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.	)	
	)	**Docket Ref. Nos. 1079, 1080 & 1108**

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

The official committee of unsecured creditors (the "Committee")[2] of Highland Capital Management, L.P. (the "Debtor"), hereby submits this objection (the "Objection") 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* [Docket

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

2 The Committee consists of (i) Redeemer Committee of Highland Crusader Fund (the "Redeemer Committee"), (ii) Meta-e Discovery ("Meta-e"), (iii) UBS Securities LLC and UBS AG London Branch (together, "UBS"), and (iv) Acis Capital Management, L.P. and Acis Capital Management GP, LLP (together, "Acis").

No. 1108] (the "Disclosure Statement Motion").[3] In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Plan contains a number of provisions that render it patently unconfirmable and therefore the Disclosure Statement Motion should be denied. On top of that, the Plan does not enjoy the support of the key constituency needed to confirm it. This point is fatal. The Debtor is insolvent, and by the Debtor's own projections, it is projected that the General Unsecured Creditors will not recover the full value of their Claims under the Plan, making them the key constituency in this case. *See* Liquidation Analysis and Financial Projections [Docket No. 1173]. Under these circumstances, as the Committee has maintained from the outset of this case, it is a waste of valuable resources for the Debtor to pursue solicitation, and ultimately confirmation, of a plan that is unsupported by both the Committee in its role as a fiduciary of all unsecured creditors and the Committee members in their individual capacities. Unfortunately, notwithstanding the Committee's repeated protests to a number of provisions in the Plan, including those which make it patently unconfirmable, the Debtor has decided to press forward and seek the Bankruptcy Court's approval to solicit a plan that is lacking the Committee's support.

2. Specifically, as detailed below, the Committee believes that the following provisions render the Plan patently unconfirmable:

(a) The Plan impermissibly (and offensively) provides for the release of claims held by the Debtor—including claims against "officers, directors, employees and agents of

[3] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Disclosure Statement Motion or the Disclosure Statement, as applicable.

the Debtor and Strand"[4] and "Related Persons"[5] of Strand—without justification as required by section 1123(b)(3)(A) of the Bankruptcy Code. Furthermore, this release purports to include claims which the Committee has been granted standing to prosecute.[6]

(b) The Plan's injunction and exculpation provisions are impermissibly broad and in direct contravention of Fifth Circuit law.

Such deficiencies cannot be cured by the vote of creditors, particularly since, as a practical matter, the Debtor's largest voting creditors (in amount) have confirmed that they will not in favor of the Plan or any other plan containing such provisions.

3. Even assuming *arguendo* that the foregoing provisions do not render the Plan patently unconfirmable, the Disclosure Statement still lacks adequate information as required under section 1125 of the Bankruptcy Code. The Disclosure Statement needs, at a minimum, additional disclosures regarding the Debtor Release, such as the identities of each person or entity to be released by the Debtor, which claims are being released, the value (if there is any) being received for the releases and any other purported justifications for such release.

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[4] Technically, the Plan provides that officers, directors, employees and agents will only be released by the Debtor if they are employed by the Debtor as of the Effective Date or employed currently and subsequently transferred by the Debtor or terminated by the Debtor without cause prior to the Effective Date. *See* Plan, Art. I.B.100. This purported limitation means nothing, however, as it would only exclude potential officers and employees who are terminated *for cause* prior to the Effective Date, and the Debtor's independent directors have made clear to the Committee over the preceding months that they do not intend to terminate any current employee or officer for cause. Moreover, if they are transferred from the Debtor's employ, they would almost certainly be transferred to another Highland entity controlled by James Dondero, who has every incentive to protect his past accomplices.

[5] The definition of "Related Persons" includes no less than a Person's "predecessors, successors, assigns (whether by operation of law or otherwise), and each of their respective present and former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, employees, subsidiaries, divisions, management companies, and other representatives, in each case, solely in their capacity as such." *See* Plan, Art. I.B.99.

[6] The Committee disputes whether the Debtor can in fact settle and release any such claims as the Committee has been granted standing to pursue all estate claims. *See* Docket No. 354.

4. Given the Plan structure and the insolvency of the Debtor's estate, as a legal and a practical matter, the Debtor cannot confirm the Plan without the affirmative vote of certain Committee members, each of which will be filing joinders to this Objection confirming that they will not vote in favor of the Plan.[7] Therefore, it is futile for the Debtor to pursue confirmation of the Plan unless and until it removes the provisions rendering it unconfirmable and remedies the following issues the Committee has raised with the Plan:

(a) The Claimant Trust Interests should bear interest at the New York State post-judgment rate of 9%, representing a fair and equitable rate of interest that would be earned by some of the largest creditors of the Debtor outside of Bankruptcy and also compensating the holders of general unsecured claims at a rate closer to a true market rate.

(b) In order to ensure sufficient liquidity to properly administer the Plan, fund the Litigation Trust and effect the asset monetization the claim threshold for Class 5 should be reduced to $1,000,000, Class 6 should be eliminated and folded into Class 5 and the recovery percentage should increase to 85%.

(c) The Committee should have sole consent rights over the form of the Claimant Trust Agreement, the initial members of the Oversight Board, and the employees retained by the Debtor as of the Effective Date of the Plan.

5. Collectively, these issues present a picture of a debtor that just doesn't "get it." This is a liquidation and the General Unsecured Creditors are impaired. The Debtor's inclusion of the releases in the Plan is not only unjustified, but is confounding. There is simply no reason to release potentially valuable claims without the Debtor receiving anything in return. Similar issues are raised by the Debtor's inclusion of the broad exculpation and injunction provisions, which the Committee has made clear to the Debtor it does not support. Perhaps even more puzzling, the

[7] See joinders filed by Redeemer Committee, Acis, UBS, and Meta-e each filed contemporaneously with this Objection.

Debtor has insisted on inserting its own judgment into issues which are squarely in the purview of the Committee and its fiduciary duties. Specifically, the Debtor has endeavored to retain consent rights over the form of the Claimant Trust Agreement and other organizational documents that govern the assets and operations of the Reorganized Debtor when the Debtor's own analysis shows that only the General Unsecured Creditors will be beneficiaries under such documents. This is a liquidating debtor that cannot pay its creditors in full. The Plan must recognize this basic fact and should not be sent out for vote otherwise.

6. For these reasons and other reasons discussed below, the Committee respectfully submits that in light of the Plan's fatal flaws (and lack of creditor support) and lack of adequate information disclosed in the Disclosure Statement, the Disclosure Statement Motion should be denied.

OBJECTION

I. The Disclosure Statement Should Not Be Approved Because it Describes a Plan That Is Patently Unconfirmable.

7. Regardless of whether a disclosure statement contains adequate information under section 1125 of the Bankruptcy Code, "[d]isapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible." *In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996). In such circumstances, bankruptcy courts have an obligation not to subject the estate to the unnecessary costs and expenses associated with soliciting votes and seeking confirmation of a plan that on its face cannot be confirmed. *See In re American Capital Equip., LLC*, 688 F.3d 145, 154 (3d Cir. 2012); *see also In re Phx. Petrol. Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is

'impossible', the court should exercise its discretion to refuse to consider the adequacy of disclosures . . . because undertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed.") (citations omitted); *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) (declining to subject the estate to the expense of soliciting votes for an unconfirmable plan); *In re Valrico Square Ltd. P'ship*, 113 B.R. 794, 796 (Bankr. S.D. Fla. 1990) ("Soliciting votes and seeking court approval on a clearly fruitless venture is a waste of the time of the Court and the parties.").

8. Specifically, a plan is considered "patently unconfirmable" if "(1) confirmation defects cannot be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing." *In re Am. Capital Equip.*, 688 F.3d at 155 (internal quotations omitted). The Committee believes that the Plan described in the Disclosure Statement is fatally flawed because, among other things, (a) it would release claims of the Debtor without any evidence that such a release and settlement is fair and equitable or in the best interest of the estate, and (b) it contains exculpation and injunction provisions forbidden by law in contravention of section 1129(a)(3).

A. The Debtor Release is Neither Fair and Equitable Nor in the Best Interest of the Debtor's Estate.

9. Section IX.D of the Plan provides for the release of "any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor," against the Released Parties (the "Debtor Release"),[8] which includes Strand, all of Strand's Related Persons, and all "officers,

[8] "On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or

directors, employees, and agents of the Debtor," among others.[9] Read together, the defined terms of Released Parties and Related Persons confirm that the Debtor Release would release claims against Debtor and Strand's "present and former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, employees, subsidiaries, divisions, management companies, and other representatives."[10] In other words, virtually everyone will get a release from the Debtor. The Debtor Release is not only overbroad but also is simply unjustifiable as a matter of law, and the Plan therefore cannot and must not include the Debtor Release.[11]

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unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person. Notwithstanding anything contained herein to the contrary, the foregoing release does not release (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, or (iv) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction." Plan Art. IX.D.

[9] Released Parties is defined in the Plan 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, 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." Plan Art. I.B.100.

[10] *See* Plan, Art. I.B.99.

[11] The fact that the Debtor Release provides a carve-out for gross negligence or willful misconduct does not change the analysis. The Debtor Release remains inappropriate and the creditors should not be put in a position of having to parse through language and conduct to determine what is covered or is not covered by the release or how the release may impact other claims in an unforeseeable manner.

10. Releases included in a plan of reorganization under Section 1123(b)(3)(A) of the Bankruptcy Code, like the Debtor Release, are evaluated under the same standards as a motion for settlement brought under Rule 9019. *See In re Bigler LP*, 442 B.R. 537, 543 n.6 (Bankr. S.D. Tex. 2010) ("[S]ettlement provisions in a Chapter 11 plan must satisfy the standards used to evaluate compromises under Rule 9019."). To approve such a settlement, a court must find that the settlement is "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). Five factors inform the "fair and equitable" analysis: (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)). Additionally, a debtor should provide all creditors with clear and complete notice of the terms of a settlement so that creditors can judge whether it is in the best interest of the estate. *See In re Taylor*, 59 B.R. 176, 177 (Bankr. S.D. Tex. 1986) (rejecting a secret compromise because creditors were not provided with notice of the issues).

11. Ordinarily, it is intended that the first two factors be weighed against the consideration received by the debtor pursuant to the settlement.[12] Neither the Disclosure Statement nor the Plan, however, disclose any purported consideration received by the Debtor from the Released Parties in exchange for the Debtor Release. Nor could it, because, to the Committee's knowledge, no such value will be received by the Debtor. This makes the comparison for the Court easy – a settlement of claims (including those against insiders of the Debtor, *i.e.*, potential defendants in estate causes of action) in exchange for *absolutely nothing* is obviously not fair and equitable or in the best interest of the Debtor's estate.

12. With respect to the third factor, while the Debtor continues to ignore the Committee's opposition to the Debtor Release, the Fifth Circuit "recognizes the paramount interest of creditors and requires deference to their reasonable views concerning proposed settlements." *In re Moore*, 608 F.3d at 265. Put even more plainly, "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). To be clear, the Committee does not support the Debtor Release. With respect to the fourth factor, while there is no evidence that the Debtor Release is a result of fraud or collusion, there is also no evidence of any negotiation at all, let alone an arms-length negotiation.

13. Finally, regarding the wisdom of providing the Debtor Release, there simply is none. If the causes of action turn out to be worthless, they are worthless. If they do not need to be pursued because there (miraculously) turns out to be enough value in the Claimant Trust to

[12] 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).

satisfy all Claims in full, then they do not need to be pursued. Neither of these possibilities can support an argument that it is wise to provide the Debtor Release now in return for no value. At bottom, the Debtor has not and cannot meet the standard for approving the Debtor Release.

B. The Plan Contains Exculpation and Injunction Provisions Forbidden by Fifth Circuit Law.

14. Section 1129(a) of the Bankruptcy Code provides that the Court should only confirm a plan if, among other things, the plan "complies with the applicable provisions of [the Bankruptcy Code]" and has not been proposed "by any means forbidden by law." 11 U.S.C. §§ 1129(a)(1), (a)(3); *see also* 11 U.S.C. § 1123(b)(6) (providing that the discretionary provisions in a chapter 11 plan must not be inconsistent with the Bankruptcy Code). In addition to the Debtor Release addressed at length above, the Plan also contains improper and unjustified overly broad exculpation[13] and injunction[14] provisions that are inconsistent with the Bankruptcy Code and violate Fifth Circuit law.

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[13] "To the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(v); provided, however, the foregoing will not apply to any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." Plan Art. IX.C.

[14] "Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether proof of such Claims or Equity Interests has been filed or not and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan) and other parties in interest, along with their respective Related Persons, are permanently enjoined, on and after the Effective Date, with respect to such Claims and Equity Interests, from (i) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or the property of any of the Debtor, the Independent Directors,

15. Similar to the proposed scope of Released Parties, the scope of "Exculpated Parties" includes the Debtor, Strand, and each of their Related Persons.[15] Such broad exculpation provisions are contrary to Fifth Circuit law. *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).

the Reorganized Debtor, or the Claimant Trust, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree, or order against the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or the property of any of the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust, (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or the property of any of the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust, (iv) asserting any right of setoff, directly or indirectly, against any obligation due from the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or against property or interests in property of any of the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust; and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan. The injunctions set forth herein shall extend to any successors of the Debtor, the Reorganized Debtor, and the Claimant Trust and their respective property and interests in property. **No Entity may commence or pursue a claim or cause of action of any kind against any Protected Party that arose from or is related to the Chapter 11 Case, the negotiation of 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. As set forth in Article XI, the Bankruptcy Court will have sole jurisdiction to adjudicate any such claim for which approval of the Bankruptcy Court to commence or pursue has been granted."** Plan Art. IX.F.

[15] *See* Plan, Art. I.B.56.

16. Moreover, the Plan's injunction provision would permanently enjoin actions against Protected Parties, which include the Debtor, Strand, and their Related Parties.[16] The proposed injunction, in essence, would achieve the same result as a non-consensual third party release that is expressly prohibited in the Fifth Circuit. *See Dropbox*, 2018 U.S. Dist. LEXIS 179769 * at 65 (disallowing similar injunction). Additionally, the Fifth Circuit has held that an injunction cannot be justified under the broad equity powers of Section 105 of the Bankruptcy Code "if it effectively discharges a nondebtor." *Feld v. Zale Corporation (In re Zale Corportion),* 62 F.3d 746, 760 (5th Cir. 1995) (overturning injunction discharging a nondebtor because such an injunction violates section 524 of the Bankruptcy Code, which was designed only to discharge the debtor, not nondebtor parties). Here, the scope of Plan's injunction would effectively function as a release of nondebtor parties, including Strand and its Related Parties. As such, the injunction and exculpation provisions of the Plan render the Plan patently unconfirmable as a matter of law.

II. The Disclosure Statement Should Not Be Approved Because the Plan Does Not Have the Creditor Support Necessary for its Confirmation.

17. The Committee has stated unequivocally to the Court and the Debtor throughout this case that no chapter 11 plan should be pursued without the support of the Committee, as it would be a futile and frivolous endeavor. Nevertheless, the Debtor has unfortunately determined to press forward with a plan the Committee does not support. Although dressed up with phrases

[16] "Protected Parties" means, 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 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." Plan Art. I.B.95.

such as "Claimant Trust," "Reorganized Debtor" and "monetization vehicle," the Plan at its core is a wind-down plan founded on the monetization of assets and pursuit of estate claims. In other words, the creditors in this case are the primary, if not *sole*, beneficiaries under the Plan and the Plan must reflect that reality. Therefore, as a legal matter, the Debtor cannot confirm a chapter 11 plan without the support of certain members of the Committee, as they are the largest creditors in Class 7 (in amount)[17] and have indicated they do not intend to vote for the Plan as currently constructed.[18] For there to be any hope that the Debtor can garner sufficient votes in support of the Plan, including the votes of Committee members, the Plan must address the flaws that make it patently unconfirmable as well as the following points.[19]

A. The Claimant Trust Instruments Should Bear Interest at Nine Percent.

18. The Debtor's prepared financial projections predict that creditors will not be paid in full under the Plan. *See* Liquidation Analysis and Financial Projections [Docket No. 1173] (projecting a 92% recovery for holders of Allowed General Unsecured Claims). In the unlikely circumstance that the value of the Debtor's assets turns out to be sufficient to pay all claims in full, however, claimholders must be compensated for effectively financing this chapter 11 case for the

[17] On September 23, 2020, the Debtor filed motions to approve settlements with two of the Debtor's largest dissenting creditors, the Redeemer Committee [Docket No. 1089] and Acis [Docket No. 1087]. Assuming the Bankruptcy Court approves each such settlement, the Redeemer Committee and Acis will hold Allowed Claims representing approximately 92.1% (in amount) of Class 7 – General Unsecured Creditors. In addition, UBS Securities LLC and UBS AG (collectively, "UBS") asserts a significant, albeit disputed, unsecured claim against the Debtor in excess of $1 billion.

[18] In addition, the Committee understand that Meta-e will not be voting to accept the Plan as a holder of an Allowed Class 5 Convenience Claim.

[19] Outside of Class 7, there are a total of 196 other claims (excluding disallowed and withdrawn claims), including the secured claim of Frontier in the amount of $5.6 million, projected priority claim amounts of $1.3 million, and $32.7 million of asserted claims in Classes 5 and 6. The Committee should hope that in the context of this case the Debtor would not be so misguided as to attempt to cram down the Plan on general unsecured creditors by either artificially impairing the Frontier claim or utilizing the convenience class treatment of claims.

benefit of equity holders—*i.e.*, the holders of General Unsecured Claim Trust Interests must be paid interest at the appropriate rate before the equityholders' Contingent Trust Interests (and any substantive rights with respect thereto) can vest. Given that the vast majority of claims, in terms of dollar value, arise under New York law, the Committee believes the 9% New York post judgment rate of interest is appropriate.

19. Due to the complex investment structures, contractual, regulatory, and fiduciary obligations of the Debtor, and the illiquid nature of many of the assets, the process of fully monetizing the Debtor's assets is expected to take a significant period of time. Although the Committee is of the view that the Debtor is insolvent, on the outside chance that the assets recover more than expected and the claim pool is less than expected, the Plan provides for Contingent Claimant Trust Interests. Before those interests vest, however, the prior trust interests must be compensated for the time (and risk) associated with the payment of their claims. During the bankruptcy, although the case law is not clear, the federal judgment rate appears to be the appropriate rate that can apply to unsecured creditors' claims in the event of a solvent Debtor. After the effective date, however, since the Contingent Claimant Trust Certificates would only recover if there was sufficient value to cover all other claims, a market rate or similar rate would be appropriate under section 1129(b)(2) of the Bankruptcy Code.

20. This Court has held that, for purposes of determining a cramdown interest rate on unsecured creditors under section 1129(b)(2) of the Bankruptcy Code, consideration of what an efficient market might dictate for a "loan" similar to what a plan provides for a creditor is required. *See In re Thru, Inc.*, 17-31034 (SJ) (Bankr. N.D. Texas July 17, 2017). Specifically, for situations where a determination of a market rate is not feasible, applying an objective rate for a litigation

creditor "***that this creditor would be entitled to outside of bankruptcy***" is 'fair and equitable' in accordance with § 1129(b)(2)(B)." *Id*. Given the nature of the claims as well as the fact that the Debtor is liquidating, and in light of this Court's guidance from *Thru, Inc*. the Committee believes the New York Statutory rate of 9% is appropriate.[20] Absent this rate, the Committee does not support the Plan, meaning the Plan cannot be confirmed, and, therefore, the Disclosure Statement should be denied.

B. The Plan Must Appropriately Address Liquidity by Modifying Certain Claim Classification and Treatment.

21. The Plan categorizes claims of unsecured creditors (other than priority and administrative claims) in three separate classes. *See* Plan Art. III.H. The Committee sees the wisdom in separating larger claims, which will receive interests in the claimant trust, from smaller claims, which will be paid out a percentage of their allowed claims. However, for liquidity reasons the Committee believes that the threshold to separate claims should be lowered to $1,000,000. Furthermore, the Committee believes that there is no justification for separately classifying the Claims in Class 6, which should be either classified with other Convenience Class Claims or with General Unsecured Claims. Lastly, with these changes, the Committee believes that the recovery to those creditors below the threshold of $1,000,000 should be increased to 85% (rather than the 75% currently included in the Plan). This would increase the chance that the Convenience Class would accept the Plan while bringing the recoveries for the Convenience Class Claims closer to

[20] Two of the primary dissenting creditors here, the Redeemer Committee and UBS, prosecuted their claims against the Debtor under New York law, either in an arbitration (Redeemer Committee) or in New York State Court (UBS) prior to the Petition Date. Had either UBS or the Redeemer Committee obtained a judgment against the Debtor in a New York State Court, such judgment would have included post-judgment interest at the New York State statutory rate of 9%. Indeed, the arbitration award explicitly awarded the Redeemer Committee pre-judgment interest at the New York statutory rate of 9%.

the projected 92% recovery for General Unsecured Claims included in the Debtor's Financial Projections. *See* Liquidation Analysis and Financial Projections.

22. Based on the Debtor's projections, post-effective date cash on hand will be reduced to roughly $2 million at the end of the first quarter of 2021. *See* Liquidation Analysis and Financial Projections. This amount of cash (and any lower amounts projected to be reached within the first quarter of 2021) is unacceptably low for projections built on the number of assumptions included in the Debtor's forecast. If any of a number of the forecasted assumptions in the Debtors Financial Projections, including the value and timing of asset monetization, winddown expenses, projected claims settlement, rejection damages claims, collection of notes receivable, and funding needed for the Litigation Trust, result in lower than expected cash flow, there may not be sufficient cash to administer the Plan, appropriate fund the Litigation Trust and effectuate the liquidation.

23. A reduction of the threshold for separation of claims to $1,000,000 and the removal of Class 6, along with an increase to recoveries for Convenience Class Claims to 85% would increase projected cash on hand at the Debtor by $8.1 million at the end of the first quarter of 2021. These extra funds would both (1) provide an increased buffer against unforeseen cash flow issues and (2) provide the Litigation Trustee sufficient funding to pursue claims upon emergence.

C. The Plan Should Reflect the Reality that the Asset Monetization is Solely for the Benefit of Creditors.

24. The Committee believes that, as a fiduciary for all unsecured creditors, its views should be considered paramount with respect to certain aspects of the Plan. Specifically, the Committee believes it should have sole consent over the form of the Claimant Trust Agreement, the selection of the initial members of the Oversight Committee, and the employees that will be

retained by the Reorganized Debtor as of the Effective Date of the Plan. Unfortunately, the Debtor has inexplicably and unjustifiably refused to relinquish control over these issues.

25. Pursuant to the Plan, the Plan shall not be effective until, *inter alia*, "This Plan and the Plan Documents, *including the Claimant Trust Agreement* and the Reorganized Limited Partnership Agreement, and all schedules, documents, supplements and exhibits to this Plan shall have been Filed in form and substance *reasonably acceptable to the Debtor* and the Committee." Plan, Art. VIII.A (emphasis added). The Committee welcomes comments from the Debtor on the Claimant Trust Agreement, but thinks it is unreasonable, unnecessary, and contrary to normal practice that the Debtor should retain consent rights over the form of the agreement that will govern how a trust for the benefit of creditors will function.

26. Similarly, the identity of the initial members of the Oversight Committee will be filed by the Debtor as part of the Plan Supplement. *See* Plan, Art. I.B.86. The Committee believes that the determination of the initial members of the Oversight Committee, who will have oversight of the trusts established for the benefit of Creditors, should be solely within the purview of the Committee.

27. The Debtor has designed the Plan to treat Retained Employee Claims as fully reinstated as of the Effective Date. This is in contrast to Unpaid Employee Claims, which will be paid out at 75% under the current Plan construction. The only difference between Retained Employee Claims and Unpaid Employee Claims are whether the employee is retained by the Reorganized Debtor as of the Effective Date. The Committee believes that the Claimant Trustee, with the consent of the Oversight Committee, should have control over which employees the Reorganized Debtor retains, if anyone. Neither the Claimant Trustee nor Oversight Committee,

however, will be installed until the Effective Date. Therefore, because the Debtor has designed the Plan to require—before the Effective Date—a determination of which employees will be staying with the Reorganized Debtor, the Committee believes that the Committee should have consent over such determination.

III. The Disclosure Statement Should Not Be Approved Because It Does Not Contain Adequate Information.

28. The Disclosure Statement lacks "adequate information" necessary to satisfy the requirement of approval of a disclosure statement.[21] The determination of what constitutes adequate information is made on a case-by-case basis. *See In re Cajun Elec. Power Co-op, Inc.*, 150 F.3d 503, 518 (5th Cir. 1998) (citing to the legislative history of section 1125, which indicates that what constitutes adequate information is a case-by-case determination) (citing *Matter of Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988), cert. denied, 488 U.S. 926 (1988).

29. Courts consider numerous, non-exclusive factors when determining the sufficiency of information provided in a disclosure statement, including, but not limited to: (a) financial information, data, and valuations relevant to a party in interest's decision to accept or reject the chapter 11 plan; (b) information relevant to the risks posed to creditors under the plan; (c) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; and (d) the relationship of the debtor with affiliates. *See In re Divine Ripe, L.L.C.*, 554 B.R. 395,

[21] Bankruptcy Code section 1125 defines "adequate information" as: Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan. 11 U.S.C. § 1125(a)(1).

Case No. 400-02 (Bankr. S.D. Tex. 2016) (citing *In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984)).[22]

A. The Terms of the Debtor Release are not Sufficiently Disclosed.

30. The lack of disclosure included in the Disclosure Statement regarding the Debtor Release make the Disclosure Statement wildly deficient. First, creditors are entitled to notice of the terms of a settlement. *In re Taylor*, 59 B.R. 176, 177 (Bankr. S.D. Tex. 1986) (rejecting a secret compromise because creditors were not provided with notice of the issues). Additionally, the Debtor's valuation of the claims being released and the value received in return constitute valuations relevant to a party in interest's decision to accept or reject the chapter 11 plan. Despite the breadth of the Debtor Release, neither the Disclosure Statement nor the Plan identifies: (1) any of the specific individuals receiving releases, (2) any specific claims that will be released, (3) the expected value of such claims, or (4) the value to be received by the Debtor in exchange for the releases. As set forth in more detail above, each of these disclosures is necessary for the Court and creditors to make a determination about whether the Debtor Release is in fact in fair and equitable and in the best interest of the estate. Without even an attempt to provide notice of these issues or information necessary for parties in interest to make an informed decision, the Disclosure Statement is insufficient.

[22] Other factors considered by courts include (1) the events which led to the filing of the bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtors; (7) the scheduled claims; (8) the estimated return to creditors under a chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtors; (11) the chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectability of accounts receivable; (14) litigation likely to arise in a nonbankruptcy context; and (15) tax attributes of the debtors; *In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

B. The Committee's Position on the Plan is not Sufficiently Disclosed.

31. The Disclosure Statement includes the Debtor's recommendation to support the Plan three separate times (twice in bolded font). *See* Disclosure Statement Art. I.; Art. IV. The Committee's disapproval of the Plan should be considered an important factor in a creditor's determination of whether to support the Plan, and therefore the Disclosure Statement should mention (more than once) that the Committee does not support the Plan, and afford such statement the same prominence that the statement Debtor's suggestion to approve the Plan is afforded.

C. The Disclosure Statement Should Include Additional Disclosures.

32. The Committee respectfully submits that the Disclosure Statement must also include a number of additional disclosures, including, but not limited to the estimated recovery for voting classes and additional risk factors addressing:

- the risk that Allowed Claims may be significantly higher than the Debtor's representation in the Disclosure Statement and the material adverse effect that could have on creditor recoveries;
- the risks associated with approving a Plan that would release claims against potential estate claim defendants and preclude that potential source of recovery;
- the risk that there may be inadequate funding for the Claimant Trust and/or Liquidation Trust; and
- The risks that collections from notes receivable, the timing or valuation of asset monetization, or the winddown costs may be different than forecasted and could have a material adverse effect on creditor recoveries.

33. The Committee respectfully submits that the Disclosure Statement should not be approved unless the foregoing disclosures are added, as applicable.

IV. The Solicitation Procedures Should Not Be Approved.

A. The Court Should Require the Debtor to Include a Committee Letter in the Solicitation Materials.

34. In addition to the foregoing, the Committee believes the Disclosure Statement Motion should not be approved unless the Committee's concerns with respect to the solicitation procedures are also addressed. At a minimum, the Committee believes that holders of unsecured claims should be informed of the Committee's views of the Plan in determining whether to vote to accept or reject the Plan, and the Committee should, therefore, be permitted to include a letter (the "Committee Letter") with the Debtor's solicitation package that would contain the Committee's recommendation to holders of Claims voting on the Plan regarding the Plan vote. The Committee respectfully requests that the Court authorize and direct the Debtor to include the Committee Letter in the solicitation materials so that it is highly visible to and easily accessible by holders of Claims voting on the Plan.

B. Creditors Who Opt into Receiving Class 7 Treatment Should be Deemed to Vote Within the Class they are Classified in Under the Plan.

35. The Committee does not object to the ability of holders of Claims that the Plan classifies in Class 5 or Class 6 to opt for treatment (for distribution purposes) equivalent to the treatment of Class 7 Claims. The Committee believes, however, that any holder of a Claim in Class 5 or Class 6 who does opt to receive the treatment provided under Class 7 for *distribution* purposes should, for voting purposes, remain treated as a member of the Class which they are currently classified in under the Plan. The logic of this is straightforward: each of the members of Class 5 and Class 6 is receiving the same treatment as the other members of the class, each member merely has a choice between two treatments for distribution purposes. Therefore, whether or not

a member of Class 5 or Class 6 elects to be treated for distribution purposes as a member of Class 7 does not change the fact that such member is receiving treatment equivalent to the other members in the class. Meanwhile, members of Class 7 are not afforded any options in the treatment of their claims. Therefore, members of Class 5 and Class 6 should be considered members of Class 5 and Class 6 for voting purposes regardless of whether they elect separate treatment for distribution purposes.

CONCLUSION

36. The Committee is disappointed that the Debtor has not taken its views on the Plan seriously and seems to exhibit a disregard for whom the Plan should benefit. That must stop. The Committee respectfully submits that the Disclosure Statement Motion should be denied.

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WHEREFORE, the Committee respectfully requests that the Court deny the Disclosure Statement Motion.

Dated: October 20, 2020
Dallas, Texas

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