UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re	)	
TRAILER BRIDGE, INC.,	)	Case No. 3:11-bk-08348-JAF
Debtor.	)	
	)	

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TRAILER BRIDGE, INC. TO DEBTOR'S MOTION UNDER 11 U.S.C. §§ 105, 1125, 1126 AND 1129 AND FED. R. BANKR. P. 2002, 3017, 3018 AND 3020; AND LOCAL RULES 3017-1, 3018-1 AND 3020-1 (I) FOR AN ORDER (A) SCHEDULING COMBINED HEARING ON ADEQUACY OF DISCLOSURE STATEMENT AND CONFIRMATION OF PLAN, (B) ESTABLISHING PROCEDURES FOR OBJECTING TO DISCLOSURE STATEMENT AND PLAN, (C) APPROVING FORM AND MANNER OF NOTICE OF COMBINED HEARING, AND (D) APPROVING SOLICITATION AND VOTE TABULATION PROCEDURES

The Official Committee of Unsecured Creditors (the "Committee") of Trailer Bridge, Inc. (the "Debtor") hereby files this objection (the "Objection") to the Debtor's Motion under 11 U.S.C. §§ 105, 1125, 1126 and 1129 and Fed. R. Bankr. P. 2002, 3017, 3018 and 3020; and Local Rules 3017-1, 3018-1 and 3020-1 (I) [Sic] for an Order (A) Scheduling Combined Hearing on Adequacy of Disclosure Statement and Confirmation of Plan, (B) Establishing Procedures for Objecting to Disclosure Statement and Plan, (C) Approving Form and Manner of Notice of Combined Hearing and (D) Approving Solicitation and Vote Tabulation Procedures [Docket No. 176] (the "Solicitation Motion"). In support hereof, the Committee incorporates the report of GlassRatner (the "GlassRatner Report"), the Committee's Financial Advisors, which is attached hereto as **Exhibit A**, and states:

Preliminary Statement

The Committee objects to the Solicitation Motion and submits that the Court should conduct a separate hearing to consider the adequacy of the Disclosure Statement in this Case. The Debtor's request for a combined hearing on the Disclosure Statement and Plan, along with the other relief requested in the Solicitation Motion, is an effort to avoid judicial scrutiny of the incomplete and misleading information contained in the Disclosure Statement to allow the Debtor to obtain acceptance of a non-confirmable Chapter 11 plan. Of particular concern, in utter disregard for the absolute priority rule and the rights of General Unsecured Creditors, the Plan proposes a distribution of New Common Stock to existing equity (worth a minimum of $1.8 million and likely worth much more[1]), while saddling General Unsecured Creditors with the undetermined weight of liability from over $120 million in filed "anti-trust conspiracy overcharge claims" (the "Civil Anti-Trust Claims").[2] The Civil Anti-Trust Claims impose joint and several liability, and carry the threat of treble damages, plus costs. As noted in the GlassRatner Report, liability on the Civil Anti-Trust Claims of as little as $10 million would reduce recovery to Class 8 General Unsecured Creditors to less 0.7%. (GlassRatner Rpt. at 3.)

[1] The actual value of the proposed distribution to existing equity is dependent on the enterprise value of the Reorganized Debtor. The draft of the Disclosure Statement filed on January 14, 2012, does not, however, provide sufficient information to determine the enterprise value of the Reorganized Debtor. Nonetheless, as indicated in the GlassRatner Report, the Debtor projects that i EBITDA will ramp up from "$7.1 million in 2011 to $16.3 million in 2012 and steadily thereafter to $21.2 million in 2016." (GlassRatner Rpt. at 5.) Common sense indicates that if liability in the form of the Civil Anti-Trust Claims is eliminated from the Debtor's balance sheet, EBITDA of $16.3 to $21.2 million will greatly enhance the value of New Common Stock.

[2] The audacity of the Debtor's actions are underscored by the Disclosure Statement, which classifies the Civil Anti-Trust Claims in Class 8 of the Plan, along with General Unsecured Claims, but specifically notes that for purposes of projected distributions, the filed Civil Anti-Trust Claims are disregarded.

To justify the incredibly inequitable treatment afforded Claims under the Plan, the Debtor offers its assurance that it "intends to contest" the Civil Anti-Trust Claims. (Disc. Stmt. at 7.) Simultaneously therewith, the Debtor asserts that it is necessary to deviate substantially from various creditor-protection procedures contemplated by the Bankruptcy Code and Bankruptcy Rules, in order to "minimize the adverse effects of the bankruptcy." (Sol. Mot. at 5.) In truth, "minimizing the adverse effects of the bankruptcy" means (a) preventing the holders of the Civil Anti-Trust Claims from voting on the Plan, (b) shifting the entire risk of the Civil Anti-Trust Claims to the unsecured creditor class, and (c) limiting judicial review of the content and quality of the Disclosure Statement until *after* a vote has been obtained through faulty solicitation. In this manner, the Debtor seeks a *fait accompli*, where it can come before to Court during the proposed combined hearing on the Disclosure Statement and Plan and argue that "the solicitation process must have been correct and the treatment under the Plan fair and equitable because creditors voted in favor of such treatment."

The Committee also asserts that the solicitation process, the Disclosure Statement, and the Plan are part of a scheme to funnel a recovery to existing equity, without proving, in open court, that such a recovery is permissible under the Bankruptcy Code. To that end, the Disclosure Statement provides misleading and incomplete information to creditors concerning, among other things, (a) the value of the Estate, (b) the enterprise value of the Reorganized Debtor, (c) the value of the Warrants and shares of New Common Stock to be issued to (x) the Noteholder Deficiency Claims in Class 8 and (y) the Class 9 claimants, (d) the rationale for including the Noteholder Deficiency Claims in Class 8, which Claims are being granted more favorable treatment than the other members of Class 8, (e) the number and amount of Claims to be included in Classes

6, 7 and 8, and (f) the quantification of the Civil Anti-Trust Claims and potential impact on Plan distributions.

Lastly, the Plan is not confirmable because it (a) provides a mere $500,000 distribution to over $4.8 million in undisputed unsecured claims, while subjecting the claims of General Unsecured Creditors to wholesale dilution if any portion of the Civil Anti-Trust Claims are allowed; (b) overpays certain Classes of Claims while under paying other Classes; (c) grants current management, insiders and existing equity a minimum distribution of over $1.8 million, while General Unsecured Creditors are not being paid in full; (d) provides disparate treatment to creditors of the same class for the purposes of gerrymandering Class votes by Classifying the Noteholder Deficiency Claim, of $21 million in Class 8 General Unsecured Claims; (e) gerrymanders plan classes through the use of $1.8 million in unimpaired "cure" and maritime lien Claims; (f) preserves the value of any and all avoidance claims for the Estate; and (g) offers, in complete disregard to the Debtor's fiduciary duties, a release of any and all avoidance claims to those creditors who vote in favor of the Plan.

The Committee's objection is not a formulaic attack on the adequacy of information in the Disclosure Statement, although the disclosure provided is certainly inadequate. Nor does this Objection rely primarily on the fact that the Plan is not confirmable, which it undeniably is not as a matter of law. No, the Objection is based upon the unequivocal fact that the Debtor seeks to subvert the interests of creditors to those of the Debtor, in violation of the most rudimentary tenants of the Bankruptcy Code and the Debtor's fiduciary duties. For this reason, combined with the numerous deficiencies in the solicitation procedures, the Plan and Disclosure Statement, the Committee requests that the Court deny the Solicitation Motion and conduct a hearing on

the adequacy of information in the Disclosure Statement, as prescribed § 1125(b) of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018, *before* the Debtor is allowed to solicit votes on the Plan.

Jurisdiction and Venue

This Court has jurisdiction over the Motion and the Objection pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

The statutory predicates for the relief requested herein are sections 105, 1125, 1126 and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") Rules 2002, 3017, 3018 and 3020 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 3071-1, 3018-1 and 3020-1 of the Local Rules for the Middle District of Florida (the "Local Rules").

Background

On November 16, 2011 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

On December 6, 2011, the United States Trustee appointed the Committee and designated the following three members to serve: (i) Earl W. Colvard, Inc., (ii) First Coast Express, Inc., and (iii) Railport Services, Inc. At its organizational meeting, the Committee selected Stutsman Thames & Markey, P.A. ("ST&M") as counsel to represent it during the pendency of the Debtor's Chapter 11 case.

No trustee or examiner has been appointed in this Chapter 11 case.

On January 14, 2012, the Debtor filed a draft version of its Plan of Reorganization for Trailer Bridge, Inc. [Docket No.: 184] (as it may be finalized, modified or amended, the "Plan") [3] and a draft version of the Disclosure Statement [Docket No.: 183].

Overview of the Debtor's Restructuring Efforts

In its initial Case pleadings, the Debtor states that this Case was filed because of its inability to restructure $86.3 million in 9.25% Senior Secured Notes before the November 15, 2011 maturity date. The Senior Secured Notes are undersecured by an undetermined amount, estimated by the Debtor to be $20 to $30 million. The Debtor's additional secured debt includes $4.4 million under a term loan with Wells Fargo, $5.9 million under a Wells Fargo revolving loan, and approximately $10 million, cumulative, owed under 6.52% and 7.07% MARAD Bonds. (Case Mg. Sum. at12 [Docket No. 3-7].) The Wells Fargo loans and the MARAD debt are oversecured by as much as $65 to 75 million.

In contrast to the approximately $107 to $110 million in secured debt, the Debtor's Case Management Summary states that the Debtor has unsecured trade debt of $3 to $4 million in debt. (Case Mg. Sum. at12 [Docket No. 8].) The Debtor has thus maintained that it would use the bankruptcy process to deleverage its balance sheet, and restructure its debt obligations and equity. As restructuring its debt was its only significant issue, the Debtor stated that it would emerge from bankruptcy within 90 to 120 days. (Case Mg. Sum. at12 [Docket No. 13].) To assist with, or ensure, its rapid restructuring in Chapter 11, the Debtor entered into the $15 million DIP Facility, which

[3] Capitalized terms not otherwise defined herein have the meaning given such terms in the Plan.

contains certain milestones, including a requirement that the Bankruptcy Court confirm the Plan by the 135th day following the Petition Date.[4]

Although the Debtor faces potential liability with respect to the DOJ investigation for anti-trust violations and the Civil Anti-Trust Claims, any discussion of the potential liability is conspicuously absent from the Debtor's Case Management Summary. Because the Civil Anti-Trust Claims impose joint and several liability, treble damages, and costs, a finding of even 1% culpability on the Claims exposes the estate to the full brunt of the claims being asserted against Sea Star Line, LLC, Horizon Lines, Inc. and Crowley Maritime Corporation. According to the proofs of claim filed to date, those claims could total more than $120 million, which if allowed, will severely dilute or eliminate altogether the proposed distribution to General Unsecured Creditors. Though disputed, the DOJ investigation and the Civil Anti-Trust Claims are of obvious concern to the Debtor, as the Debtor provided notice of the Bankruptcy Case to the DOJ and the relevant anti-trust claimants so that whatever liability the Debtor may have with respect to such claims will be satisfied through the Chapter 11 Case.

Summary of Plan Classifications

The Plan provides for 8 separate Classes of Claims and 1 Class of Interests. The treatment of those Claims and Interests under the Plan is summarized below:

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[4] As stated at the 341 Meeting of Creditors held on January 18, 2012, the Debtor has over $16 million in cash on hand and is depositing $12 million of the DIP proceeds into an interest bearing account, and retaining another $4.5 million on hand. It thus appears to the Committee that the need for the DIP Facility may not have been immediate access to funds but rather the imposition of artificial deadlines to which the Debtor could refer in support of its request for an expedited confirmation process.

Description and Amount of Claims or Interests	**Summary of Treatment**
Class 1: Wells Term Loan Secured Claims Estimated Aggregate Amount: $4.4 million	• Unimpaired • Class 1 consists of all Allowed Wells Term Loan Secured Claims against the Debtor • On the Effective Date (or as soon thereafter as is practicable) the holder of any Allowed Wells Term Loan Secured Claims shall receive either (i) Cash in the full amount of such Allowed Wells Term Loan Claims, including any unpaid postpetition interest accrued pursuant to section 506(b) of the Bankruptcy Code or (ii) such other no more favorable treatment as to which the holder of Wells Term Loan Secured Claims and the Debtor shall have agreed upon in writing and as to which each of the Majority Secured Noteholders consent. • Conclusively presumed to have accepted the Plan and, therefore, not entitled to vote. • Estimated Recovery: 100%
Class 2: Wells Revolver Loan Secured Claims Estimated Aggregate Amount: $5.9 million	• Unimpaired • Class 2 consists of all Allowed Wells Revolver Secured Claims against the Debtor • On the Effective Date (or as soon thereafter as is practicable) the holder of any Allowed Wells Revolver Secured Claims shall receive either (i) Cash in the full amount of such Allowed Wells Revolver Secured Claims, including any unpaid postpetition interest accrued pursuant to section 506(b) of the Bankruptcy Code or (ii) such other no more favorable treatment as to which the holder of Wells Term Loan Secured Claims and the Debtor shall have agreed upon in writing and as to which each of the Majority Secured Noteholders consent. • Conclusively presumed to have accepted the Plan and, therefore, not entitled to vote. • Estimated Recovery: 100%
Class 3: MARAD 6.52% Bond Claims Estimated Aggregate Amount: $8.57 million	• Impaired • Class 3 consists of all Allowed MARAD 6.52% Bond Claims against the Debtor. • On the Effective Date, at the election of the holders of MARAD 6.52% Bond Claims, either

	(i) the MARAD 6.52% Indenture shall be reinstated, except to the extent that such Indenture requires the MARAD Agent to consent to a second lien and a third lien being placed on the MARAD Collateral, and the MARAD 6.52% Bond Claims shall be paid in accordance with the terms and conditions of the MARAD 6.52% Indenture, or (ii) holders of MARAD 6.52% Bond Claims shall be paid in full the obligations owing under the MARAD 6.52% Indenture, if the requisite number of holders exercise their right to make the Premium Waiver Election by checking the applicable box on the ballot. • Entitled to vote to accept or reject the Plan. • Estimated Recovery: 100%
Class 4: MARAD 7.07% Bond Claims Estimated Aggregate Amount: $5.1 million	• Impaired • Class 4 consists of all Allowed MARAD 7.07% Bond Claims against the Debtor. • On the Effective Date, at the election of the holders of MARAD 7.07% Bond Claims, either (i) the MARAD 7.07% Indenture shall be reinstated, except to the extent that such Indenture requires the MARAD Agent to consent to a second lien and a third lien being placed on the MARAD Collateral, and the MARAD 7.07% Bond Claims shall be paid in accordance with the terms and conditions of the MARAD 7.07 Indenture, or (ii) holders of MARAD 7.07% Bond Claims shall be paid in full the obligations owing under the MARAD 7.07% Indenture, if the requisite number of holders exercise their right to make the Premium Waiver Election by checking the applicable box on the ballot. • Entitled to vote to accept or reject the Plan. • Estimated Recovery: 100%
Class 5: Secured Note Claims Estimated Aggregate Amount: $86.3 million	• Impaired • Class 5 consists of all Allowed Secured Note Claims against the Debtor • Unless the holder of the Secured Note Claim and the Debtor agree to a different treatment, on the Effective Date, each holder of an Allowed Secured Note Claim shall receive that holder's Pro Rata share of the New Class 4 Secured Not [Sic][5]. The Allowed Noteholder Deficiency Claim shall receive such treatment

[5] The Debtor presumably means the New Class 5 Secured Note.

	as set forth in Class 8: General Unsecured Claims below. • Entitled to vote to accept or reject the Plan. • Estimated Recovery: 75%
Class 6: Miscellaneous Secured Claims Estimated Aggregate Amount: $250,000 to $1.8 million	• Unimpaired • Class 6 consists of all Allowed Miscellaneous Secured Claims against the Debtor. The Allowed Miscellaneous Secured Claims shall be deemed to have been classified into separate subclasses within Class 6 to the extent such claims are secured by different collateral. • Unless the holder of such claim and the Debtor agree to a different treatment, to which each of the Majority Secured Noteholders consent, on the Effective Date, each holder of an Allowed Miscellaneous Secured Claim shall receive, in full satisfaction, settlement, release, and discharge of, and in exchange for, such Miscellaneous Secured Claim, either (i) Cash in the full amount of such Allowed Miscellaneous Secured Claim, including any postpetition interest accrued pursuant to section 506(b) of the Bankruptcy Code, to be paid from the Miscellaneous Secured Reserve (ii) the proceeds of the sale or disposition of the collateral securing such Allowed Miscellaneous Secured Claim to the extent of the value of the holder's secured interest in such collateral, (iii) the collateral securing such Allowed Other Secured Claim and any interest on such Allowed Miscellaneous Secured Claim required to be paid pursuant to section 506(b) of the Bankruptcy Code, or (iv) such other distribution as necessary to satisfy the requirements of section 1129 of the Bankruptcy Code. If the claim of a holder of such Allowed Miscellaneous Secured Claim exceeds the value of the collateral that secures it, such holder will have an Miscellaneous Secured Claim equal to the collateral's value and a General Unsecured Claim for the deficiency. • Conclusively presumed to have accepted the Plan and, therefore, not entitled to vote. • Estimated Recovery: 100%
Class 7: Other Priority Claims Estimated Aggregate Amount: Unknown	• Unimpaired • Class 7 consists of all Allowed Other Priority Claims against the Debtor. • On the Effective Date, each holder of an Allowed Other Priority Claim shall receive, in

	full satisfaction, settlement, release and discharge of and in exchange for such Allowed Other Priority Claim, (i) Cash in an amount equal to the aggregate principal amount of the unpaid portion of such Allowed Other Priority Claim, or (ii) such other no more favorable treatment as to which such holder and the Debtor shall have agreed upon in writing and as to which each of the Majority Secured Noteholders consent. • Conclusively presumed to have accepted the Plan and, therefore, not entitled to vote. • Estimated Recovery: 100%
Class 8: General Unsecured Claims Estimated Aggregate Amount: $2 to 4 million.	• Impaired • Class 8 consists of all Allowed General Unsecured Claims against the Debtor. • On the Effective Date (or as soon thereafter as is practicable) each holder of an Allowed General Unsecured Claim, other than the holders of an Allowed Noteholder Deficiency Claim, shall receive, in full satisfaction, settlement, release, and discharge of, and in exchange for, such Allowed General Unsecured Claim, either (i) its Pro Rata share of the General Unsecured Reserve, or (ii) such other no more favorable treatment as to which such holder and the Debtor shall have agreed upon in writing. • On the Effective Date (or as soon thereafter as is practicable), the holders of the Allowed Noteholder Deficiency Claims shall be deemed to waive their right to participate in any distribution from the General Unsecured Reserve and instead will receive that holder's Pro Rata share of [__] million shares of New Common Stock. Such [__] million shares to be so distributed to the holder of Allowed Noteholder Deficiency Claims shall represent, as of the Effective Date, 91% of the outstanding shares of New Common Stock (subject to (i) dilution of up to 5% upon the issuance of any shares of stock granted pursuant to the New Management Incentive Plan and (ii) further dilution upon the exercise of the New Warrants). • In addition, if Class 8 accepts the Plan, and a holder of a General Unsecured Claim votes to accept the Plan, any and all potential Avoidance Actions against such holder shall be waived. • Entitled to vote to accept or reject the Plan.

	• Estimated Recovery: 25-85%
Class 9: Old Common Interests Estimated Aggregate Amount: N/A	• Impaired • Class 9 consists of all Allowed Old Common Interests of the Debtor. • On the Effective Date, or as soon thereafter as is practicable, each holder of an Allowed Old Common Interest will receive in full satisfaction, settlement, release, and discharge of, and in exchange for such Interest either: (i) a cash payment of $0.15 per share; or (ii) such holder's Pro Rata share of: (x) 9% of the outstanding shares of New Common Stock and (y) each of the Tranche 1 and Tranche 2 Warrants; *provided, however*, that in the event a holder of an Allowed Old Common Interest does not affirmatively elect to receive either of the options set forth in (i) and (ii), then such holder will receive a cash payment of $0.15 per share. • Entitled to vote to accept or reject the Plan. • Estimated Recovery: N/A

I. A Combined Hearing is Antithetical to the Interests of Creditors in this Case.

In the Solicitation Motion, the Debtor requests a combined hearing to consider confirmation of the Plan and approval of the Disclosure Statement, and an aggressive solicitation and balloting timeline with respect thereto "to minimize the adverse effects of the Chapter 11 filing upon the Debtor's business and going concern value, and benefit the estate's creditors by making prompt distributions and reducing administrative expenses of the estate. (Sol. Mot. at 3, 5, 9.) In support of its request for a combined hearing the Debtor notes that the Bankruptcy Code authorizes combined hearings on plan confirmation and approval of a disclosure statement in (i) small business cases under § 1125(f)(3) and (ii) prepackaged plans. (Sol. Mot. at 4.)

As an initial matter, in a Chapter 11 case, that is neither a prepackaged case nor a small business case, the Bankruptcy Code and Bankruptcy Rules impose specific and exacting procedures upon a debtor in connection with soliciting votes in connection with a plan of reorganization. Bankruptcy Rule 2002(b) requires creditors and parties in interest to be provided with 28 days' advanced notice of the deadline for filing objections to the disclosure statement and of the hearing to consider approval of the disclosure statement. Likewise, Bankruptcy Rule 3017(a) provides that "the court *shall hold a hearing on at least 28 days' notice* . . . to consider the disclosure statement." Bankruptcy Rule 3017(b) provides that "*following* the hearing [on the disclosure statement] the court shall determine whether the disclosure statement should be approved." The rule reflects Congress' intent that the disclosure statement hearing "be one of, if not the major procedural hearings in a reorganization case." *In re Jeppson*, 66 B.R. 269, 295 (Bankr. Utah 1986).

Further, Bankruptcy Rule 3017(c) provides that "[o]n or before approval of the disclosure statement" the court shall fix a time within which the holders of claims and interests may accept or reject the plan". Rule 3017(d)(4) provides that the record date to determine security holders shall be the date "the order approving the disclosure statement is entered or another date fixed by the court, *for cause*, after notice and hearing." Similarly, Bankruptcy Rule 3018 provides that an equity security holder "shall not be entitled to accept or reject a plan unless the equity security holder is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, *for cause*"

The detailed Chapter 11 disclosure and solicitation procedures reflect Congressional judgment that safeguards must be incorporated into the Chapter 11 process

to ensure creditor rights will not be subverted to the interests of the debtor. Thus, a bankruptcy court should only approve a debtor's request to truncate Chapter 11 timelines and modify procedures in those rare and limited circumstances where the potential risk of harm to creditors is outweighed by the benefits that will flow to creditors, *i.e.* where cause exits. This is not one of those rare and limited circumstances and cause does not exist to modify the solicitation regime contemplated by Congress.

The Debtor is currently maintaining cash reserves in excess of $16 million, which is $6 million more than budgeted. There is no risk of impairment of collateral as all secured creditors are receiving adequate protection payments, notwithstanding that substantial equity exits with respect to the MARAD and Wells Fargo collateral. The Senior Secured Notes have reached agreement with the Debtor, as embodied in the Plan. Prepetition vendors continue to do business with the Debtor as only $140,000 of the $425,000 approved for the payment of critical vendors has been utilized. Thus, this Case is not one of those rare and limited circumstances justifying the departure from the plan confirmation process contemplated by Congress.

The Debtor submits that its proposed solicitation procedures are in the best interests of the Estate because the procedures "minimize the disruption to the Debtor's business and avoid the costs associated with lengthy chapter 11 proceedings." (Sol. Mot. at 10). The fact that the modified procedures may minimize the disruption and costs to the Debtor is not "cause" sufficient to justify the relief requested. If such were the case, cause to modify bankruptcy procedures would exist in every case. As the Debtor has not articulated a sound justification for the implementation of procedures that undermine the ability for creditors to participate in the plan confirmation process, the Solicitation Motion must be denied. The Debtor cannot simply choose to comply with only the

Bankruptcy Code provisions and Bankruptcy Rules that if finds convenient or useful. To enforce the creditor safeguards written into the Bankruptcy Code, solicitation of the Plan should not be permitted until the Debtor revises the Disclosure Statement and the same is approved by the Court, *after* notice and hearing.

A. The Debtor cannot use Section 105(d) of the Bankruptcy Code as a Means to Impair Creditors' Rights of Adequate Disclosure.

The Debtor argues in § 105(d)(2)(B)(vi) of the Bankruptcy Code supports its request for a combined hearing on the Plan and Disclosure Statement. (Sol. Mot. at 5.) Section 105(d) of the Bankruptcy Code provides that a bankruptcy "on its own motion or on the request of a party in interest – (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case. 11 U.S.C. § 105(d). Trumpeting the "expeditious and economical" theme, the Debtor stresses that a combined hearing "will enable the Debtor to minimize the adverse effects of the chapter 11 filing upon the Debtor's business and going concern value, and benefit the estate's creditors by making prompt distributions and reducing administrative expenses of the estate." (Sol. Mot. at 5).

The Debtor's reliance on the economic administration rational of § 105(d) is disingenuous and evinces a blatant disregard for the rights of creditors. Section 105 of the Bankruptcy Code provides for the use of ***status conferences*** to promote the efficient administration of a bankruptcy estate and directs a court at such ***status conferences*** to "***unless inconsistent*** with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order . . . to ensure that the case is handled expeditiously and economically, including an order that . . . provides that the hearing on

approval of the disclosure statement may be combined with the hearing on confirmation of the plan." 11 U.S.C. § 105(d) (emphasis added). It is absurd for the Debtor to assert that this case can be administered through status conferences. Additionally, the procedures proposed by the Debtor are inconsistent with § 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018.

In a complex Chapter 11 case such as this, where the Debtor has annual revenues in excess of $100 million, multiple levels of debt, insufficient reserves to redeem maturing debt, significant equity in collateral that cannot be monetized, exposure to potentially crippling liability in the form of claims for anti-trust conspiracy overcharges, and a reorganization plan premised on a complex debt-for-equity swap, a combined hearing on the Disclosure Statement and Plan is inappropriate. *See In re Gulf Coast Oil Corp*., 404 B.R. 407, 425-426 (Bankr. S.D. Tex. 2009) (noting that §105(d) promotes simplification of procedures for debtors but not at the expense of disclosure. "Bankruptcy Code § 1125 requires a disclosure statement to give sufficient information to permit a typical creditor to vote on the plan. The long, complex, boilerplate legalese found in most disclosure statements in smaller, simpler cases probably does not meet the statutory requirement; a typical creditor probably cannot understand it.").

Moreover, by its terms, § 105(d) of the Bankruptcy Code cannot be invoked in contravention of other provisions of the Bankruptcy Code or the Bankruptcy Rules. Section 1125(b) of the Bankruptcy Code, and the implementing procedures set forth in Bankruptcy Rule 3017, require a hearing on the Disclosure Statement before the Court may approve it and only upon approval may the Court order transmission of the Plan along with notice of the time within which acceptances and rejections must be filed. The Debtor's proposed procedure for a combined hearing on the Plan and Disclosure

Statement is inconsistent with both the requirements of § 1125(b) and the procedure set forth in Bankruptcy Rule 3017. *See In re Amster Yard Assocs.*, 214 B.R. 122 (Bankr. S.D.N.Y. 1997) (holding that an order combining the disclosure statement and confirmation hearings is inconsistent with§ 1125 of the Bankruptcy Code and Bankruptcy Rule 3017). To enforce the creditor safeguards written into the Bankruptcy Code, solicitation of the Plan should not be permitted until the Debtor revises the Disclosure Statement.

B. The Solicitation Procedures Disenfranchise Certain Claimants.

The Debtor proposes that any creditor "whose claim was (a) untimely (unless allowed as timely prior to the Voting Deadline), (b) based upon a pending lawsuit as to which no judgment has been rendered, or (c) asserted in a proof of claim as to which an objection to the entirety of the claim is pending as of the Claim Objection Deadline (the "Non-Voting Claimants") not be permitted to vote on the Plan except as specifically provided in this Motion." (Sol. Mot. at 14.) Because the Motion never provides an alternative method of voting for Non-Voting Claimants, the Debtor has eliminated the voting and estimation rights of such creditors.

The Non-Voting Claimant Voting provision violates Bankruptcy Rule 3018, which provides in relevant part, "[n]otwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." Fed. R. Bankr. P. 3018. Moreover, the Debtor cannot unilaterally limit or deny a claimant the right to vote solely because such claimant holds a contingent or unliquidated claim as the

estimation of claims for voting purposes is committed to the Court's discretion. *See, e.g. Bittner v. Borne Chem. Co*., 691 F.2d 134, 135–136 (3d Cir. 1982).

Furthermore, when viewed in the context of the Debtor's impermissible Plan classifications and violation of the absolute priority rule, the provision prohibiting the estimation and voting of claims for the Non-Voting Claimants is clearly improper in this case and designed to avoid a "cram-down" hearing under § 1129(b) of t4h Bankruptcy Code.

II. The Disclosure Statement does not Provide Adequate Information.

The primary purpose of a disclosure statement, which is mandated by 11 U.S.C. § 1125, is to give creditors the "adequate information" necessary for them to decide whether to accept a proposed plan. *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985); *In re Stanley Hotel, Inc.*, 13 B.R. 926 (Bankr. D. Colo. 1981). Sufficient financial information must be provided so that a creditor (likened to a "hypothetical reasonable investor") can make an "informed judgment" whether to accept or reject the plan, *In re Jeppson*, 66 B.R. 269, 289 (Bankr. D. Utah 1986); *In re Civitella*, 15 B.R. 206 (Bankr. E.D. Pa. 1981); *In re Northwest Recreational Activities, Inc.*, 8 B.R. 10 (Bankr. N.D. Ga. 1980).

In determining the adequacy of information under § 1125(a)(1), the bankruptcy court reviews the information on a case by case basis. *In re A.H. Robins, Co.*, 880 F.2d 694 (4th Cir.1989). Adequate information was vaguely defined by Congress so that courts could view the circumstances of each particular case. *In re Oxford Homes*, Inc., 204 B.R. 264, 269 (Bankr.Me.1997) (internal citations omitted). A disclosure statement

should provide the average unsecured creditor "what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Joseph A. Ferretti*, 128 B.R. 16, 19 (Bankr. N.H. 1991)

A. For a Creditor to Understand "What it is Going to Get", a Disclosure Statement Must Include a Reasonably Accurate Estimate of Claims in Each Class.

For a creditor to understand what it is going to get, a disclosure statement must include information regarding claims against the estate, including allowed, disputed, and estimated claims, given that the claims bar date for non-governmental entities does not expire until February 1, 2012, and the bar date for non-governmental entities expires on May 14, 2011. The Debtor asks the Court to conduct a confirmation hearing 2 months *before* the expiration of time by which all claims against the Estate must be filed. Such a request is disturbing because a distribution is being made to existing equity while the DOJ investigation remains pending. Thus, not only is the Debtor violating the absolute priority rule by distributing assets to existing equity under Class 9 and the New Management Incentive Plan, it is asking creditors to bear 100% of the risk associated with the DOJ investigation as well as any other government claims that may be asserted.

Indeed, the Debtor acknowledges that it is unable "to predict the ultimate outcome or cost of the DOJ investigation, the civil class actions, or other related matters." (Disc. Stmt. III.A.4. at 11.) A disclaimer is not proper disclosure where, as here, the outcome of the DOJ investigation and civil action claims "could have a material adverse effect on the Debtor's financial position and future operations." (*Id.*) If the Plan is confirmed before the expiration of the governmental bar, then the DOJ investigation *could have a material adverse effect on distributions to creditors*. It is appropriate therefore that the Disclosure

Statement hearing be held after the expiration of the governmental bar date so that the materiality of any DOJ claim can be vetted and disclosed:

> Having elected chapter 11, they must suffer its warts and barnacles. [The Debtor] has not identified any emergent circumstances that warrant expedited action, and as a practical matter, it could not obtain approval of the disclosure statement, solicit votes or confirm a plan until it has defined the outer universe of potentially allowable claims. The deadline for filing claims does not expire for another month, and during this period, [the Debtor] has ample time to obtain judicial approval of the disclosure statement through the traditional route.
>
> *In re Amstar Yard Assoc.*, 214 B.R. 122 (Bankr. S.D. N.Y. 1997.

Finally, the Debtor proposes to include between $250,000 to $1.8 million in "Miscellaneous Secured Claims" in Class 6, which Claims shall be paid in full and are purportedly senior to Class 8 General Unsecured Claims. The term Miscellaneous Secured Claim is not defined in the Plan or the Disclosure Statement, but the Debtor has told the Committee that certain maritime lien claims and "cure" claims will be included in Class 6. A specific definition of "Miscellaneous Secured Claim" should be incorporated into the Plan to ensure that Claims included in Class 6 are secured by a lien on property in which the estate has an interest as required under § 506 of the Bankruptcy Code.

B. For a Creditor to Understand "What it is Going to Get", the Disclosure Statement must Provide Reliable and Accurate Financial Information.

There is no dispute that a class of creditors cannot receive more than full consideration for its claims, and that excess value must be allocated to junior classes of

debt or equity, as the case may be. *In re Exide Technologies*, 303 B.R. 48, 61 (Bankr. D. Del. 2003) ("a corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."); *In re MCorp. Financial, Inc.*, 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992) ("creditors must not be provided for more than in full"). Because the Senior Note Claims are being satisfied through the issuance of New Common Stock, it is necessary to determine the enterprise value for the Debtor, to determine whether the holders of Noteholder Deficiency Claims are receiving more than full payment.

The Disclosure Statement does not provide adequate, if any, information concerning the amount, percentage of distribution, or value of the New Common Stock to be issued to holders of Noteholder Deficiency Claims, nor does it provide information adequate information regarding the amount of the Noteholder Deficiency Claim. Accordingly, it is impossible to determine if the Plan provides such creditors with a recovery in excess of their Allowed Claims. The fact that the Debtor's fails to present even rudimentary financial information concerning the value of the New Common Stock is fatal to the Debtor's request in the Solicitation Motion for a fast track solicitation and confirmation process. Moreover, the Debtor has yet to final a final form of the Disclosure Statement, has not detailed the numerous assumptions used in reaching its conclusions, and has ignored professional standards preparing its financial projections.

The Disclosure Statement should be set for a hearing, with a minimum of 28 days' notice as required under Bankruptcy Rule 2002(b)(1), which will provide an opportunity for the Debtor to share with the Committee the Debtor's financial models, projections and analysis concerning the debt-to-equity swap and the Debtor's reorganization value. The Disclosure Statement notice period will also enable the

Committee to collaborate with the Debtor on appropriate materials for inclusion in the Disclosure Statement summarizing and explaining the value being distributed under the Plan, ensuring the accuracy of proposed plan distributions and that claims are properly classified.

Additionally, none of the Financial Projections, Liquidation Analysis, or Valuation exhibits were filed with the Disclosure Statement.[6] The drafts of these documents do not provide creditors with information such that they could determine what they will receive under the Plan. In fact, with respect to its Feasibility Analysis and Financial Projections, the Debtor admits that it used projections inconsistent with the reporting requirements to which it is subject as a public company:

> The Projections were not prepared in accordance with standards for projections promulgated by the American Institute of Certified Public Accountants or with a view to compliance with published guidelines of the SEC regarding projections or forecasts. The Projections have not been audited, reviewed, or compiled by the Debtor's independent public accountants.
>
> (Disclosure Statement, p. 63).

The Plan also fails to provide sufficient financial information concerning the terms and provisions of the Exit Facility. It is incumbent for the Debtor to include essential information such as (i) the basis for ascertaining the enterprise value of the Debtor, (ii) assessing the amount of the Noteholder Deficiency Claim, (iii) evaluating the type and amount of equity the Debtor proposes to issue; including the Tranche I Warrants

[6] The Debtor provided drafts of these documents to the Committee. The Committee anticipates that the Debtor will file revised documents in advance of the January 27, 2012 hearing on the Solicitation Motion, but submits that a separate hearing on the Disclosure Statement, and the exhibits thereto, is necessary to determine the nature and veracity of the information being distributed to creditors in connection with the solicitation of votes on the Plan.

and the Tranche II Warrants, and (iv) quantifying the Reorganized Debtor's equity value. The Court will then be able to properly evaluate whether the Disclosure Statement contains adequate information to enable creditors to make an informed decision on whether to accept or reject the Plan. The Committee submits that any enterprise valuation submitted to creditor be subject to a full evidentiary hearing to ensure accuracy and completeness.

III. The Court's Independent Duty to Determine Compliance with the Bankruptcy Code's Confirmation Standards.

The Court has an independent duty to ensure that the requirements of 11 U.S.C. § 1129. *See Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1299–1300 n. 4 (11th Cir.2001) ("A court must independently satisfy itself that these criteria [of § 1129(a)] are met."); *In re Mayslake Village–Plainfield Campus, Inc.*, 441 B.R. 309, 316 (Bankr.N.D.Ill.2010) ("[R]egardless of whether an objection to confirmation has been asserted, the court must determine whether the requirements of § 1129(a), and if applicable § 1129(b), have been met."); *Ala. Dep't of Econ. & Cmty. Affairs v. Ball Healthcare–Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1229 (11th Cir. 2011) ("Importantly, the Bankruptcy Code envisions a bankruptcy court exercising an independent duty to ensure that the strictures of § 1129(b) are met with regard to impaired dissenting classes of creditors in a Chapter 11 cram down.").

A. The Plan is Not Confirmable because it Impermissibly Classifies Claims.

The Debtor has classified Claims and included provisions in Plan, Disclosure Statement and Solicitation Procedures with obvious intent to control the voting process. As presently drafted, in satisfaction of their $86.3 Claim, the Plan contemplates the issuance of a new $65 million secured debt obligation to holders of Secured Note Claims *and* a distribution of 91% of the Reorganized Debtor's New Common Stock:

> *Class 5: Secured Note Claims*
>
> a. *Claims in Class:* Class 5 consists of all Allowed Secured Note Claims against the Debtor.
>
> b. *Treatment:* The legal, equitable, and contractual rights of the holders of the Secured Note Claims are Impaired by the Plan. Unless the holder of the Secured Note Claim and the Debtor agree to a different treatment, on the Effective Date, each holder of an Allowed Secured Note Claim shall receive that holder's Pro Rata share of the New Class 5 Secured Note. The Allowed Noteholder Deficiency Claim shall receive such treatment as set forth in Class 8: General Unsecured Claims below.
>
> Plan, p. 14.

With respect to the claims of unsecured creditors, the Plan presently provides:

> *Class 8: General Unsecured Claims*
>
> c. *Claims in Class*: Class 8 consists of all Allowed General Unsecured Claims against the Debtor.
>
> d. *Treatment:* The legal, equitable and contractual rights of the holders of General Unsecured Claims are Impaired by the Plan. On the Effective Date (or as soon thereafter as is practicable) each holder of an Allowed General Unsecured Claim, other than the holders of an Allowed Noteholder Deficiency Claim, shall receive, in full satisfaction, settlement, release and discharge of, and in exchange for, such Allowed General Unsecured Claim, either (i) its Pro Rata share of the General Unsecured Reserve [established elsewhere in the Plan at $500,000], or (ii)

> such other no more favorable treatment as to which such holder and the Debtor shall have agreed upon in writing and as to which each of the Majority Secured Noteholders consent.
>
> The holders of the Allowed Noteholders Deficiency Claims shall be deemed to waive their right to participate in any distribution from the General Unsecured Reserve and instead will receive that holder's Pro Rata share of [__] million shares of New Common Stock. Such [___] million shares to be so distributed to the holder of Allowed Noteholder Deficiency Claims shall represent, on the Effective Date, 91% of the outstanding shares of New Common Stock, which percentage shall be subject to (i) dilution of up to 5% upon the issuance of any shares of stock granted to the New Management Incentive Plan and (ii) further dilution upon the exercise of New Warrants.
>
> In addition, if Class 8 accepts the Plan, and a holder of a General Unsecured Claim votes to accept the Plan, any and all potential Avoidance Actions against such holder shall be waived. If Class 8 does not vote in favor of the Plan, the Debtor will be unable to confirm the Plan, the Debtor's Chapter 11 Case might be delayed and creditors' and interest holders' recoveries and distributions diminished, in some instances significantly or entirely.
>
> Plan, pp. 15, 16.

Thus, the Debtor and holders of Secured Note Claims have negotiated a settlement that provides for a $65 million New Secured Note, plus the Allowed Noteholder Deficiency Claim of $21.3 million. The Debtor then included the $21.3 million deficiency in Class 8 General Unsecured Claims to vote and control the unsecured creditors class even though the Senior Note Holders - - and only the Senior Note Holders - - will receive stock in the reorganized debtor on account of their unsecured claims.

It is well established law that a debtor enjoys considerable discretion when classifying similar claims. *See In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 714, 715 (Bankr.S.D.N.Y.1992) (separate classification of similar classes was rational where members of each class "own[ed] distinct securities and possess[ed] different legal

rights"). This requirement insures that classes of claims will have similar interests, and that votes cast by the class will reflect the joint interests of the class. It thus assures that large claims of a different legal nature are not classed with other claims so as to enable the improperly classed claims to dictate the treatment afforded to other claims.

In this case, however, the Plan classifications are designed to ensure confirmation of the Plan through manipulation of the votes in Class 8 – General Unsecured Claims. Most obviously, the Allowed Noteholder Deficiency Claim (*i.e. the Senior Secured Note deficiency claim)*, which is being satisfied in full by receiving shares of New Common Stock under the Plan, is classified in Class 8. Other forms of vote manipulation are more subtle.

For example, included in Class 8 are $1.8 million in contract "cure" and maritime lien claims designated in Schedule F as general unsecured claims. According to the Plan, the maritime lien claimants will be paid in full as Class 6 Miscellaneous Secured Claims, as will all parties to executory contracts with the Debtor under the expanded definition of the executory contracts contained in Section 1.51 of the Plan. The balance of the unsecured creditors will in turn share in a pot of only $500,000 which again, is subject to full dilution if the Civil Anti-Trust Claims are ultimately allowed. Those unsecured creditors who are unfortunate enough not to fall in either group of claimants being paid in full are thus subject to being outvoted by those receiving more favorable treatment.

Bill Gottimer, speaking on behalf of the Debtor, made little attempt to disguise the Debtor's gamesmanship when he testified at the § 341 meeting of creditors that the Plan was drafted to guaranty its acceptance:

> Q. And if [the senior bondholders are] waiving their deficiency claims and they're going to get the --- stock

> of the new --- the reorganized company, why are they --- why does you plan propose that they vote in the unsecured creditors class?
>
> A. I think --- I think the plan was --- the plan speaks for itself. The plan was drawn up to give it the best chance of --- the company believes this is the best chance for the company to continue to survive and continue to provide its services and employ its employees and --- and contract with its vendors, and we believe that the way the plan is set up --- again, I'm not a bankruptcy attorney. I don't know the ins and outs of it, bu I believe the way the plan is set up is designed best to secure a positive --- a positive confirmation.
>
> Q. So to shorten the anwser, there are --- you proposed that the senior note holders vote in the unsecured creditors class to maximize your chances of getting acceptances of the plan by that class?
>
> A. I think everything in the plan was designed that --- that it receive confirmation. . . .
>
> Transcript, § 341 Meeting of Creditors, January 18, 2012, p. 59, lns. 10 – 25, p. 60, lns. 1 – 6.

Though the issue of gerrymandering most often arises in the context of creating too many classes, it can also be found with respect to the creating of too few classes. In either event, if gerrymandering is present, the Plan cannot be confirmed:

> Although the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case, this discretion is not unlimited. '[T]here must be some limit on a debtor's power to classify creditors . . . The potential for abuse would be significant otherwise.' . . . *If the plan unfairly creates too many or too few classes, if the classifications are designed to manipulate class voting, or if the classification scheme violates basic priority rights, the plan cannot be confirmed.*

> *In re Holywell Corp. (Olympia & York Fla. Equity Corp. v. Bank of N.Y., et al.),* 913 F.2d 873, 880 (11th Cir. 1990), *citing Teamsters Nat'l. Freight Indus. Negotiation Comm. v. U.S. Truck Co.,* 800 F.2d 581, 586 (6th Cir. 1986) (emphasis added).

Section 1123(a)(4) requires that a plan "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." 11 U.S.C. § 1123(a)(4). If § 1123(a)(4) is to have any meaning, then the Debtor's classification and voting scheme cannot by condoned.

The different legal origins of the Allowed Noteholder Deficiency Claim and General Unsecured Claims, and their differing treatments, dictate separate classification of the note claims from general unsecured claims. See, e.g., *In re Calpine*, No. 05–60200, 2007 WL 4565223 (Bankr. S.D.N.Y. Dec. 19, 2007) (order confirming chapter 11 plan separately classifying convertible unsecured notes claims from general unsecured claims); *In re Coram Healthcare Corp.*, 315 B.R. 321, 350–51 (Bankr. D. Del. 2004) (finding noteholders represented "a voting interest that is sufficiently distinct from the trade creditors to merit a separate voice in this reorganization case").

B. The Plan is not Confirmable because it Violates the Absolute Priority Rule.

The absolute priority rule specifically prevents a holder of equity interests — whose claim is junior to that of unsecured creditors — from retaining property interests under a plan unless dissenting impaired unsecured creditor classes are paid in full. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, (1988) ("[T]he absolute priority

rule provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan." (alteration in original) (citations omitted) (internal quotation marks omitted)). The Absolute Priority Rule was developed to protect against "the danger inherent in any reorganization plan proposed by a debtor ... that the plan will simply turn out to be too good a deal for the debtor[ ]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444, (1999) (citations omitted).

The Plan in this case is simply too good for the Debtor. It allows the 12,016,681[7] existing shares of equity to receive $.15 per share, approximately $1.8 million cumulatively, or receive up to 9% on New Common Stock. Conversely, the Disclosure Statement states that General Unsecured Creditors are receiving a proposed distribution of between 25 to 85%, when in fact that distribution could be as little as 0.7% if the Civil Anti-Trust Claims are ultimately allowed. Although the Debtor steadfastly states it has no liability under the claims, the Debtor has proposed solicitation provisions, such as those directed at the Non-Voting Claimants addressed in Section I.B. above, that prevent any estimation of those claims.

C. The Plan and Disclosure Statement Contain Numerous Provisions Contrary to Established Law.

1. The Debtor Impermissibly Attempts to Limit Information Distributed to Creditors. In the Introduction and Disclaimer, the Disclosure Statement attempts to limit the Committee's right to contact creditors by providing that "no person may give any information or make any representations, other than the information and representations

[7] As reported in the Debtor's 10Q/A dated November 22, 2011.

contained in this disclosure statement, regarding the plan or the solicitation of acceptances of the plan." (Disc. Stmt. at 4). A similar notice attempting to preclude information being submitted from the Committee is provided in section V.D. *Notice to Holders of Claims and Interests.* The Debtor does not have the sole and exclusive right to control the flow of information to creditors and these provisions should be removed. *Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94, 100 (3d Cir. 1988) (finding that § 1125 does not on its face empower the bankruptcy court to require that all communications between creditors be approved by the court.)

2. The Plan Violates § 365 of the Bankruptcy Code. The Plan violates § 365 of the Bankruptcy Code and Bankruptcy Rule 6006, by providing that "as of the Effective Date the Debtor shall be deemed to have assumed each executory contract and unexpired lease to which the Debtor is a party." (Plan VII.A.) The Debtor cannot assume contracts without taking affirmative actions with respect to each such executory contract unexpired lease.

3. The Debtor has not Negotiated with the Committee in Good Faith. The Debtor attempts to coerce the Committee into supporting the Plan by eliminating the Committee Counsel from the releases and indemnification provisions of the Plan and Disclosure Statement.

4. The Third-Party Releases in the Plan are Arguable Improper. Non-debtor releases are permissible where "truly unusual circumstances render the release terms important to success of the plan." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142–43 (2d Cir. 2005); *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from

suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."). Courts will only tolerate non-debtor releases, however, in "circumstances that may be characterized as unique." *In re Metromedia,* 416 F.3d at 142. Non-debtor releases should be rare, courts have found that "the mere fact of financial contribution by a non-debtor cannot be enough to trigger the right to a Metromedia/Drexel release." *Cartalemi v. Karta Corp. (In re Karta Corp.),* 342 B.R. 45, 55 (S.D. N.Y. 2006). The non-debtor contribution must do more.

5. A Stand-Alone Disclosure Statement Hearing will avoid Unnecessary Litigation. The Committee desires to avoid litigation expense. Inasmuch as the Plan cannot be confirmed as presently drafted, it is important that the estate be spared the expense of the effort by vetting the adequacy of the disclosures prior to vote solicitation. *In re Pecht*, 53 B.R. 768, 772 (Bankr. E.D. Va. 1985) ("Submitting the debtor to the attendant expense of soliciting votes on a clearly fruitless venture would be costly and it would delay any possibility of a successful reorganization"). *See also In re Eastern Maine Electric Corp., Inc.*, 125 B.R. 329, 333 (Bankr. Me. 1991) ("Where the plan's inadequacies are patent, they may, and should, be addressed at the disclosure statement stage"). That these items be addressed through a stand-alone disclosure statement hearing *prior to vote solicitation* is also important to avoid designation of votes as being cast in bad faith and the other inevitable fights flowing from the Debtor's attempts to manipulate voting. *See e.g. In re Media Central, Inc.*, 89 B.R. 685, 691 (Bankr. E.D. Tenn. 1988) ("Failure to obtain beforehand a judicial ruling on the propriety of statements or information sent in conjunction with a vote solicitation may lead to a vote disqualification after the fact if it is later determined that the statements or information were improper and the solicitation in bad faith").

Conclusion

For all of the forgoing reasons, the Committee respectfully requests the Court deny the Motion (unless its objections are resolved) and grant such other relief as is just and proper.

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