United States Courts
Southern District of Texas
FILED

FEB 22 2021

Nathan Ochsner, Clerk of Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:

SUPERIOR ENERGY SERVICES, INC., et al **Chapter 11**

Case No. 20-35812 (DRJ)

MOTON FOR DIRECT APPEAL CERTIFICATION
TO FIFTH CIRCUIT COURT OF APPEALS

Appellants/creditors Stephen Sammons, Elena Sammons, and Michael Sammons, *pro se*, ("Appellants") request this Court certify the pending appeal in the above referenced case to the Fifth Circuit Court of Appeals. 28 USC 158(d)(2).

In support thereof the Appellants would show that the judgments appealed involve matters of great public importance: (1) whether creditors are entitled to be heard in Chapter 11 cases, and (2) whether fundamental due process can be (repeatedly) violated in a Chapter 11 bankruptcy case in the interests of expediency.

In this $1.3 *billion* complex Chapter 11 case, rushed through in only *43 days*, there were numerous violations of statutory due process protections: no creditors committee was appointed in violation of 11 USC 1102(a)(1); *pro se* creditors were denied their right to be heard in violation of 11 USC 1109(b); *pro se* creditors were denied their right to pursue necessary and reasonable discovery before judgment or hearing after a material plan modification, in violation of 11 USC 1127(b); and, notwithstanding all of these due process protection violations, the Court rubber-stamped a plan which on its face was unconfirmable where some creditors received only a 2% cash recovery when under a liquidation scenario they would have received a 19% cash recovery, in violation of 11 USC 1129(a)(7).

A draft Appellant's Brief, **Exhibit A attached**, incorporated fully herein, discusses these issues in more detail.

WHEREFORE, this appeal should be certified for direct appeal to the Fifth Circuit Court of Appeals.

Respectfully submitted,

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Certificate of Service

A true copy delivered to all parties. 2/18/2021

Michael Sammons

Michael Sammons

Exhibit A

No. 21-

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT - HOUSTON

STEPHEN, ELENA, AND MICHAEL SAMMONS;
Creditors-Appellants

v.

SUPERIOR ENERGY SERVICES, INC. et al,

Debtors-Appellees

On Appeal from the United States Bankruptcy Court,
Western District of Texas,
Houston, No. 20-35812,
Honorable Bankruptcy Judge David R. Jones, Presiding

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

Creditor/Appellants Stephen Sammons, Elena Sammons, and Michael Sammons, *pro se*, ("Appellants") seek appellate review of a disclosure statement and plan confirmation.

This Court has appellate jurisdiction pursuant to 28 USC 158(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether *pro se* creditors are entitled to be heard in a Chapter 11 case pursuant to 11 USC § 1109(b).
2. Whether the modification as to DTC eligibility was a "material" change to the plan and to creditors.
3. Whether the plan's "default" bond recovery option, 2% recovery in cash, violated 11 USC § 1129(a)(7), where the liquidation cash recovery value under the plan was 19%.
4. Whether a unilateral material modification to a confirmed but not yet final plan, unnecessarily threatening dozens, perhaps hundreds, of creditor retirement accounts, is a contested matter warranting due process protections, including the right to necessary limited discovery. 11 USC § 1127(b)("after notice and a hearing").
5. Whether such a material plan modification contested matter involving millions of dollars and unnecessarily threatening the value of numerous creditor retirement accounts requires the U.S. Trustee or the court to immediately appoint a creditors committee (requested by creditors) to pursue the matter pursuant to the mandatory 11 USC § 1102(a)(1).

STATEMENT OF THE CASE

FACTS

On December 7, 2020, Superior Energy Services. Inc. (SESI") and certain subsidiaries, with approximately $1.3 *billion* in defaulted bonds, filed for Chapter 11 bankruptcy protection. Dkt. 1. No creditors committee was ever appointed.

Appellants/creditors Elena Sammons (with a direct and beneficial interest belonging to Michael Sammons) and Stephen Sammons hold SESI bonds in their IRA retirement accounts.

Per the Disclosure Statement, bondholders were to receive a 2% cash recovery; however, if a bondholder actively opted-out of the 2% default recovery, then he/she would receive a 69% recovery in new stock. Dkt. 12, pg. 19. In a liquidation scenario the cash recovery was stated to be 19%. Dkt 12, pg. 344.

The Plan as approved by the Court *just 43 days later* on January 19, 2021 stated: "The Debtors ... will use their best efforts to make the New Common Stock ... (DTC) eligible." Dkt. 289, pg 85. But SESI had misled the Court and, just two days later on January 21, 2021, SESI revealed what it had secretly intended all along: "the New Equity will (not) be DTC eligible," i.e., that *no* effort at all would be made to obtain DTC eligibility. See Motion to Reconsider, Exhibit A, Dkt. 306. This means that the new SESI stock cannot go back to the IRA account which had already submitted the SESI bonds pursuant to the Plan (most brokers will not accept non-DTC stock), and instead must be delivered *outside* the IRA triggering a *massive* tax liability and penalties for premature IRA withdrawals and destroying a *significant* part of the IRA retirement accounts values (contrary to public policy).[1] See Exhibit B to Motion to Reconsider, Dkt. 306 (email dated January 25, 2021

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1 Stephen Sammons is in his 20's. He has $10,000 in SESI bonds in his IRA which under the Plan approved by the Court would have resulted in his IRA receiving new SESI stock with a value of $6,000 (per disclosure statement). With this new *devastating* modification of the Plan, the $6,000 in new SESI stock must now be issued to him *outside* his IRA. This triggers an income tax liability and 10% penalty for a premature withdrawal; but worst of all $6000 in assets are unilaterally stripped from his IRA, ultimately reducing the assets in his IRA by $100,000 at age 65 (assuming 7% annual return). Few, if any, IRA (or any other retirement account) holder would have approved this "modified" Plan.

from TD Ameritrade to Stephen Sammons).

Had IRA bondholders been warned that retirement accounts would be *decimated* under the plan as modified, at the very least IRA bondholders – including Appellants - would have strenuously objected to the Plan and would have insisted that a creditors committee be appointed as required by law when such material substantive rights of bondholders with IRA accounts are threatened. 11 U.S.C. §1102(a)(1).

The plan confirmed on January 19, 2021 was equally fatally flawed because $50 million in bondholders, many of whom purchased bonds on the open market in the days before the confirmation hearing (having no notice or opportunity to be heard or vote on the plan), were forced to receive only the 2% cash recovery rather than the 69% stock recovery. In addition, those bondholder with IRA accounts, such as Appellants, who failed to provide alternative non-IRA accounts for delivery of the new stock, may now only receive the 2% recovery in cash (which *could* be returned to their IRA accounts). Where the stated liquidation cash recovery would have been 19% for these bondholders, a 2% recovery in cash under the plan violates 11 USC § 1129(a)(7).

Appellants filed a proper timely contested "motion to reconsider" the Order approving the disclosure statement and confirming the plan on January 27, 2021, Dkt. 306, which motion was summarily dismissed, without analysis or comment or due process, by Order entered on February 4, 2021, Dkt. 323.

A notice of appeal was filed on February 10, 2021. Dkt. 332.

STANDARD FOR REVIEW

Whether the bankruptcy court's procedures comport with due process is reviewed *de novo*.

SUMMARY OF THE ARGUMENT

This appeal involves a $1.3 *billion* complex Chapter 11 bankruptcy case rammed through the bankruptcy court in *only 43 days*. In violation of 11 USC § 1102(a)(1) no creditors committee was appointed. The case from start to swift finish was controlled by an Ad Hoc Group of bondholders who sought to enrich themselves at the expense of other unrepresented bondholders.

The central piece of the reorganization scheme orchestrated by the Ad Hoc Bondholder Group was quite ingenious (and devious). All bondholders would be offered a choice between a 2% recovery in cash or a 69% recovery in stock. Of course, no rational bondholder would choose a 2% recovery over a 69% recovery, so the Ad Hoc Group rigged the deck to ensure that as many bondholders as possible fell onto the 2% sword: (1) no bond purchased after the December 7, 2021 case filing date could elect the 69% recovery option, and (2) for any bondholder that inadvertently missed receiving notice (illness, vacation, broker error, covid-19, or who purchased any of the millions in bonds which traded on the open market in the days before the confirmation hearing), or failed to complete all the necessary forms and hoop jumping, the "default" option would be the 2% cash recovery.

With over $10 million in bonds having traded in a single day (http://finra-markets.morningstar.com/BondCenter/Results.jsp), perhaps over $200 million in bonds traded after the December 7, 2020 arbitrary plan option record date, the Ad Hoc Bond Group scheme would have resulted in a $134 million windfall, mostly accruing to the Ad Hoc Bond Group ($200 million in other bonds settled for 2% on the dollar rather than 69% on the dollar).

Appellants, *pro se*, in the absence of any appointed creditors committee, called the Debtors and Ad Hoc Bond Group out on this scheme, and the Debtors and Ad Hoc Bond Group quietly removed the December 7, 2020 record date requirement for the non-cash option.

However, $50 million in bondholders had failed to respond to the solicitation materials or purchased bonds too late to receive notice, and, under the plan, they could therefore only recover 2% in cash. Since the Disclosure Statement stated that even in a cash liquidation scenario recovery would be 19%, Dkt. 12, pg. 344, the plan violated 11 USC § 1129(a)(7) and was unconfirmable.

Nevertheless, the plan was confirmed on January 19, 2021. But the Ad Hoc Bond Group's scheme did not end there.

Of crucial importance to all bondholders holding bonds in their retirement accounts was this assurance from the plan which can be found on pg. 85 of the Order, Dkt. 289, approving disclosure statement and confirming the plan:

> "The Debtors or Reorganized Debtors (as applicable) shall use their best efforts to make the New Common Stock ... eligible for distribution through the facilities of the DTC" (DTC eligible)

Before the ink was dry on the Confirmation Order, the Ad Hoc Bond Group sprung its second devious trap, having convinced or coerced the Debtors into a modification of the plan, reneging on the promise to make the new stock "DTC eligible" - a modification which would financially *decimate* the retirement accounts of the Appellants and any other bondholders holding SESI bonds in their retirement accounts.

The January 21, 2021 notice of this modification, attached as Exhibit A to the Motion to Reconsider, Dkt. 306, stated:

> **"It is not anticipated that the New Equity will be DTC eligible and, as a result, will not be distributed through DTC."**

Brokers then notified creditors with SESI bonds held in retirement accounts that because the brokers could not accept stock which was not DTC eligible that the New Stock could only be delivered "outside" the retirement account, resulting in a forced IRA withdrawal, thereby inflicting tax liability for an IRA withdrawal, 10% penalty for early IRA withdrawal in many cases, and worst of all a sharp diminution of IRA assets. See Exhibit B to Motion to Reconsider, Dkt. 306 (email dated January 25, 2021 from TD Ameritrade to Stephen Sammons).

Appellants immediately filed a contested motion to reconsider, and immediately (two days later) initiated discovery to be able to prove their case at a future expedited hearing pursuant to 11 USC § 1109(b) and 11 USC § 1127(b). Those discovery efforts were cut short by an Order entered on February 4, 2021 by the court (before any discovery was produced by Debtors), which summarily denied the motion without opinion or comment.

This appeal followed, challenging confirmation of the plan and challenging the modification of the plan.

ARGUMENT

1. Whether *pro se* creditors deserve to be heard in a Chapter 11 case pursuant to 11 USC § 1109(b).

11 U.S. Code § 1109. Right to be heard:

> (b) A party in interest, including ... a creditor ... may raise and may appear and be heard on any issue in a case under this chapter."

Perhaps in a $1 *billion* Chapter 11 case, in which a creditors committee had properly been appointed with a fiduciary duty to protect the rights of all creditors, a bankruptcy court would be justified in denying a *pro se* creditor the right to be heard altogether.

But in the absence of a creditors committee, or even a single attorney representing any non-Ad Hoc Bond Group bondholder, the bankruptcy court cannot merely rubber stamp whatever plan the Debtors and Ad Hoc Bond Group submit.

In all complex Chapter 11 cases there are important due process guardrails to ensure due process. The law provides that a creditors committee "shall" be appointed. 11 USC § 1102(a)(1). If the U.S. Trustee and bankruptcy court[2] ignore that due process safeguard, there remain three other due process safeguards: (1) the court itself can undertake an independent critical view of the disclosure statement and the plan, asking the type questions any competent creditors committee would have, (2) where an ad hoc bond group is attempting to secure financial benefits for themselves at the expense of other similarly situated bondholders, another bondholder might retain counsel to ask the same questions, and (3) last, but least effective, a *pro se* bondholder could step in the due process vacuum to ask such questions.

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2 The apparent position of the U.S. Trustee is that there was insufficient interest in serving on a creditors committee, at least from the 30 top creditors. But the U.S. Trustee should not have prematurely quit there. This case has hundreds of creditors, including hundreds of bondholders, so with minimal notice efforts a creditors committee could have easily been appointed. Appellants Stephen Sammons and Elena Sammons, along with dozens of other bondholders, are now, and would have been, willing to serve. In any event, the court should have inquired as to why in this $1.3 *billion* complex Chapter 11 case no creditors committee had been appointed as required by 11 USC § 1102(a)(1).

In this case it is difficult to understand how any bankruptcy judge could have missed the enormous red flag presented by the 2% recovery vs 69% recovery scenario for similarly situated bondholders under the plan – that was the sole essential term of the plan – not to mention that the plan clearly stated that in a liquidation the cash recovery would be 19%. But at confirmation there was no careful review and not a single question was asked – the very definition of "rubber-stamped."

With no statutory creditors committee, and a bankruptcy judge disinclined to make any kind of independent critical review of the plan, who was left to ask obviously needed questions as to the legality and fairness of the plan? Certainly not the Ad Hoc Bond Group, and certainly not the Debtors, all but controlled by that Ad Hoc Bond Group (its imminent new owners).

The Ad Hoc Bond Group was determined to force as many other bondholders into the 2% recovery as possible, which would render the group's 69% recovery all the greater. So the Ad Hoc Bond Group, without fiduciary duties to anyone but themselves, provided *less* than no due process protection at all.

So if there was to be any due process protection at all in this case – if there was to be any voice asking questions – it could only be the *pro se* Appellants. But even this slim flicker of due process was quickly snuffed out by the court: no questions, no discovery, nothing but a swift boot out the courthouse door.

In a third world banana republic this would be all the "due process" citizens could expect. But if there has been one shining light throughout U.S. judicial history it has been that voices will not be arbitrarily silenced, complaints will be afforded a fair opportunity to develop the facts through reasonable discovery, and that disputes will be heard by an impartial judiciary. But the real question here is whether due process even has any place in a bankruptcy court concerned only with expediency?

If fundamental concerns of due process do not apply in bankruptcy court, if statutory mandates, such as 11 USC § 1102(a)(1)(right to creditors committee), 11 USC § 1109(b)(right to be heard), and 11 USC § 1127(b)(right to notice and hearing, including discovery following a plan modification), are mere guidelines that can be sacrificed at the altar of expediency, then the answer to the question as to whether due process has any place in bankruptcy court, is simply, "no."

2. Whether the modification as to DTC eligibility a "material" change to the plan and to creditors?

Liberally construing the *pro se* Motion to Reconsider, it was apparent that the Appellants main concern was that the plan had been modified in violation of 11 USC §1127, which states:

> "(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan ... only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified .."

Since the bankruptcy court order denying the motion to reconsider was devoid of facts, law, or reasoning, one can only assume that perhaps the DTC eligibility modification was not deemed "material." As already noted, dozens, perhaps hundreds, of bondholders would strenuously disagree. But the due process concern here is that the court also actively prevented the Appellants from necessary and reasonable discovery on the issue, barring the discovery needed to determine the number of injured bondholders and the amount of financial loss attributable to the modification inflicted upon those bondholders.

Was the unilateral modification as to DTC eligibility coerced by the Ad Hoc Bond Group and implemented by the Debtors "material"?

Debtors, in their blind subservience to the Ad Hoc Bond Group, would suggest that if there was a modification it was not a "material" modification: "We did not guarantee the new stock would be DTC eligible, we only promised to exercise our best efforts – maybe we would have failed." True enough, but *no* effort was made, and the truth is that DTC eligibility is almost automatic and all but guaranteed with remarkably minimal effort (*thousands* of penny stock companies, worth a small fraction of 1% of the new SESI, are DTC eligible). Of course, there is no proof of this in the record, because, again, the court silenced Appellants before they could conduct even minimal discovery on the point.

The fact that forcing premature IRA withdrawals, resulting in well-known IRS tax liability and penalties, would cause material damage to even a small IRA account such as that of Appellant Stephen Sammons, portends that perhaps hundreds of millions in retirement account value could be lost.

A modification which threatens millions of dollars of retirement account values is certainly "material."

3. Whether the plan's "default" bond recovery option, 2% recovery in cash, violated Section 1129(a)(7), where the liquidation recovery cash value under the plan was 19%.

But with the due process concerns aside, the fact is that the plan was unconfirmable as a matter of law pursuant to Bankruptcy Code § 1129(a)(7). Bondholders holding $50 million in SESI bonds, through lack of actual notice unattributable to SESI, did not respond to the solicitation documents; i.e. they "have not voted in favor of the plan." This might now include the Appellants who have refused to accept new stock delivered outside their IRA accounts. Therefore, under the plan, bondholders of $50-$100 million will receive the default recovery of 2% in cash, far less than the 19% they would have received in a cash liquidation scenario – and that violates 11 USC § 1129(a)(7).

Bankruptcy Code § 1129(a)(7) requires each holder of a claim or interest of such class:

> (1) has accepted the plan; or
> (2) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date....

Bankruptcy Code § 1129(a)(7) is commonly referred to as the "best interests test," because it ensures that reorganization is in the best interest of individual claimholders who have not voted in favor of the plan. In re Cypresswood Land Partners, I, 409 B.R. 396, 428

(Bankr. S.D.Tex. 2009). It requires that all holders of claims and interests in impaired classes must either vote to accept the plan or receive at least as much as they would receive in a Chapter 7 liquidation.

The fact that a creditor did not vote against the plan, is not the same as to vote for the plan. Abstention is not acceptance. In re Emerge Energy Services LP, Case No. 19-11563 (Bankr. D. Del., Dec. 5, 2019). This is particularly true where many of the $50 million in bondholders who did not actively opt-out of the 2% recovery (necessary to get the 69% recovery) purchased bonds publicly traded in the weeks and days before confirmation and never received any notice at all – or, like Appellants, did not know before the confirmation that there was a planned subsequent modification which would make it impossible for them to accept stock back into their IRA accounts (which could result now in their only receiving the 2% recovery in cash, or more likely, to the delight of the Ad Hoc Bond Group, a complete *forfeiture* of *any* recovery at all as an "undeliverable distribution" pursuant to the approved plan, Dkt. 289, pg. 86).

The Disclosure Statement stated that bondholders would recover 19% in a liquidation scenario. Dkt. 12, pg. 344 ("(T)he Liquidation Proceeds would be sufficient to satisfy approximately 19% of the Prepetition Notes Claims"). Therefore, because $50 million in bondholders did not vote to accept the plan will receive only a 2% cash recovery – substantially less than the 19% recovery they would have received in a liquidation – the plan should not have been confirmed.[3]

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[3] The Court has an independent duty to determine compliance with the Bankruptcy Code's confirmation requirements. See Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus., 244 F.3d 1289, 1299 n. 4 (11th Cir.2001) ("A court must independently satisfy itself that these criteria [of § 1129(a)] are met."); In re New Midland Plaza Assocs., 247 B.R. 877, 895 (Bankr. S.D.Fla.2000) ("The Court ... has an independent duty to determine whether a Plan complies with the best interests of creditors."); In re Future Energy Corp., 83 B.R. 470, 503 (Bankr. S.D.Ohio 1988). ("The issue of compliance with § 1129(a)(11) [the "feasibility" requirement] was not raised by the objectors. Nevertheless ... the Court has an independent duty to determine that all of § 1129(a)'s confirmation criteria have been met.").

4. Whether a unilateral material modification to a confirmed but not yet final plan, unnecessarily threatening dozens, perhaps hundreds, of creditor retirement accounts, is a contested matter warranting due process protections, including the right to necessary limited discovery. 11 USC § 1127(b)("after notice and a hearing").

As Debtors will no doubt forcefully argue, everything above is nothing but conjecture, devoid of proven facts. Debtors are correct and how that came to be is the due process problem.

The only uncontested fact, since it relies upon well-known IRS regulations, is that bonds in a retirement account exchanged for stock delivered *outside* that retirement account will suffer significant financial loss: (1) income tax liability from the "withdrawal", (2) a 10% penalty for "early withdrawal", and (3) diminution of the retirement account value. Numerous other relevant facts required limited reasonable discovery.

It is axiomatic that due process in contested actions in *any* court implicitly includes the right to limited necessary and reasonable discovery prior to a hearing or decision. This obvious due process protection is codified in particular for modifications of confirmed Chapter 11 bankruptcy plans by 11 USC § 1127(b)("After notice and a hearing").

Limited expedited discovery (documents, interrogatories, and 2-3 depositions) here would have provided proof of the following:

1. The Debtors had no business interest in reneging on the promise in the confirmed plan to make a good faith effort to obtain DTC eligibility for the new SESI stock.
2. The Debtors were coerced into reneging on that promise by the Ad Hoc Bond Group, which demand was motivated by a desire to force the 2% cash recovery upon as many other bondholders as possible who had elected the 69% stock recovery option but held their bonds in retirement accounts.
3. "DTC eligibility" requires a simple short form application and less than $100 in costs.
4. The nature and scope of the harm to IRA bondholders from the modification.

The right to be heard is meaningless in a judicial setting if limited reasonable discovery is not allowed to develop material facts relevant to the issue.

5. Whether such a material plan modification contested matter involving millions of dollars and unnecessarily threatening the value of numerous creditor retirement accounts requires the U.S. Trustee or the court to immediately appoint a creditors committee to pursue the matter pursuant to the mandatory 11 USC § 1102(a)(1).

For a plan modification which threatened all retirement accounts holding SESI bonds, effecting dozens, perhaps hundreds, of retirement accounts and potentially millions in retirement assets, should the U.S. Trustee or the court have appointed a creditors committee to investigate the substantive issue? The answer is "yes" because the law requires such appointment.

Obviously, a creditors committee should have been appointed at the start of this case as required by 11 USC § 1102(a)(1). Only "on request of a party at interest in a case in which the debtor is a small business debtor" can this mandate and obligation to appoint a creditors committee be avoided. 11 USC § 1102(a)(3). But again, absent minimal discovery, we do not have a full understanding of why that violation of the law occurred.

But Appellants have now raised at least two material issues involving $50-$100 million of bondholders clearly warranting professional investigation by a formal creditors committee. The request for a creditors committee was made in the motion for reconsideration filed before this case was even 51 days old. Timeliness is not therefore an issue; but even if many more months had passed, the obligation to appoint a creditors committee arises at any time during the case at which an interested party requests one be appointed. In re Breland, 583 BR 787, 793 (Bankr. Court, SD Ala 2018)("ongoing duty until a party in interest requests that a committee be appointed.").

CONCLUSION

How many violations of the law, such as failure to appoint a creditors committee, 11 USC § 1129(a)(7), failure to allow a creditor to be heard, 11 USC § 1109(c), and failure to allow essential and reasonable discovery of a plan modification, 11 USC § 1127(b)("after notice and a hearing"), and denial of fundamental due process, can a bankruptcy court allow in the name of expediency?

This case should be reversed and remanded with instructions to appoint a creditors committee to address (a) the above concerns as to the $50-$100 million in bondholders whose rights were violated by confirmation of the plan in violation of 11 USC § 1129(a)(7), (b) the plan modification implemented in violation of 11 USC § 1127(b), and (c) to consider how best to remedy as many of the due process violations in this case as possible while balancing principles of equitable mootness.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

A true copy provided all parties.

Michael Sammons

Michael Sammons