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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re FREMONT GENERAL CORPORATION, a Nevada Corporation Debtor. Tax I.D. 95-2815260	Case No. 8:08-13421-ES Chapter 11 **NOTICE OF MOTION AND MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ORDER TERMINATING THE EXCLUSIVE PERIODS IN WHICH ONLY THE DEBTOR MAY FILE A PLAN AND SOLICIT ACCEPTANCES THERETO; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [Declarations of Deborah Hicks Midanek, Hugh Steven Wilson and Jonathan S. Shenson in support thereof filed concurrently herewith under separate cover] <u>Hearing</u> Date: TBD Time: TBD Place: Courtroom 5A 411 West Fourth St. Santa Ana, California

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TO THE HONORABLE ERITHE A. SMITH, UNITED STATES BANKRUPTCY JUDGE; THE OFFICE OF THE UNITED STATES TRUSTEE; THE DEBTOR AND THE DEBTOR-IN-POSSESSION IN THE ABOVE-CAPTIONED CHAPTER 11 CASE AND OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that a hearing will be held before the Honorable Erithe A. Smith, United States Bankruptcy Judge, on this *Motion for Order Terminating the Exclusive Periods in Which Only the Debtor May File a Plan and Solicit Acceptances Thereto* (the "Motion"), filed by the Official Committee of Unsecured Creditors (the "Creditors' Committee") appointed in the chapter 11 case (the "Case") of the above-captioned debtor and debtor-in-possession (the "Debtor"). The Creditors' Committee has concurrently filed a motion for entry of an order shortening time (the "OST Motion") for a hearing on this Motion, and has requested, for the reasons stated therein, that the Motion be heard on June 18, 2009 at 10:30 a.m.

PLEASE TAKE FURTHER NOTICE that, by the Motion, the Creditors' Committee seeks entry of an order pursuant to Bankruptcy Code section 1121(d) terminating the period under Bankruptcy Code section 1121(c)(3) in which the Debtor has the exclusive right to solicit and obtain acceptances of a plan and during which time competing plans may not be filed ("Solicitation Exclusivity Period").

On June 1, 2009, the last day of the Debtor's plan-filing exclusivity period under Bankruptcy Code section 1121(b) and various orders of this Court, the Debtor filed a plan of reorganization and an accompanying disclosure statement (both of which are missing all exhibits, including any liquidation analysis and balance sheet and financial information). These filings nevertheless automatically extended the Solicitation Exclusivity Period through and including September 1, 2009.

The Creditors' Committee seeks entry of an order terminating the Solicitation Exclusivity Period to permit the filing of an alternative plan of reorganization because (i) the Debtor has not demonstrated any genuine interest or ability to negotiate with the constituencies in this case and has squandered an already extraordinary lengthy period of

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exclusivity, (ii) the Debtor failed to use the last exclusivity extension (and the lengthy extensions previously granted) to formulate, negotiate and document a confirmable plan of reorganization, violating representations to this Court upon which the Debtor preserved exclusivity, (iii) the Debtor's plan is not the product of any negotiation among creditors and is not supported by those constituencies, (iv) the Creditors' Committee and its members do not have any confidence that the Debtor can formulate a plan that creditors will support or move this case forward, (v) having spent over seven months in an unsuccessful and expensive effort to locate a third party investor, and having had nearly a year of plan filing exclusivity, the Debtor's plan is patently unconfirmable as a matter of law, (vi) the Debtor's plan and disclosure statement also are materially incomplete, guarantee expensive and time consuming plan-related litigation, and do not even begin to approach so much as a blueprint to finally bring this case to any conclusion and (vi) numerous other reasons set forth in this Motion.

Under these circumstances, there is no sound reason to require the Creditors' Committee to wait until September 1, 2009 to file a chapter 11 plan. The Debtor has had more than a fair opportunity to conclude this case, and has failed. Despite the Creditors' Committee's well publicized pleas and many efforts, the Debtor's multi-month process to attract a third-party investor was to the exclusion of working with the key constituencies in this case to negotiate and draft a confirmable standalone chapter 11 plan. Permitting the Debtor to maintain exclusivity through September 1, 2009 will *not* facilitate the prompt resolution of this case.

To the contrary, doing so will result in greater delay for the stakeholders in this case, the unnecessary accrual of greater administrative expenses, and the consequent reduction in recoveries. Whether or not the Debtor decides to amend its plan so as to at least try to satisfy the confirmation requirements, or repair its disclosure statement to begin to furnish meaningful information, is simply beside the point. The Debtor no longer should have a monopoly over the plan process. Terminating exclusivity will level the playing field and

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allow those with a real stake in the estate an opportunity to facilitate a prompt exit from this case. The unsecured creditors in this case have waited long enough.

If the Court grants the relief requested, the Creditors' Committee intends to file a chapter 11 plan ("Committee Plan") focused on promptly realizing the value of the Debtor's estate and getting cash into the hands of creditors as quickly as possible. The Committee Plan will, among other things, propose to distribute the property available to the constituencies in this case to creditors of the Debtor as soon as practicable and will establish a definitive distribution scheme in a manner that comports with the Bankruptcy Code. In short, the Committee Plan will provide for a speedy rehabilitation, rather than interminable litigation over the extent of the distributions owing to creditors.

PLEASE TAKE FURTHER NOTICE that the Motion is based on the facts and legal analysis set forth in the accompanying Memorandum of Points and Authorities and the Declaration of Deborah Hicks Midanek (the "Midanek Declaration"), the Declaration of Hugh Steven Wilson (the "Wilson Declaration") and the Declaration of Jonathan S. Shenson (the "Shenson Declaration"), the record in this case and any other evidence before the Court prior to or at the hearing on the Motion, and all matters of which this Court may properly take judicial notice.

PLEASE TAKE FURTHER NOTICE that, if you wish to oppose this Motion, you must file a written response with the Court and serve a copy of it on the undersigned counsel for the Creditors' Committee no later than the date set by the Court. Pursuant to the OST Motion, the Creditors' Committee is requesting that the Court fix 4 p.m. on June 15, 2009 as the deadline for filing an opposition to the Motion. Pursuant to Rule 9013-1(a)(11) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Central District of California, the failure to file and serve a written opposition to the Motion may be deemed to constitute consent to the relief requested in the Motion.

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DATED: June 8, 2009

/s/
JONATHAN S. SHENSON an Attorney with
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OTHER AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES[1]

I.

INTRODUCTION

The Debtor has had nearly a year in which to negotiate and submit a plan. The Debtor has requested and received three extensions of exclusivity in order to do so, each time assuring the Court that the extended exclusivity period would provide adequate time for the Debtor to locate a third-party plan proponent interested in investing in the Debtor through a chapter 11 plan. Skeptical of the merits of this effort, the Creditors' Committee repeatedly stated to the Court and privately to the Debtor that if the Debtor was going to pursue such a strategy, it should at least proceed on a "dual track," simultaneously negotiating a standalone chapter 11 plan with the key constituencies in this case. The Creditors' Committee has sought throughout the case to engage the Debtor in negotiations aimed at formulating such a plan, but its efforts were repeatedly rebuffed. As documented below in Section II.A., although the Debtor represented to the Court that, at last, it would use the last exclusivity period to negotiate a standalone plan, the Debtor failed to honor that undertaking.

On June 1, 2009, the expiration date of the Debtor's plan-filing exclusivity, the Debtor filed a plan (the "Plan") and disclosure statement (the "Disclosure Statement").[2] As those documents demonstrate, the Debtor's effort to identify a third-party plan investor has failed. The Debtor's Plan does not provide for any third-party investment, but instead provides (albeit thin on details and violative of the Bankruptcy Code) for the distribution of indeterminate amounts to creditors and the retention of interests in the Debtor by existing equity holders. After an entire year, and the expenditure of millions of dollars on professional fees, the Debtor finds itself precisely where the Creditors' Committee anticipated: without a plan proponent and without a viable plan.

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[1] Capitalized terms that are defined in the foregoing Notice of Motion and Motion are intended to have the same meaning ascribed to them in this Memorandum of Points and Authorities. Terms not otherwise defined herein have the meanings ascribed to them in the Plan and Disclosure Statement.

[2] For the convenience of the Court, copies of the Plan and Disclosure Statement are attached to the Shenson Declaration as Exhibits E and F.

The Debtor's standalone Plan is too little and too late. The Plan is not the result of any negotiations among the key constituencies in this case, does not reflect the views of the Creditors' Committee, is already opposed by the Creditors' Committee and its members (who hold a substantial amount of the Debtor's unsecured debt), and is patently unconfirmable. The Plan does not represent progress of any kind. It is a unilateral, last-ditch effort by the Debtor and its professionals to maintain an undeserved monopoly over the plan process.

Under the Court's most recent exclusivity order (the "Exclusivity Order")[3], the filing of the Debtor's plan on June 1, 2009 effectively extends the Debtor's Solicitation Exclusivity Period to September 1, 2009. Under the Exclusivity Order, the Solicitation Exclusivity Period could not be extended without the consent of the Creditors' Committee, which the Creditors' Committee made clear it did not intend to grant. Thus, the only way the Debtor and its professionals could try to preserve exclusivity was to file a plan – *any plan* – regardless of whether the plan was complete, made sense, reflected creditor input, had the support of any constituency, or was capable of confirmation.

After shunning the Creditors' Committee and the Official Committee of Equity Holders (the "Equity Committee") for most of a year, the Debtor did not provide a first draft of *any* plan to the parties until May 22, 2009, and even then advised in writing that it did not intend to file its plan on June 1, 2009. The Debtor did not make any meaningful attempt to solicit input from the Creditors' Committee regarding the basic structural and economic terms that would be agreeable it until Friday, May 29, 2009, *just one business day before the Plan was filed*. And although the Creditors' Committee responded within hours and over that weekend with detailed proposals, those proposals were not incorporated into the Plan that the Debtor ultimately filed.

After enjoying a year of plan-filing exclusivity, it is reasonable to expect that the Debtor would file a facially confirmable chapter 11 plan and a complete disclosure statement

[3] *See* Order Regarding Fremont General Corporation's Third Motion for Order Extending the Exclusive Periods in Which Only the Debtor May File a Plan and Solicit Acceptances Thereto [Docket No. 708].

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containing adequate information. And yet despite having spent many months and hundreds of thousands of dollars working on draft plans and disclosure statements, the Debtor did nothing of the kind. Sadly, the Plan and Disclosure Statement are materially incomplete, internally inconsistent, ambiguous, and replete with traps, loopholes and litigation landmines. Moreover, the Plan on its face does not satisfy numerous requirements of Bankruptcy Code sections 1123(a) and 1129(a), and it affirmatively violates the absolute priority rule embodied in Bankruptcy Code section 1129(b).

As discussed in greater detail below, the Plan provides that existing equity holders will receive property under the Plan, but the Plan does <u>not</u> promise the payment of any particular amount to unsecured creditors (let alone payment in full), does <u>not</u> provide a timetable for payment to unsecured creditors, does <u>not</u> specify any definitive payment terms, and does <u>not</u> specify the manner in which the Debtor will realize the funds necessary to pay unsecured claims. Indeed, the literal language of the Plan provides that although equity holders will retain their interests in the Debtor, unsecured creditors may not receive the full present value of their claims (or even the principal amount of their claims) and may not receive distributions for years to come. A more patent violation of the Bankruptcy Code requirements is hardly possible.

Among other egregious provisions, the Debtors propose to pay unsecured creditors no more than the federal judgment rate (if at all) on the deferred cash payments made under the Plan, even if creditors remain unpaid for years and years. As of the petition date, that rate was a paltry 2.51%. The Plan further provides that if each of the Debtors' dozens of unsecured creditors believes it is entitled to a greater interest rate, *each must seek from this Court and obtain an order adjudicating its own entitlement to that rate at a confirmation hearing*. This is absurd. Requiring each of the Debtor's dozens of creditors to come to Court to litigate what the Plan must provide violates any number of basic Bankruptcy Code requirements, including not only that a plan must specify the proposed treatment to be provided to creditors, but that similarly classified creditors must receive the same treatment. Under the well-settled law of the Ninth Circuit, moreover, unsecured creditors are

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indisputably entitled to a "market rate" of interest on deferred plan payments, a rate that is far in excess of 2.51% under the circumstances. The Debtor's attempt to avoid paying this obligation to unwary creditors by creating artificial procedural requirements and ignoring well-settled law is the epitome of bad faith.

The Debtor's failure to proceed diligently and in good faith is further underscored by its Disclosure Statement, which evidences not even an effort to supply adequate information. In a deplorable example of "hide the ball," the Disclosure Statement (i) is missing all of its exhibits (other than the Plan), including a liquidation analysis and updated financial information concerning the Debtor (which the Debtor advises in its filing will only be submitted sometime before the hearing on the Disclosure Statement, as if that will be helpful), (ii) does not include or contemplate the inclusion of any projections or a business plan, (iii) does not include or contemplate the inclusion of any information regarding the assets and liabilities of Fremont Reorganization Corporation (f/k/a Fremont Investment & Loan) ("FRC"), the largest potential source of recovery by the Debtor's estate and (iv) does not include any explanation as to how and when the Debtor intends to realize the value of those assets.

Under the circumstances, it would be grossly inappropriate and unfair to require unsecured creditors to wait until September 1, 2009 to file a plan. The Debtor's lack of meaningful progress towards a confirmable plan, its failure over the last year to engage the constituencies in good faith negotiations, and its last-ditch filing of a plan all constitute cause to terminate the Solicitation Exclusivity Period. They also explain the absence of any confidence on the part of the Creditors' Committee that the Debtor is capable of negotiating a consensual, confirmable plan. Indeed, it is unrealistic to expect that continuing the Debtor's exclusivity will yield a different result than it has produced to date: delay, frustration and unnecessary expense. By contrast, opening up the process to a competing plan from unsecured creditors offers the realistic prospect of bringing this case to a prompt resolution.

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II.

BACKGROUND

A. The Hastily Filed Plan and Disclosure Statement Are Dead On Arrival.

In response to the repeated demands of the Creditors' Committee, and in an effort to persuade this Court to grant one last extension of exclusivity, the Debtor represented to this Court in April that it would "timely circulate a draft 'standalone' plan to both committees, and will work to make that plan strong – and, we hope, consensual – based upon committee input."[4] The Debtor further represented that it sought an extension so it could "clean-up its current working draft 'standalone' plan, circulate that plan to both committees for their review and comment, incorporate revisions from the committees or based upon the effectiveness of pending and possible settlements, and finalize a disclosure statement which comports with Bankruptcy Code section 1125."[5] The plan and disclosure statement, it promised, would "comply with all aspects of the Bankruptcy Code."[6]

Unfortunately, the Debtor failed to deliver on its promises to this Court and creditors. Despite repeated requests, the Debtor waited until May 22, 2009 to circulate for the first time a draft plan and disclosure statement.[7] Moreover, counsel to the Debtor advised at that time that the documents were still works in progress and that the Debtor did *not* intend to file them by June 1, 2009.[8] On the last business day prior to June 1, 2009, the Debtor made an about-face, advising that it might actually file its draft plan and disclosure statement on June

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[4] *See* Fremont General Corporation's Reply Brief In Further Support Of Its Third Motion For Order Extending The Exclusive Periods In Which Only The Debtor May File A Plan And Solicit Acceptances Thereto [Docket No. 620], at 14-15. *See also* Notice of Third Motion and Third Motion for Order Extending the Exclusive Periods in Which Only the Debtor May File a Plan and Solicit Acceptance Thereto; Memorandum of Points and Authorities [Docket No. 584] ("Even if the ultimate result in this case is not a proponent plan, certain open issues remain regarding the terms of a joint liquidating plan. The Debtor has not yet had the opportunity to discuss many of the issues (including difficult tax, securities, and bankruptcy issues) with the committees and their professionals, and desires to do so before any such plan is put before this Court or the estate's stakeholders. Additional time may be appropriate and necessary for these discussions to occur.")

[5] *Id.* at 14.

[6] *Id.*

[7] *See* Shenson Declaration at ¶ 3, Exh. A.

[8] *Id.*, Exh. B.

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1st, and requesting, *for the first time*, input from the Creditors' Committee on plan economics and structure.[9] The Creditors' Committee responded within hours with detailed proposals, and communicated with the Debtor throughout the weekend, but the Debtor filed a plan on the following Monday that effectively ignored those proposals.[10]

The Plan proposed by the Debtor seeks to pay unsecured creditors less than the full amount of their claims while enabling equity holders to retain their interests in the Debtor. The Debtor cannot confirm such a plan without gaining the affirmative support of the Creditors' Committee, its members and unsecured creditors generally. The Debtor has had a year to gain that support, but has utterly failed to do so. Indeed, the Debtor has lost all credibility by filing a plan that is not the product of genuine negotiation and that raises more questions than it answers. The plan filed by the Debtor promises prolonged litigation, not a consensual resolution among the stakeholders.

Not surprisingly, the Creditors' Committee and its members (who individually hold a substantial amount of the unsecured debt in this case) already oppose the Plan.[11] As the plan term sheet long ago filed by the Creditors' Committee[12] demonstrates, the Creditors' Committee intends to file a plan that will promptly realize the value of the Debtor's interests in FRC, promptly begin distributing cash to creditors and subsequently to equity holders if, as and when the creditors of the estate are paid in full, in accordance with the priority scheme of the Bankruptcy Code.[13]

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9 *Id.* at ¶ 4, Exh. D.

10 *Id.*

11 For instance, Tennebaum Capital Partners, a member of the Creditors' Committee, which holds over 95% of the Senior Debt and the vast majority of the other Class 2A claims, opposes the Plan. *See* Wilson Declaration at ¶ 6. In light of this fact, and the recommendation of the Creditors' Committee to unsecured creditors to reject and oppose the Plan, it is highly unlikely that Class 2A would ever accept the Plan filed by the Debtor. *Id.* at ¶ 7. Similarly, based on input from ex officio representatives, the Creditors' Committee believes that a majority of the holders of TOPrS Claims will oppose the Plan, meaning that it is equally unlikely that Class 2B would ever accept the Plan.

12 *See* Declaration of David Hollander in Support of Official Committee of Unsecured Creditors' Objection to Second Motion for Order Extending the Exclusive Periods in Which Only the Debtor May File a Plan and Solicit Acceptances Thereto [Docket No. 438], Exh. A.

13 *See* Wilson Declaration at ¶ 10.

1. The Plan Does Not Promise Unsecured Creditors Any Distribution On Their Claims.

The Plan classifies unsecured, non-priority claims into two classes: Class 2A, comprised of all general unsecured claims other the claims of the FGFI Trust under the Subordinated Debenture (the "TOPrS Claims"), and Class 2B, comprised of the TOPrS Claims, which are contractually subordinated to certain other unsecured claims. But the provisions purporting to describe the treatment of these claims do not contain *any* promise of repayment whatsoever. The Plan issues no promissory note to unsecured creditors, grants them no security, fixes no maturity date on the indebtedness owing to them under the plan, provides no fixed interest payment date and offers no principal amortization. At most, these provisions create a *cap* on distributions that *may* be made to unsecured creditors which, as discussed below, is at an amount equal to less than full payment under the Bankruptcy Code. *See* Plan at 22-25.

In substance, these provisions are akin to a "cash flow note," *i.e.*, a note that is issued to a creditor stating that such creditor will receive payment as and when cash becomes available for satisfaction of the indebtedness. Significantly, the Plan sets forth no formula or timetable for determining when "Distributable Cash" will be remitted to unsecured creditors (or when it will be distributed to equity holders). Rather, "Distributable Cash" is simply cash that is deemed available from time to time by the Board of Directors of the "Reorganized Debtor." *See* Plan at 7. The Plan does not confer any right on unsecured creditors to compel payment under the Plan if they disagree with the decisions of the Board of Directors.

Moreover, the Plan provides that <u>no</u> distribution is to be made to the holders of unsecured claims until the Reorganized Debtor has fully funded a variety of reserves for the full amount of the claims asserted (even if such claims are disputed): "the Administrative Claims Reserve, Priority Tax Claims Reserve, Priority Non-Tax Claims Reserve, and Equity Trust Expense Amount." *See* Plan at 22-23. Thus, the Plan leaves up in the air whether, when and to what extent the holders of unsecured creditors will be paid any amounts

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whatsoever. As to the Equity Trust Expense Amount, moreover, it improperly places the costs of making distributions to equity *ahead* of making distributions to unsecured creditors.

2. The Plan Provisions That Purport To Provide Interest On Unsecured Claims Are Illusory, Inadequate and Misleading.

The Plan purports to provide "Postpetition Interest" to the holders of unsecured claims (i) for the postpetition period prior to confirmation ("Postpetition Period") and (ii) for the post-effective date period in which the payment of their claims is deferred ("Post-Effective Date Period"). *See* Plan at 12 (definition of "Postpetition Interest"); 22-25 (treatment of unsecured claims). Careful examination of the text reveals, however, that any promise of interest is illusory and entirely insufficient to provide the holders of unsecured claims with payment in full over time of the present value of their claims, and is nothing more than a prescription for endless litigation.

First, the Plan provides nothing more than that the holders of unsecured claims *may* receive interest. The holders of unsecured claims will *not* receive interest if there is insufficient Distributable Cash to pay, "in full, all Allowed Administrative Claims, Allowed Professional Fee Claims, Allowed Priority Tax Claims, Allowed Priority Non-Tax Claims, Allowed General Unsecured Claims, Late Filed Claims, and all Post Effective Date Plan Expenses," or if for any other reason the Reorganized Debtor does not *actually* pay all of these amounts – even if adequate reserves are established. *See* Plan at 22 ("and if the foregoing are paid, then Allowed General Unsecured Claims shall also include any Penalty or Postpetition Amount"). Moreover, this provision improperly elevates the unliquidated and unlimited post-effective date expenses of the Reorganized Debtor ahead of the payment of allowed unsecured claims. *Id.* at 22.

Second, the interest rate proposed is inadequate and illusory. The Plan provides that to the extent any interest is accrued and paid on unsecured claims for the Postpetition Period and the Post-Effective Date Period, it will be at the federal judgment rate in effect on the petition date, "in accordance with section . . .726(a)(5). " of the Bankruptcy Code.[14] *See*

[14] The Plan also provides that a "Penalty" may be paid on an unsecured claim pursuant to Bankruptcy Code

Plan at 12, 23, 25. As discussed in Section III.E.b below, the Plan (perhaps intentionally) confuses the rate that must be awarded under Bankruptcy Code section 726(a)(5) to holders of allowed unsecured claims in a solvent chapter 7 case ("Chapter 7 Solvency Interest" and "Chapter 7 Solvency Rate"), with the market rate of interest that must be paid on deferred cash payments following the effective date of a chapter 11 ("Market Interest" and the "Market Rate"). Market Interest calculated at the Market Rate is required to provide unsecured creditors whose compensation is deferred under a chapter 11 plan with the full present value of their claims.

The Chapter 7 Solvency Rate specified in the Plan is a mere 2.51%. By contrast, as demonstrated in the Midanek Declaration, the Market Rate that unsecured creditors should be receiving on their deferred payments under the Plan is substantially higher – reflecting the terms, conditions and structure of the payment "obligation" that the Debtor has proposed to provide unsecured creditors under the Plan. The Plan provides no fixed revenue stream and leaves the Debtor highly leveraged. The Senior Note, TOPrS and general unsecured debt exceed $330 million, and no new capital is being contributed. Utilizing the current equity capitalization of the Debtor (based upon the trading of the Debtor's common stock), the debt to equity ratio substantially exceeds twenty times. Compounding these extremely unattractive features, repayments are only available under the Plan to the extent cash can be realized from FRC.

Under prior circumstances, when FRC was a functioning bank, the Senior Notes and the TOPrS were performing loans, and each of those instruments had enforceable payment obligations, fixed maturities, and definitive terms, the interest rates accorded unsecured creditors under the Senior Notes and the TOPrS were 7.875% and 9.000%, respectively – far higher than the 2.51% rate proposed by the Debtor under the Plan. Under the Plan, the applicable Market Rate is going to be even higher. None of the prepetition facts and circumstances that were true with respect to the Senior Notes and TOPrS are true with respect to the soft payment "obligations" that the Debtor proposes to create under the Plan.

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section 726(a)(4). <u>See</u> Plan at 23, 25.

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Indeed, there is no business plan whatsoever to support any of these so-called obligations could ever be satisfied.

Third, the Plan attempts unfairly to create a trap through which individual unsecured creditors who do not affirmatively seek relief from this Court will be stuck with the Chapter 7 Solvency Rate, rather than the Market Rate to which they are entitled with respect to deferred plan payments. Specifically, the Plan provides that "if the holder of a particular Allowed Claim in connection with Confirmation of the Plan obtains a ruling from the Bankruptcy Court that another interest applies with respect to such holder's Allowed Claim, then such rate shall determine the Postpetition Interest due such holder." *See* Plan at 12.

This provision contemplates the untenable result that (i) the treatment of claims under the Plan will turn not on whether they are entitled to a particular treatment, but whether each of the holders of those claims affirmative requests and obtains from this Court an order entitling them to that treatment, (ii) similarly situated claims in the same class will be treated differently and (iii) dozens of claimants will to come to this Court seeking such relief at the time of plan confirmation. Further, it is not clear whether the promise of a higher interest rate is anything but illusory, as the Plan additionally provides, without exception, that any interest awarded on unsecured claims will be "(to the extent and priority payable) in accordance with Section . . . 726(a)(5)." *See* Plan at 23, 25. Thus, even if an individual creditor goes through the time and expense of proving entitlement to a higher rate of interest, that creditor must presumably come back to Court at a later date and attempt to make an additional showing as to the "extent and priority" of such creditor's entitlement to interest (whatever that might mean).

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3. The Plan Expressly Provides That The Debtor, At Its Election, May Pay Unsecured Creditors Less Than The Full Amount Of Their Claims.

Separate and apart from the inadequacy of the post-effective date interest rate, the Plan expressly provides that the Debtor unilaterally may elect not to pay Postpetition Interest and Post-Effective Date Interest to the holders of unsecured claims, thereby depriving them full satisfaction of their claims. Specifically, the Plan provides that if the Plan becomes effective on or before October 31, 2009, and the holders of the Senior Notes receive cash equal to the stated principal of those notes ($175 million), they will not be entitled to the payment any Postpetition Interest, Post-Effective Date Interest, or Penalty amounts accrued on those claims whatsoever. *See* Plan at 23. To the contrary, payment of the original principal amount "shall constitute a full and final *satisfaction and accord*" of each the claims arising from the Senior Notes. *Id.* (emphasis added). Likewise, the other unsecured claims in Class 2A are deemed satisfied if they are paid by October 31, 2009, without Postpetition Interest, Post-Effective Date Interest, or Penalty amounts. *Id.*

This provision is remarkable in that it does not confer upon the creditors affected by it the option to accept less than full payment. But rather, it *requires* all creditors to accept less than full payment if the Debtor is able to and actually elects by October 31, 2009 to pay the principal amount of those claims. There is nothing in the Plan or the Disclosure Statement that explains or justifies the denial under this provision of interest and penalties on unsecured claims that have gone unpaid during the year this case has been pending, or that would remain unpaid through October 31, 2009.

4. The Plan Permits Equity To Retain Their Interests in the Reorganized Debtor Regardless Of Whether Unsecured Creditors Are Paid In Full.

The Plan defines Distributable Cash as cash "that is determined by the Board of the Reorganized Debtor from time to time to be currently available for distribution to holders of Allowed Claims and Allowed Interests by the Plan Administrator *in the order of priority established by the Plan*." *See* Plan at 7 (emphasis added). There is no provision in the Plan

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that plainly articulates that order of priority. Moreover, irrespective of any distributions, the Plan on its face permits equity holders to receive and retain interests in the Reorganized Debtor, *irrespective of whether unsecured creditors are ever paid in full*. *See* Plan at 25.

5. Neither The Plan Nor The Disclosure Statement Adequately Address The Means By Which Plan Payments To Unsecured Claims Will Be Funded.

The Disclosure Statement states that the estimated aggregate range of allowed unsecured claims (other than TOPrS claims) in Class 2A is $222,171,214 to $241,003,550, and the estimated aggregate amount of the TOPrS claims in Class 2B is $107,467,913. *See* Disclosure Statement at 12-13. Further, the Disclosure Statement acknowledges that with approximately $26 million in the estate, the Debtor's ability satisfy the unsecured claims is Class 2A and Class 2B "is entirely contingent upon its ability to successfully realize upon its substantial investment in its indirect, non-debtor subsidiary FRC." *See* Disclosure Statement at 70.

Yet, amazingly, neither the Plan nor the Disclosure Statement articulates the means, method, or mechanism by which the Debtor intends to realize the value in FRC. There are no business plans, no projections, and no attempt in the Plan to implement a solution to this problem. Moreover, the Disclosure Statement does not contain, or suggest any intention by the Debtor to provide, detailed information regarding FRC's finances, its assets and liabilities, the potential for recovery from FRC, or the effort, costs, risks and timetable associated with achieving those recoveries.[15]

Even more amazing (and irresponsible), other parts of the Disclosure Statement create the misimpression that unsecured creditors actually *will* be paid in full. For instance, the Disclosure Statement states in an utterly conclusory fashion that the "Estimated Percentage Recovery Of Allowed Claims or Interests" for each of Class 2A and Class 2B is "100%."

[15] The Disclosure Statement goes only so far as to say that the Debtor's bankruptcy schedules previously "assigned a $278,481,263 value to its direct interest in FRC, subject to the qualifications stated therein." Disclosure Statement at 72. This is hardly adequate where, according to the Debtor's own statements, the feasibility of the Plan is contigent on the realization of a recovery from FRC.

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See Disclosure Statement at 12-13. The Disclosure Statement likewise states: "The Plan proposes that Classes 2A and 2B *shall receive payment in full* of the principal indebtedness owed to holders of Senior Notes and the holder of the Subordinated Debenture." *See* Disclosure Statement at 79. In light of the other representations contained in the Disclosure Statement, these statements may fairly be described as "double-talk." More importantly, they are totally unsubstantiated. Neither the Plan nor the Disclosure Statement describe the means by which the Debtor intends to achieve this goal, or the information necessary to assess its prospects for doing so.

6. The Plan Articulates A Corporate Governance Structure That is Incomplete, Poorly Conceived and Inappropriate.

The Plan provides that after the occurrence of the Effective Date, the Board of Directors will be composed of 3 persons selected by the "Non-Subordinate Members of the Creditors Committee" (i.e., that are holders of unsecured claims in Class 2A), 1 person selected by the "Subordinate Members of the Creditors Committee" (i.e., that are holders of TOPrS claims in Class 2B), and 1 person selected by the Equity Committee. *See* Plan at 28. If, as and when Class 2A Claims are paid in full, the Plan further provides that the Board of Directors will be reconstituted to consist of 3 persons "selected by the Subordinate members of the Creditors Committee" and persons selected by the Equity Trustee." Upon payment of all Class 2B Claims in full, the Board of Directors is to comprise 5 persons, all selected by the Equity Trustee. *See* Plan at 28-29.

The Plan also contemplates that the Reorganized Debtor will have a chief executive officer that serves as "Plan Administrator," with the principal responsibility of liquidating the assets of the Reorganized Debtor and making distributions to stakeholders under the Plan. The Disclosure Statement states that the "Plan Administrator shall be a natural person acceptable to each of the Debtor, the Creditors Committee and the Equity Committee, and shall be appointed by the Court by a provision of the Confirmation Order," although the *Plan itself* does not contain any such provision. *Compare* Disclosure Statement at 52, with Plan at 30.

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The Debtor's proposals are riddled with problems and confirmation infirmities. First, the governance structure described in the Plan is materially incomplete. The Plan contemplates the filing of two exhibits at an unspecified time before the Confirmation Hearing, listing certain assets and "matters," the sale or settlement of which would constitute a "Significant Matter." *See* Plan at 14, 52-53. The Plan provides that the Plan Administrator can effectuate the compromise of any claim or cause of action that is not a Significant Matter *without* the approval of the Board of Directors. *See* Plan at 29. Without these exhibits, however, it is impossible to fully understand the breadth of the unfettered powers that the Debtor proposes to confer on the Plan Administrator.

Second, while the Board of Directors has authority to refuse to consent any proposed Significant Matter, there is nothing vesting the Board of Directors with the authority to effectuate a settlement on its own, manage the affairs of the Reorganized Debtor, direct the Plan Administrator to do so, *or to terminate the Plan Administrator, with or without cause*. Thus, although the Plan nominally states that the Plan will be implemented by the Plan Administrator "subject to the supervision of the Board of Directors," *see* Plan at 30, the Plan fails to enable the Board of Directors to exercise the essential powers of a corporate board or grant it the powers necessary to effectively hold the Plan Administrator accountable. Moreover, because the Plan Administrator cannot be fired, that individual is not accountable *at all* to the creditors.

Third, the Debtor states in the Disclosure Statement that there may not be sufficient value to pay unsecured claims in full. As a matter of law, until and unless unsecured creditors are fully paid, it is inappropriate to permit existing equity holders to participate in the governance of the Reorganized Debtor and to vote on matters as to which it has no demonstrated economic interest. Yet, the Plan vests the Equity Committee (and the Debtor) with a veto over the selection of the Plan Administrator and gives equity holders the right to designate a Board of Directors representative, all before creditors are repaid.

Finally, the Plan provides that if, as and when the holders of Class 2A unsecured claims are paid in full, the Board of Directors will be reconstituted to include 3 persons

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"selected by the Subordinate Members of the Creditors Committee." Yet, the Plan provides that Creditors' Committee will continue only until the Effective Date of the Plan, at which time it will "terminate and disband." *See* Plan at 38. Unless it is clear in advance of the Effective Date that the holders of Class 2A unsecured claims are going to be paid *on* the Effective Date, there will no Creditors' Committee – and no Subordinated Members of the Creditors' Committee – to appoint additional members to the Board of Directors.

* * *

As the balance of this Memorandum demonstrates, the foregoing facts and circumstances establish cause to terminate the Solicitation Exclusivity Period and permit the Creditors' Committee to immediately file its own chapter 11 plan.

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III.

ARGUMENT

A. Cause Exists To Terminate The Solicitation Exclusivity Period.

Pursuant to Bankruptcy Code section 1121(d), the Court "may for cause reduce" the Debtor's exclusive periods to file and solicit acceptance of a plan. 11 U.S.C. § 1121(d). Although the term "cause" is not defined in the Bankruptcy Code, it is well established that bankruptcy courts have wide latitude and discretion to determine whether sufficient "cause" exists to alter the exclusivity periods based on the facts and circumstances of each particular case. *See, e.g., United Savings Assoc. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 370 (5th Cir. 1987) (noting that bankruptcy code "[s]ection 1121 was designed, and should be faithfully interpreted, to limit the delay that makes creditors the hostages of Chapter 11 debtors"), *aff'd*, 484 U.S. 365 (1988).[16]

Courts have recognized, moreover, that the termination of exclusivity benefits both creditors and the debtor. Increased competition by other parties frequently helps, rather than hurts, negotiations toward a consensual plan. *See, e.g., In re Public Service Co. of New Hampshire*, 99 B.R. 155 (Bankr. D.N.H. 1989) (termination of the exclusive period created a level playing field and fostered the negotiation of a consensual plan of reorganization). Indeed, "the ability of a creditor to compare the debtor's proposals against other possibilities is a powerful tool by which to judge the reasonableness of the proposals. A broad exclusivity provision, holding that only the debtor's plan may be 'on the table,' takes this tool from creditors." *Century Glove, Inc. v. First American Bank*, 860 F.2d 94, 102 (3rd Cir. 1988).[17]

[16] Bankruptcy Code section 1121 was a enacted as a compromise of provisions in former Chapter X, which gave the debtor no ability to propose a plan and former Chapter XI, which gave the debtor indefinite and exclusive control over the plan process. *See* H.R. Rep. No. 95-595, 95th Cong. 1st Sess. at 231 [hereinafter, "House Report"]. Thus, Congress established a presumptive 120-day plan filing exclusivity period, and gave the courts the ability to shorten or extend that period on a case by case basis. *See* 11 U.S.C. § 1121(b), (c), (d).

[17] *See also In re Rook Broadcasting of Idaho, Inc.*, 154 B.R. 970, 976 (Bankr. D. Idaho 1993) ("[i]t is in the interest of creditors that they have a choice between competing plans"); *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1005 (Bankr. N.D. Ind. 1990) (denying an extension of exclusivity affords other parties in

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No inequity results to a debtor if exclusivity is terminated. *See, e.g., Tony Downs Food Co.*, 34 B.R 405, 407 (D. Minn. 1983). The debtor retains a concurrent right to file its own plan. As stated by one court which denied a debtor's first request to extend exclusivity: "[B]y denying the extension, the Court does not prejudice the debtors' coexistent right, nor dilute the debtors' duty to a file a plan." *In re Southwest Oil Co.*, 84 B.R. 448, 454 (Bankr. W.D. Tex. 1987). *See also In re Grossinger's Assoc.*, 116 B.R. 35, 26 (Bankr. S.D.N.Y. 1990) ("loss of plan exclusivity does not mean that the debtor is foreclosed from promulgating a meaningful plan of reorganization, only that the right to propose a chapter 11 plan will not be exclusively with the debtor.")

If anything, the existence of competing plans commonly results in a higher and more expeditious recovery for the parties. *See, e.g., Bank of America v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 457 (1999) (explaining that allowing competing plans is one method of ensuring that property is exposed to the marketplace and tends to increase creditor dividends) (citing scholarly authority); *In re Sound Radio, Inc.*, 93 B.R. 849 (Bankr. D.N.J. 1988) (after court modified exclusivity to authorize filing of three competing plans, plan ultimately confirmed aid more per share to equity, paid creditors in full and allowed debtor to go forward as reorganized company).[18]

As discussed below, the courts have interpreted the term "cause" flexibly to encompass a wide variety of circumstances, including those in which the debtor is not working diligently towards the formulation and acceptance of a confirmable plan, has not been successful in efforts to achieve that objective, and/or where it appears that the continuation of the debtor's exclusivity is not likely to achieve that objective expeditiously, if at all. All of these circumstances are applicable in this case. By opening up the plan process, this Court will give unsecured creditors an opportunity to move this case towards an

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interest an opportunity to file a plan and "there is no negative effect upon the debtor's co-existing right to file its plan").

[18] It is not necessary at this juncture for the Court "to judge what the likely success of those alternative approaches may be but it is sufficient for [the Court] to recognize and express the judgment that opening up the process to those alternative approaches in this particular case is desirable." *In re EUA Power Corp.*, 130 B.R. 118, 119 (Bankr. D.N.H. 1991).

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expeditious resolution, where the Debtor has simply failed to do so. Allowing the Creditors' Committee to pursue its own plan, while the Debtor continues to pursue whatever strategies it wishes, preserves a fair balance between the interests of creditors and those of the Debtor.

B. After A Year In Chapter 11, The Debtor Has Failed To Make Genuine Progress In Developing A Viable Plan.

"Where there is no reasonable likelihood of reorganization or where the debtor unreasonably delays in its efforts to reorganize, the Bankruptcy Code affords several avenues for relief to all creditors, secured as well as unsecured." *United Savings Assoc. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 370 (5th Cir. 1987), *aff'd* 484 U.S. 365 (1988). One of those avenues is the termination of a debtor's plan exclusivity. *Id.; see also* H.R. Rep. No. 95-595, 95th Cong. 1st Sess. at 232 ("if a debtor delayed in arriving at an agreement, the court could shorten the period and permit creditors to formulate and propose a reorganization plan").

The Debtor in this case has not been diligent in pursuing a consensual plan with its constituents. The Debtor has spent the better part of a year and a substantial amount of estate funds pursuing a failed strategy to attract a third party investor. The Debtor has pursued this strategy to the exclusion of any effort to negotiate a stand-alone plan with the Creditors' Committee – despite the Debtor's representations to the Court and the repeated requests of the Creditors' Committee. When the Debtor was finally ready to talk, it was on the last business day before the expiration of the Debtor's plan-filing exclusivity, and the Creditors' Committee's views were not reflected in the documents filed with the Court. There is no reason to believe anything will change in the next three months.

The Plan and Disclosure Statement filed on June 1, 2009, do *not* represent a genuine effort to formulate a plan that creditors will accept or that the Court can confirm. They represent a last-ditch effort to preserve control of the plan process. The filing of this sort of "placeholder plan" is not evidence of diligence or progress in formulating a viable plan, but instead an indication that without the relief requested, the unsecured creditors of the estate likely will be forced to endure another three months of delay and administrative expense

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with little to show for it. *See, e.g., In re Grossinger's Associates*, 116 B.R. at 36 (terminating exclusivity where debtor was "bidding for more time" by filing unconfirmable plan on the last day of plan-filing exclusivity period); *In re Dow Corning Corp.*, 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997) (condemning the filing of "placeholder" plans that are merely intended to retain control over the plan process).

The filing of a confirmable plan by the Creditors' Committee either will serve as an impetus for the Debtor and other constituencies to engage in a genuine negotiation, and/or will create a competitive environment that offers the stakeholders a viable alternative to the Debtor's plan and ensures that the disclosure and confirmation process proceed without delay. Either way, the termination of exclusivity *will* move this case forward. *See Dow Corning*, 208 B.R. at 670 ("When the Court is determining whether to terminate a debtor's exclusivity, the primary consideration should be whether or not doing so would facilitate moving the case forward."); *see also In re Henry Mayo Newhall Memorial Hosp.*, 282 B.R. 444, 453 (BAP 9th Cir. 2002) ("We also agree with the *Dow Corning* court that a transcendent consideration is whether adjustment of exclusivity will facilitate moving the case forward toward a fair and equitable resolution.")

C. The Debtor Has Failed To Negotiate With The Creditors' Committee In Good Faith.

The complete "breakdown of negotiations between the debtor and the objecting creditors" and the Debtor's failure to pursue any such negotiations in good faith are circumstances favoring the termination of exclusivity. *See, e.g., In re R.G. Pharmacy, Inc.*, 374 B.R. 484, 488 (Bankr. D. Conn. 2007) (denying extension of exclusivity where "breakdown of negotiations between the debtor and the objecting creditors" made "extension unlikely to significantly improve progress toward an effective reorganization"); *In re Tripodi*, 2005 Bankr. LEXIS 1981, at *6-*7 (Bankr. D. Conn. Feb. 18, 2005) (denying extension of exclusivity where there had "been no progress negotiating with creditors" and "consensual plan [was] nowhere on the horizon" because of "positions and continuing acrimony between the Debtors and their principal creditors"). In this case, the Debtor not

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only has failed to negotiate in good faith, it literally has failed to negotiate at all. As noted above, the Debtor ignored the repeated requests of the Creditors' Committee to work on a standalone plan, waited until exclusivity was about to expire to even inquire regarding the views of the Creditors' Committee, and then filed a plan that bears no relation to those views. The Creditors' Committee has been forced to put up with this long enough. It is now time to permit the Creditors' Committee to move the process forward.

D. The Creditors' Committee Does Not Have Confidence In The Debtor Or Its Ability To Promptly Effectuate A Viable Plan.

Based upon all of the foregoing, unsecured creditors have no confidence that the Debtor and its professionals are interested in and/or capable of promptly formulating a viable plan under the cloak of exclusivity. Even if the Debtor were now genuinely interested in developing a consensual plan (which does not appear to be the case), the level of frustration and distrust that the Debtor has engendered as a result of its conduct and lack of progress to date means that the Debtor cannot succeed in spearheading a consensual resolution at this juncture. *See, e.g., All Seasons Industries*, 121 B.R. at 1006 ("While the [C]ourt makes no finding as to whether or not this loss of faith is justified . . . for the purpose of the present motion [to extend exclusivity], it is only necessary to realize that a loss of confidence exists. This is a factor the [C]ourt should and must consider in its determination.")

E. The Plan Is Patently Unconfirmable.[19]

The use of exclusivity as a tool to pressure creditors to accept unsatisfactory or unconfirmable plans is also a reason to terminate exclusivity. *See, e.g., In re Texaco*, 81 B.R. 806, 812-13 (Bankr. S.D.N.Y. 1988); *In re Curry Corp.*, 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992); *In re Standard Mill Ltd. Partnership*, 1996 Bankr. LEXIS 1120, at *3 (Bankr. D. Minn. September 12, 1996) ("the debtor's use of the exclusivity period to force creditors to accept a patently unconfirmable plan" may constitute cause to terminate exclusivity).

[19] The violations of the Bankruptcy Code described below is an illustrative and non-exhaustive list of the many defects of the Plan which render it unconfirmable as a matter of law.

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That is precisely what the Debtor is attempting to do by filing a plan that enables equity holders to retain their interests without paying creditors in full, and that is otherwise unconfirmable. The Debtor should not be rewarded for doing so with another 3 months of exclusivity in which it can drag out the process, delay the realization of creditor recoveries, and thereby pressure creditors into giving up consideration to equity holders, to which it is not otherwise entitled.

1. The Plan Violates The Absolute Priority Rule By Permitting Equity To Retain Value While Failing To Satisfy Unsecured Claims In Full.

Unsecured creditor classes under the Plan will reject the Plan. In that circumstance, the only way to confirm the Plan would be to satisfy the absolute priority rule codified in Bankruptcy Code section 1129(b)(2)(B). That statute requires that either of the following must be satisfied with respect to a rejecting class of unsecured claims:

> (i) the plan provides that each holder of a claim or such lass receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of each such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. . . .

11 U.S.C. § 1129(b)(2)(B). Accordingly, if a plan provides that equity holders will receive or retain any property, the unsecured creditors in a non-accepting class must be paid cash as of the effective date of the plan or receive over time the present value of their claims. *Liberty National Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 654 (9th Cir. 1997).

Here, the Plan clearly provides that equity holders will receive interests in the Reorganized Debtor. Given this provision, and absent the support of unsecured creditors, the Plan would have to provide that unsecured creditors be fully paid on the Effective Date, or that they receive over time the present value of their claims as of the Effective Date. For the reasons described below, the Plan does not satisfy the absolute priority rule.

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The fact that the Debtor filed a plan that does not satisfy the absolute priority rule without the support of creditors (and absent any genuine effort to negotiate) is itself cause to terminate exclusivity. *See Grossinger's Associates*, 116 B.R. at 36 (terminated exclusivity where debtor filed unconfirmable plan that violated absolute priority rule and could "not realistically expect to satisfy its creditors").

a. The Plan Permits Equity To Retain Property Even Though There Is No Obligation In The Plan To Pay Unsecured Claims In Full, Including Interest On Those Claims..

As discussed above, the Plan permits equity holders to retain their interests in the Reorganized Debtor, even though there is no definitive, enforceable obligation to pay unsecured creditors any amount, let alone pay them the full amount of their claims. Likewise, the Plan permits equity holders to retain their interests in the Reorganized Debtor, even though there is no definitive, enforceable obligation to pay unsecured creditors any postpetition interest on their unsecured claims, whether it accrued prior to or after the Effective Date. As discussed above, the payment of principal and interest on Class 2A and Class 2B claims is expressly subject to the prior payment of myriad other claims.

b. The Plan Fails To Provide The Full Present Value Of Unsecured Claims By Providing An Inadequate Rate of Post-Effective-Date Interest.

"In order for [a creditor] to be paid the full value of its claims, the Plan must provide for payment of interest for the post-confirmation time value of the amount of [the creditor's] unsecured claim." *Ambanc La Mesa Ltd. P'ship*, 115 F.3d at 654; *In re Perez*, 30 F.3d 1209, 1214-15 (9th Cir. 1994) (creditors paid over time must be must be paid interest for the time-value of their money). The appropriate rate of interest for this purpose is a "market rate," *i.e.*, "the interest rate the reorganizing debtor would have to pay a creditor in order to obtain a loan on equivalent terms in the open market," which involves consideration of the "the term of deferment of present use and risk of default, as affected by any security." *In re Camino Real Landscape Maint. Contractors, Inc.*, 818 F.2d 1503-04 (9th Cir. 1987); *see also In re Fowler,* 903 F.2d 694 (9th Cir. 1990) (adopting similar approach) (chapter 12); *In re Carolina Tobacco Co.*, 2006 U.S. Dist LEXIS 6577 (D. Ore. 2006) (adopting similar approach by applying the holding in *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004) to chapter 11 plan).

The Plan proposes that unless each unsecured creditor seeks and obtains a ruling that its claim is entitled to a higher interest rate, it will at most receive the federal judgment rate applicable at the outset of the case, 2.51%, in perpetuity. With respect to payments on unsecured claims that are deferred under the Plan, following the Effective Date, this rate is wholly inadequate. It does not reflect the "market rate" of interest to which unsecured creditors are entitled on deferred plan payments. Indeed, given the uncertainty of payment under the plan, the lack of amortization, security or any other definitive terms, the "market rate" applicable to unsecured creditor payments would be substantially higher than 2.51%.[20]

In its Disclosure Statement, the Debtor states that it selected the "2.51% federal judgment rate as the baseline Postpetition Interest rate in order to comply with the Ninth Circuit's opinion in *Onink v. Duke (In re Cardelucci)*, 285 F.3d 1231 (9th Cir. 2002)." In the *Cardelucci* case, the Ninth Circuit considered whether postpetition interest is to be calculated using the federal judgment interest rate or is to be determined by the parties' contract or state law." *See* Disclosure Statement at 79-80. The Debtor's citation to and discussion of *Cardelucci* is completely disingenuous, because that case in no way stands for the proposition that a plan may deprive an unsecured creditor of a market rate of interest during the period *after* confirmation of a plan

The decision in *Cardelucci* specifically addressed Bankruptcy Code section 726(a)(5), which requires "payment of interest at the legal rate from the date of the filing of the petition" in a chapter 7 case, where the estate proves to be solvent. *See* 11 U.S.C. 726(a)(5). The question presented was whether "the legal rate" referenced in that statute was the federal judgment rate or an otherwise applicable contract or state law rate. The opinion does <u>not</u> address the rate of interest that is necessary to fully compensate the holder of an unsecured claim for purposes of cramdown under Bankruptcy Code section 1129(b)(2)(B); in other

[20] *See* Midanek Declaration at ¶¶ 18-22.

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words, during the period after a plan is confirmed and an unsecured creditor claims are deferred.

To be sure, *Cardelucci* did involve a chapter 11 case. But contrary to the Debtor's suggestion, *see* Disclosure Statement at 80, there is no "ambiguity" regarding the breadth of the holding in *Cardelucci* and no reasonable construction of the opinion that would allow application of the federal judgment rate in a cramdown plan. The opinion notes at the very outset that the plan at issue provided two *different* rates of interest, one for "post-confirmation interest" and one for "postpetition interest." The opinion goes on to describe and resolve a dispute regarding the appropriate rate for "postpetition interest" only. The court in *Cardelucci* did not purport to, and could not, rewrite the plan confirmation provisions of the Bankruptcy Code governing the treatment of unsecured creditor claims and the required "post-confirmation interest." Any suggestion to the contrary is absurd.

c. The Plan Permits Equity To Retain Property Even Though It Provides That Unsecured Creditors May Be Forced To Accept Less Than Payment In Full.

The treatment provisions for Class 2A provide that the holders of unsecured claims in that class may be "cashed out" prior to October 31, 2009, if they are paid the principal amount of their obligations, but no interest or penalties whatsoever, regardless of whether they accrued before or after the Effective Date. The Debtor has provided no authority and no justification for forcing creditors to accept less than the full amount of their unsecured claims because none exists. It is one thing to offer unsecured creditors an opportunity to accept less than they are entitled in exchange for an earlier payment in case (*see* 11 U.S.C. §1123(a)(2)), but it is quite another to *force* them to take less whether or not creditors agree. There is no legal basis upon which the Debtor could "propose" such a coerced treatment.

2. The Plan Violates Bankruptcy Code Section 1123(a)(3) by Failing To Specify The Treatment of the Claims In Class 2A and Class 2B.

Bankruptcy Code section 1123(a)(3) provides that a chapter 11 plan *shall* "specify the treatment of any class of claims or interests that is impaired under the plan." As the Court of Appeals explained in *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1353 (5th Cir. 1989), the

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Plan needs to specify the treatment being accorded to claims, rather than leave open the question for future determination:

> For instance, a plan providing for future cash payments must specify the amount of payments to be made and the date when such payments will be due. 5 Collier on Bankruptcy at 1123-7. If a plan proposes to convert debt to equity, the terms of this conversion must be described in detail. *Id.* In the current case, the plan is completely devoid of specificity as to the division of Port Vincent [i.e., the real property being given to secured creditors in satisfaction of their claims]. It is unclear whether each creditor will receive a portion of the property or an undivided fractional interest. The plan apparently assumes that "all portions of the tract . . . have equal proportionate value and [that] a fractional part can simply be 'carved out' after valuation of the whole" *Sandy Ridge*, 77 B. R. at 80. However, the bankruptcy court found that "the evidence does not support that concept," since the value of parts of Port Vincent depends upon factors such as road frontage. We see no clear error in this finding.

Here, the Plan fails to satisfy section 1123(a)(3) with respect to Class 2A and Class 2B, because the interest rate applicable to unsecured claims in these classes is just left up in the air. The definition of "Postpetition Interest" states that creditors may receive as much as 2.51%, but it also states that a creditor may receive some other amount if that creditor seeks and obtains an order of the Court fixing a different interest rate. In leaving this material treatment term open and subject to uncertainty (and differing treatment depending on which creditors elect to show up at the confirmation hearing and fight for an appropriate interest rate), the plan simply fails to specify the treatment that creditors in those classes will receive. In substance, the Plan says that a creditor may receive what the law requires if that creditor comes to Court and establishes what the law requires. That is not specification of the "treatment" provided to class of claims. Requiring each and every creditor to come to Court to litigate the treatment to be provided under the Plan is manifest bad faith.

3. The Plan Violates Bankruptcy Code Section 1123(a)(4) As It Contemplates Different Treatment For Unsecured Claims Within The Same Class.

The Plan provisions governing unsecured claims in Class 2A and Class 2B also violate section 1123(a)(4) of the Bankruptcy Code. That statute provides that a plan *shall*

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"provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." The interest payable to the holders of unsecured claims in those classes may differ, depending on whether they choose to litigate that issue in this Court and the outcome of such litigation. Moreover, the interest rate provision does not qualify under the exception set forth in the statute, because creditors are not being asked to consent to a less favorable treatment than members of the class generally. They are being *forced* to accept less favorable treatment, unless they affirmatively seek an order of this Court.

4. The Plan Violates Bankruptcy Code Section 1123(a)(5) And Is Incapable Of Satisfying The Feasibility Requirement of Bankruptcy Code Section 1129 (a)(11) Because It Does Not Provide Any Mechanism For The Debtor To Realize The Value In FRC.

The Plan specifies no mechanism by which the Debtor will realize the value of FRC. As the Debtor acknowledges, realization of value from FRC is the only possible means of satisfying unsecured claims in full – which is the only realistic way that equity holders can retain their interests in the Debtor. Accordingly, the Plan does not provide adequate means for its implementation, and there is no basis, from the face of the plan itself, to conclude that that Plan is at feasible, as required by Bankruptcy Code section 1129(a)(11).

5. The Corporate Governance Structure Is Improper.

As noted above, the Plan permits a representative of equity holders to sit on the Board of Directors for the Reorganized Debtor before unsecured creditors are paid in full and irrespective of whether they are ever paid in full. Moreover, as the Debtor has acknowledged, there may not be sufficient value to fully satisfy all unsecured claims. As such, it is improper to give the equity holder representatives (as well as the Debtor, which has no stake whatsoever) a *veto* over the selection of the Plan Administrator. *See In re Allegheny Int'l, Inc.*, 118 B.R. 282 (Bankr. W.D Pa. 1990) ("As discussed at length above, there is insufficient enterprise value to allow a distribution to the equity holders, other than the warrants. Because present equity holders will not obtain stock in the reorganized debtor, it is not unfair to exclude present equity holders from selecting directors of the reorganized

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debtor or participating in the committee overseeing the reorganized debtor. When their warrants are exercised for shares, they will receive appropriate rights as shareholders").

Additionally, it is improper for the Plan to establish the Plan Administrator as an Chief Executive Officer of the Reorganized Debtor, without expressly granting the Board of Directors the power to cause the Plan Administrator to follow all of its instructions (including on matters that are not Significant Matters) and the power to remove the Plan Administrator, with or without cause. The idea that the Plan Administrator might not be subject to removal by the Board of Directors, and could effectively disregard the directions of the Board of Directors, is simply untenable. Under Nevada law, "the business of every corporation must be managed under the direction of a board of directors or trustees." Nev. Rev. Stat. § 78.115.

IV.

CONCLUSION

The time has come for exclusivity to end. For the reasons set forth above, the Creditors' Committee respectfully requests that the Court grant the Motion, terminate the Solicitation Exclusivity Period, and authorize the Creditors' Committee to file a chapter 11 plan for the Debtor.

Respectfully submitted,

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/s/
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