoveries, the Debtor has presented no evidence to show this will be the case in reality. It is possible that if no Unpaid Employee Claims opt out of Class 6 treatment, the Class 6 Claims could receive a recovery of less than 75%, and the same is true with respect to Class 5.

31. These issues are further compounded by the fact that the Unpaid Employee Claims include incentive compensation of insiders that should be subordinated to other General Unsecured Claims on equitable grounds. It appears that several of the insiders who would receive payment of their Unpaid Employee Claims have been accused of, or found to have engaged in, wrongdoing against UBS and other claimants in this case. And, as set forth above, the Plan provides an entirely speculative recovery to the largest Holders of Claims in this case, all of whom hold Claims stemming from allegations of wrongdoing by the Debtor, including actual fraud. Accordingly, the Plan unfairly discriminates against General Unsecured Creditors by dividing them into five separate classes, including the Retained Employee Class (which is Unimpaired) and the Subordinated Creditor Class, and providing for different recoveries to each such Class, without a rational basis for doing so.

D. The Plan is Patently Unconfirmable Because it Improperly Releases Potentially Valuable Claims.

32. Article IX.D of the Plan provides for a release by the Debtor of claims and causes of action against a wide range of parties (the "**Debtor Release**").[10] The Debtor Release renders the Plan patently unconfirmable.

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[10] The Plan defines "**Released Parties**" as collectively, (i) the Reorganized Debtor, (ii) the Claimant Trust, (iii) the Litigation Trust, (iv) the Independent Directors,(v) Strand (solely from the date of appointment of the Independent Directors), (vi) the Committee, (vii) the officers, directors, employees, and agents of the Debtor and Strand in each case (a) as are employed as of the Effective Date or (b) as are employed as of the date hereof and subsequently transferred by the Debtor or terminated by the Debtor without cause prior to the Effective Date, (viii) the CEO/CRO;

33. Debtors are permitted to release estate causes of action against third parties in connection with a settlement effectuated in a chapter 11 plan. Fifth Circuit courts have held that release provisions similar to the Debtor Release must be "fair and equitable" and in the best interests of the estate. *See Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010) (citing *Am. Can Co. v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 605, 608 (5th Cir. 1980). Courts evaluate five factors in determining whether releases are "fair and equitable:" (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any, to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the settlement is truly the product of arm's-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise. *See DeepRock Venture Partners, L.P. v. Beach (In re Beach)*, 731 F. App'x 322, 325 (5th Cir. 2018) (citing *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Courts weigh the first two factors against the consideration received by the debtor under the settlement. *See Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015) (upholding an approval of a settlement where a court valued the claims released against the estate relative to the claims being released by the estate).

34. Here, the Debtor has not produced any evidence that any of the Released Parties have made any contribution of assets to the Estate. The lack of consideration for the releases renders the Plan fundamentally defective. Further, although certain of the Released Parties may have an identity of interests with the Debtor, the Debtor has not shown that a suit against such

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and (ix) the Related Persons of each of the parties listed in (i) through (vi); provided, however, that neither James Dondero nor Mark Okada is included in the term "Released Party." *See* Plan, Art. I.B.100

parties is not recoverable from them individually or that such litigation would be complex, inconvenient or costly. In fact, the Plan, through its Claimant Trust construct rests on the premise that there are causes of action worth pursuing by the Estate. And, here, the Debtor has not provided a shred of evidence that it has performed any investigation into claims and causes of action against the Released Parties, or into the value of any released causes of action

35. The Fifth Circuit has held that a "a bankruptcy court may not ignore creditors' overwhelming opposition to a settlement." *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp*. (*In re Foster Mort. Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995). As parties have not yet voted to accept or reject the Plan, the Debtor cannot show that impacted creditors support the Plan, releases and all. Importantly, however, none of the members of the Committee support the Plan because of the breadth of the Debtor Release (among other reasons).

36. This is all especially questionable considering how the Debtor got here in the first place. The largest Claims against the Debtor's Estate consist of litigation claims, including that of UBS, based on the Debtor's alleged misconduct and fraud. Although the definition of Released Parties expressly excludes James Dondero and Mark Okada, a number of the Debtor's insiders and former insiders remain Released Parties. And, several of these individuals have been found to have committed fraudulent acts giving rise to the aforementioned litigation claims. It is not outside the realm of possibility that the Debtor itself may have some claims against certain of these parties. In fact, the Claimant Trust and the litigation sub-trust are premised on the expectation that there are valuable causes of action that may be asserted by the Estate against certain former and current employees that would inure to the benefit of the Debtor's creditors. UBS respectfully submits that before the Debtor releases causes of actions against known wrongdoers it should at the very least

present evidence that it has investigated such causes of action and made an informed decision that they are not worth pursuing.

37. The exculpation provisions contained in Article IX.C of the Plan (the "**Exculpation Provisions**") also violate Fifth Circuit law. The "Exculpated Parties" under the Plan are similar in scope to the parties released by the Debtor Release.[11] Courts in the Fifth Circuit have found that similar exculpation clauses were overbroad. *See Dropbox Inc. v. Thru Inc.*, Case No. 17-1958-G, 2018 U.S. Dist. LEXIS 179769 * 66-68 (N.D. Tex. Oct. 19, 2018) (finding that the scope of an exculpation clause similar to the scope of the Exculpation Clause in the Plan provided insulation to non-debtor third parties in contravention of 5th Circuit law); *see also In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (rejecting an exculpation clause, the "essential function" of which was "to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy," and noting that was not the intended purpose of section 524(e) of the Bankruptcy Code).

38. The ostensible carve out from the Debtor Release and Exculpation Provisions for causes of action related to bad faith, criminal misconduct, willful misconduct, fraud or gross negligence does not alleviate these concerns because the injunction provision contained in Article IX.F of the Plan (the "**Plan Injunction**") provides in relevant part that:

> No Entity may commence or pursue a claim or cause of action of any kind against any Protected Party[12] that arose from or is related to the Chapter 11 Case, the negotiation of

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[11] The Plan defines "**Exculpated Parties**" as collectively, (i) the Debtor, (ii) the Independent Directors, (iii) the Committee, (iv) the members of the Committee (in their official capacities), (v) the Professionals retained by the Debtor in the Chapter 11 Case, (vi) Strand (solely from the date of appointment of the Independent Directors), (vii) the CEO/CRO; and (viii) the Related Persons of each of the parties listed in (i) through (vii); provided, however, that neither James Dondero nor Mark Okada is included in the term "Exculpated Party."

[12] The Plan defines "**Protected Parties**" as collectively, (i) the Debtor, (ii) Strand (solely from the date of the appointment of the Independent Directors), (iii) the Reorganized Debtor, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Claimant Trust, (viii) the Claimant Trustee, (ix) the Litigation Trustee, (x) the members of the Claimant Trust Oversight Committee (in their official capacities), (xi) New GP LLC, (xii) the Professionals retained by the Debtor in the Chapter 11 Case, (xiii) the

> this Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust, or the transactions in furtherance of the foregoing **without the Bankruptcy Court (i) first determining, after notice, that such claim or cause of action represents a colorable claim of bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence** against a Protected Party and (ii) specifically authorizing such Entity to bring such claim against any such Plan Party.

See Plan at Art. IX. F (emphasis added).

39. The Plan Injunction's requirement that a party (including the Claimant Trustee or Litigation Trustee) first obtain a determination that there is a colorable claim of bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence before bringing such a cause of action guts the carve out from the Debtor Release and Exculpation Provisions for such causes of action by creating additional expenses that will make it impractical (or potentially impossible) for the Litigation Trustee to pursue such claims on a relatively limited budget.[13] Preemptively knocking the legs out from under the Litigation Trustee in this manner is improper. If these causes of action are in fact worthless, then the Litigation Trustee will not pursue them. On the other hand, imposing an additional upfront cost to pursuing a cause of action that may be colorable cannot be justified, especially in this case, where the beneficiaries of this construct have provided no value to the Estate. For all of these reasons the Debtor Release and Exculpation Provisions render the Plan patently unconfirmable.

II. Approval of the Disclosure Statement Should be Denied Because the Disclosure Statement Does not Contain Adequate Information for Creditors to Determine Whether to Accept or Reject the Plan

40. Section 1125(b) of the Bankruptcy Code requires a plan proponent to furnish creditors with "a written disclosure statement approved, after notice and a hearing, by the court as

CEO/CRO; and (xiv) the Related Persons of each of the parties listed in (i) through (xii); provided, however, that neither James Dondero nor Mark Okada is included in the term "Protected Party. *See* Plan, Art. I.B.95.

[13] The DS Projections assume a budget of $2 million for the Litigation Trustee.

containing adequate information" in order to solicit acceptances or rejections of a proposed chapter 11 plan. 11 U.S.C. § 1125(b). "Adequate information" is defined in the Bankruptcy Code as:

> Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.

11 U.S.C. § 1125(a)(1).

41. Adequate disclosure is crucial to the bankruptcy process. *See, e.g.*, *Westland Oil Dev. v. MCorp Mgmt. Solutions, Inc.*, 157 B.R. 100, 102 (Bankr. S.D. Tex. 1993) (noting disclosure is the "pivotal" concept in reorganization cases); *Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) ("Of prime importance in the reorganization process is the principle of disclosure."); *see also Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of 'adequate information.'"); *Galerie Des Monnaies of Geneva, Ltd. v. Deutsche Bank, A.G., N.Y. Branch (In re Galerie Des Monnaies, Ltd.*), 55 B.R. 253, 259 (Bankr. S.D.N.Y. 1985) ("The preparing and filing of a disclosure statement is a most important step in the reorganization of a Chapter 11 debtor.").

42. The plan proponent has the burden of proof regarding the adequacy of a disclosure statement, *see, e.g., In re Alaska Fur Gallery, Inc.*, No. A09-00196-DMD, 2011 WL 4904425, at *2 (Bankr. D. Alaska Apr. 29, 2011), once objectors have identified issues. *See In re McGee*, No. 09-11860, 2010 WL 9463258, at *1 (Bankr. N.D. Ind. Apr. 21, 2010). "The determination of what is adequate information is subjective and made on a case by case basis. This determination is

largely within the discretion of the bankruptcy court." *Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988), *vacated on other grounds, Adams v. First Fin. Dev. Corp. (In re First Fin. Dev. Corp.)*, 960 F.2d 23 (5th Cir. 1992). "Disclosure statements which are misleading, or which contain unexplained inconsistencies, should not be approved." *In re Applegate Prop., Ltd.*, 133 B.R. 827, 829 (Bankr. W.D. Tex. 1991).

43. To be approved, a disclosure statement must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy] Code alternatives . . . ." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988); *see also In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991) (A disclosure statement must "clearly and succinctly inform the average . . . creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution."). In particular, a disclosure statement must provide enough information for creditors to understand the financial ramifications of acceptance or rejection of the relevant plan, *see In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987), and courts determine the adequacy of information in a disclosure statement based on the facts and circumstances of each case. *See Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 179 B.R. 24, 29 (S.D.N.Y. 1995).

44. The Debtor has failed to meet these requirements. The Disclosure Statement lacks adequate information in critical areas, which is necessary for creditors to make an informed decision regarding whether to accept or reject the Plan.

A. The Disclosure Statement Lacks Adequate Information with Respect to Asset Values, Distributions, the Disputed Claims Reserve, and Key Mechanics of the Plan

45. The Plan purports to provide General Unsecured Creditors with shares in a Claimant Trust which assets include: "(a) all Assets of the Estate other than the Reorganized Debtor Assets, including, but not limited to, the Causes of Action, Available Cash, any proceeds

realized or received from such Assets, all rights of setoff, recoupment, and other defenses with respect, relating to, or arising from such Assets, (b) any Assets received from the Reorganized Debtor on or after the Effective Date, (c) the limited partnership interests in the Reorganized Debtor, and (d) the ownership interests in the New GP LLC." *See* Plan, Art. I.B.26. The Plan and the Disclosure Statement provide almost no additional detail regarding the value of the Claimant Trust Assets. No value is ascribed to the Causes of Action to be transferred to the Claimant Trust. No estimate of Available Cash that will be distributed to the Claimant Trust is provided. And no value is ascribed to the fund assets of the Debtor that will purportedly be transferred to the Claimant Trust.

46. Further, as discussed in detail in Section I of this Objection, the Plan and Disclosure Statement lack information regarding the amount or nature of the reserves that will be made to ensure that both: (a) all Cash distributions contemplated by the Plan are made and (b) Holders of General Unsecured Claims that are disputed or otherwise contingent or unliquidated as of the Effective Date will receive the same pro rata recovery as Holders of other Allowed Claims in Class 7.

47. The Disclosure Statement also lacks adequate disclosures with respect to the following key matters:

- the contemplated sources of Cash to be used to make distributions both on and after the Effective Date;
- how that use of Cash will affect the recoveries of Holders of General Unsecured Claims;
- the settlement between the Debtor and the Redeemer Committee and the Debtor's agreement to permit the Redeemer Committee to retain all of its shares in Cornerstone, which have significant value;[14]

[14] The deficiencies in the Redeemer settlement are set forth in greater detail in *UBS's Objection to the Debtor's Motion for Entry of an Order Approving Settlements with (A) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72) and (B) the Highland Crusader Fund (Claim No. 81)* filed October 16, 2020 [Docket No. 1190].

- the Debtor's defenses to the IFA, Hunter Mountain and HarbourVest Entities Claims and how such Claims may affect the Plan and the potential recovery of other creditors if deemed Allowed by the Court;

- the Plan Supplement documents – which may not be disclosed until November 26 – 6 days ***after*** the Voting Deadline. The Plan Supplement includes several key documents that are necessary in order for creditors entitled to vote on the Plan to have sufficient information to determine whether to accept or reject the Plan: (i) the form of Claimant Trust Agreement, (ii) the forms of New GP LLC Documents, (iii) the form of Reorganized Limited Partnership Agreement, (iv) the Sub-Servicer Agreement, (v) the identity of the members of the Claimant Trust Oversight Committee, (vi) the schedule of Causes of Action, and (vii) the schedule of Executory Contracts and Unexpired Leases to be assumed pursuant to the Plan;

- whether and how the Debtor intends to appropriately reserve interests in the Claimant Trust to ensure that all Holders of General Unsecured Claims, including those with Claims that are currently disputed, contingent, or unliquidated receive their required distributions under the Plan;

- the identity of assets that will be used to support the Disputed Claims Reserve (as certain of the Debtor's assets are not readily capable of being liquidated into Cash) and the actual value of such assets;

- an explanation as to why the Debtor's assets have declined in value by over $210 million (by over 35%) between the Petition Date and June 30, 2020 and are expected to decline by an additional $40 million or more in the last six months of 2020;

- a description of the Debtor's assets that will be liquidated by the Claimant Trust and the plan for liquidating such assets;

- how distributions will be made to the beneficiaries of the Claimant Trust, including whether such distributions will be made while potential beneficiaries of the Claimant Trust still have disputed, contingent, or unliquidated claims; and

- how the value of interests in the Claimant Trust may be diluted depending on the allowance or disallowance of Disputed Claims.

48. Absent such information, the Disclosure Statement falls well short of providing adequate information for Holders of General Unsecured Claims (and other Impaired Claims) to make an informed decision to vote to accept or reject the Plan. This is especially true in light of the fact that, as discussed above, the Plan purports to provide for distributions on account of Claims that would otherwise rank *pari passu* or arguably (in the case of insider bonuses) be subordinated

to General Unsecured Claims. With such Claims being offered concrete recoveries, Holders of General Unsecured Claims are entitled to an understanding of the nature and quantum of their estimated recoveries in order to determine how to vote on the Plan.

49. Also troubling is the fact that the Plan Supplement documents will not be filed until *after* the Voting Deadline. The Plan Supplement documents, in particular the Claimant Trust Agreement, are critical to understanding how the Plan will be implemented as well as the recoveries that creditors will receive. The critical information that the Plan and Disclosure Statement indicate will be provided in the Claimant Trust Agreement includes, but is not limited to: (a) the method for vesting of Claimant Trust Interests; (b) rules regarding subordination of certain Claimant Trust Interests; (c) the governance of a contemplated Litigation Sub-Trust; (d) the scope of the powers and rights of the Claimant Trustee and Claimant Trust Oversight Committee; (e) how the Claimant Trust will invest and monetize assets and litigate or resolve Causes of Action and disputed Claims; (f) how the Disputed Claims Reserve will be administered and how distributions will be made therefrom; and (g) how the Reorganized Debtor will be managed, including whether a Sub-Servicer will be utilized. *See* Plan at Arts. I.B.43, 74, 115, and IV.B. These are all critical pieces of information that creditors require so that they can understand their recoveries under the Plan and make an informed voting decision. Further, the Causes of Action constitute the source of a substantial portion of the recoveries being offered to Holders of General Unsecured Claims under the Plan. The Debtor's intent to disclose these after the Voting Deadline falls far short of the Bankruptcy Code's requirement that the Debtor provide adequate information for creditors to make an informed decision on how to vote.

B. The Disclosure Statement Lacks Adequate Information Regarding the UBS Claims

50. Despite the fact that the UBS Claims represent the largest asserted Claims against the Debtor's Estate by some magnitude, the Disclosure Statement provides little to no discussion of the claims other than a brief (and, UBS contends, insufficient) summary of the State Court Action's procedural history, and a few blanket statements that the Debtor believes that the UBS Claims will be reduced significantly by the Court. Leaving aside that UBS believes that it will prevail in its claim dispute with the Debtor, even if the UBS Claims are reduced significantly, they still have the potential to be the largest claims against the Estate by a significant margin. Nonetheless, also absent from the Disclosure Statement is any discussion regarding how the allowance or estimation of the UBS Claims would or could affect distributions under the Plan. The Disclosure Statement does not even contain a risk factor indicating that the allowance of disputed claims generally would dilute recoveries to other General Unsecured Creditors.

51. In reality, even if reduced by half, the UBS Claims could significantly dilute the recoveries available to other General Unsecured Creditors and make stark the discriminatory nature of the Convenience Classes contemplated by the Plan. The Disclosure Statement should not be approved until it contains adequate disclosures regarding the amount and nature of the UBS Claims, as well as a description of how and when the UBS Claims will be liquidated or estimated and the potential impact that the allowance and/or estimation of the UBS Claims could have on the amount and timing of recoveries available to all Holders of General Unsecured Claims.

C. The Disclosure Statement Lacks Adequate Information Regarding the Proposed Releases

52. The Disclosure Statement fails to provide creditors with adequate information with respect to the consideration received for the Plan's releases (both the Debtor Release and the exculpation provisions). And, as discussed above, neither the Plan nor the Disclosure Statement

contain any indication of what investigation or inquiry the Debtor has made into the nature or value of the claims it intends to release under the Plan, which value might otherwise be captured for the benefit of the Debtor's creditors. These defects are particularly problematic here given the history of past misconduct by the Debtor's insiders.

53. The Disclosure Statement also includes no discussion regarding the consideration that the Released Parties are providing in exchange for their broad releases. Bankruptcy Courts have held that contributions are a core component of the determination of whether to approve releases of non-debtor parties. *See, e.g.*, *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005).

54. There are numerous proposed beneficiaries of the Debtor's releases, many of whom do not appear to be providing any consideration in exchange for being released (and the Debtor has not identified the consideration provided for any of them). For example, it is not clear what possible consideration former directors and officers of the Debtor and the other Released Parties could be providing in exchange for receipt of releases from the Debtor in connection with the Plan. Further, the Debtor's current directors and officers have been and are continuing to be compensated for their continued service to the Debtor so they also do not appear to have provided any tangible consideration in exchange for their releases either. Without understanding the value of the releases being provided and sufficient information to determine whether the releases are defensible, the average voter lacks sufficient information to be able to vote on the Plan.

RESERVATION OF RIGHTS

55. UBS expressly reserves all rights, claims, arguments, defenses, and remedies with respect to the adequacy of the Disclosure Statement, confirmation of the Plan, or any other issue in this Chapter 11 Case, and to supplement, modify, and amend this Objection, to seek discovery, and to raise additional objections in writing or orally at the final hearing on the Motion.

WHEREFORE, for the foregoing reasons, UBS respectfully requests that the Court (a) deny the approval of the Disclosure Statement and Motion, and (b) grant such other relief as the Court deems just and proper.

DATED this 20th day of October, 2020.

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CERTIFICATE OF SERVICE

I, Martin Sosland, certify that the *Objection of UBS to Debtor's Motion for Approval of the Debtor's Proposed Disclosure Statement and Certain Solicitation and Notice Procedures* was filed electronically through the Court's ECF system, which provides notice to all parties of interest.

Dated: October 20, 2020.

/s/ Martin Sosland