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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
EXCEL MARITIME CARRIERS LTD., *et al.*,	:	**13 - 23060 (RDD)**
Debtors.	:	**(Jointly Administered)**

ROBERTSON MARITIME INVESTORS'
OBJECTION TO MOTION TO APPROVE DEBTORS' DISCLOSURE STATEMENT

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

Robertson Maritime Investors, LLC ("Robertson") further supplements its objection to the Debtors' Disclosure Statement[1] and objects to the Motion to Approve the Debtors' Disclosure Statement (Docket #88) because the recent changes are so comprehensive that the motion must be re-served so creditors are afforded a realistic opportunity to object before the

[1] Capitalized terms have the same definition contained in the Disclosure Statement, which was filed with the Court (Docket #87). The initial objection was filed as Docket #25 and a subsequent objection was filed as Docket #328.

hearing. The Disclosure statement provides inadequate information and continues to propose a facially unconfirmable plan.

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SUMMARY

1. The Debtors negotiated a pre-bankruptcy plan when the Baltic Dry Index ("BDI") of dry bulk day rates fell below 700. In September and October, the BDI rocketed to over 2000, changing the nature of the Debtor's profitability, the plan, the interests of secured lenders, and the options for all parties. The parties mediated. The composition of the secured lenders changed. The Plan's proposed treatment of the unsecured claims changed. The Plan's proposed ownership and the nature of management changed. The secured lenders abandoned their section 1111(b) election. Now, in exchange for waiving deficiency claims, the secured lenders receive 82.9% of the Reorganized Debtor.

2. With all of these changes, the Debtors merely "supplemented" their Motion to Approve the Disclosure Statement on November 27, the day before Thanksgiving, for a hearing scheduled December 6. The new Disclosure Statement sets on an entirely different path from the earlier one. Creditors have not had sufficient time to react. The supplement was not apparently served on all creditors.[2] The Debtors must re-serve the Motion to Approve the Disclosure Statement on all creditors entitled to notice, with sufficient time for the creditors to react.

3. For Robertson, this prolix and confusing Disclosure Statement does not explain how the Plan handles the central concern of Robertson's previous objections—whether Robertson's ROFO on Christine Shipco interests is reinstated after the Plan, or whether the ROFO was breached and claims for violation of the ROFO are limited to an unsecured claim. The Plan described remains facially unconfirmable because it illegally forces third parties to release claims against non-debtors.

[2] It is possible, albeit unlikely, that the supplement and/or the new Disclosure Statement was served upon the entire creditor body, but no affidavit of service has been filed in any event.

The Plan and Disclosure Statement are Completely New and Require Re-Noticing

4. The Plan and Disclosure Statement are entirely different from the previous versions of the Plan circulated to the creditors, but the Debtors have not re-served the motion to approve the Disclosure Statement or given creditors a reasonable opportunity to object. The new Plan was repeatedly tinkered with by the Consenting Parties over two months, who drafted and negotiated a myriad of complex changes. But the entire creditor group entitled to notice is not being told of the changes to the Disclosure Statement before the hearing. Those who did receive notice of the changes have only two or three business days to review the 286-page redlined Disclosure Statement and object.

5. The Plan contains the following major changes from the earlier version:

a. There is no Christine Shipco Note to fund unsecured claims; creditors receive restricted stock rights in a foreign company instead.

b. There will be "Minority Protections" on the stock of Holdco in favor of the Panyotides family, but the exact language has not been disclosed.

c. There will be a "Management Incentive Program", the provisions of which will remain undisclosed until four days before the voting deadline, in favor of the Panyotides Family.

d. The ownership of the Debtor and control of the board will no longer be in the Panyotides family, but there are understandings with the family about future ownership.

e. Instead of the 1111(b) election, the secured lenders will reduce their secured claim but hold a large unsecured deficiency claim, which will be waived in exchange for stock and the consent of Class 8.

f. Instead of a portion of the proceeds from a note, the unsecured creditors will receive a percentage of ownership of the reorganized debtor, which have different (perhaps undisclosed) tax implications.

g. There will be a rights offering to unsecured creditors to acquire stock based on their claims.

h. The Plan Support Agreement is gone.

6. These changes alter the entire framework of the Disclosure Statement circulated previously. While the changes attempt to cure the deficiencies of the earlier disclosure statements, new issues have arisen which creditors should have a fair opportunity to review. Two or three business days is not a reasonable time to digest these changes.

7. Due Process and common sense require that when the nature of the relief sought by motion changes as radically as these proposed changes, the parties entitled to notice of the initial motion should receive notice of the proposed changes. Otherwise, the creditors are denied notice and a fair opportunity to ask for additional information to be included in the Disclosure Statement. In considering what constitutes fair notice, the Court should consider that there are a large number of creditors who were apparently denied notice, that the proposed changes are substantial and complex, and that the Debtors could easily re-serve the motion to approve the disclosure statement to provide fair notice before the Disclosure Statement is approved.

Section 1125 Requires Better Disclosure

8. The Court must evaluate a disclosure statement's adequacy "in light of the facts unique to the case [and] [t]he debtor's particular circumstances."[3]

9. Likewise, a disclosure statement that is too confusing to convey the truly useful information should not be approved. Adequate information, therefore, is not simply an issue of quantity. Rather, the debtor must demonstrate that the disclosure statement contains information of a sufficient quality that holders of claims and interests can make an informed decision on the

[3] *In re Eastern Maine Elec. Coop., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991).

plan.[4] Courts have held that a disclosure statement that does not provide sufficient factual support for its position cannot be approved.[5]

10. In this instance, the unsecured creditors would receive stock in a company that will have ownership and shareholder restrictions in favor of the Panyotides family, but those agreements are not attached. The proposals for dividends and future profitability are likewise murky. The proposals for alternatives to the plan (*i.e.*, a public stock auction) are not addressed. The massive increase in the BDI and changes to the profitability of the Debtor are addressed only minimally, and the financials were not updated. Finally, the language of the rights offering itself is incomprehensible and internally inconsistent with portions of the plan.

11. An "investor typical of holder of claims or interest of the relevant class" would not buy shares in a company when the seller has not disclosed restrictions on shareholder power and the details of deals with insiders. Without timely disclosure of all side agreements with all parties to the transactions contemplated in the Plan, the Disclosure Statement lacks the information necessary for a typical investor to evaluate whether to vote for the Plan. Providing additional details four business days before the voting deadline[6] would not be acceptable to an investor and should not be acceptable here.

12. The Disclosure Statement does adequately explain how the tax consequences of receiving shares in a Marshall Islands Holdco are entirely different from the tax consequences of a promissory note. The Disclosure Statement attempts to address some of those issues (there is a

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4 *In re Rodriguez Gas & Oil Servs., Inc.*, 2008 Bankr. LEXIS 2718 (Bankr. S.D. Tex. Oct. 2, 2008).

5 See, e.g., *In re Egan*, 33 B.R. 672, 675-76 (Bankr. N.D. Ill. 1983) (noting that disclosure statement is "intended to be a source of factual information upon which one can make an informed judgment about a reorganization plan").

6 Disclosure Statement 1.86 anticipates a summary of certain provisions of the Management Incentive Program to be mailed out four business days before the voting deadline. That is, under the circumstances, insufficient notice.

potential for "passive foreign investment company" exposure and a "QEF election"), but the creditor body has not been given notice, and objecting parties are given only two business days over a holiday weekend to evaluate the accuracy of these tax claims. Additional undisclosed tax consequences may exist for non-us investors. Given the dramatically different tax implications recognized by the Disclosure Statement, more notice is required so that creditors can ensure the tax information is accurate and complete.

13. While side agreements with other consenting parties are mentioned, the details and actual agreements themselves are not. The Holdco's LLC restrictions on shares, Management Incentive Program, and all insider deals must be not merely mentioned,[7] but actually attached and provided to creditors.

14. With all of these omissions, the proposal to re-notice this new Disclosure Statement and plan is common sense. Before circulating this disclosure statement to the entire creditor body, the consenting parties can finalize their side-agreements and stock restrictions to disclose them adequately, they can make the appropriate disclosures on plan alternatives and tax consequences, and the creditor body can have a reasonable opportunity to digest this new proposal.

Some Issues Previously Raised by Robertson have not Been Addressed

15. Robertson has previously objected on several substantive grounds to the Debtors' Disclosure Statement inasmuch as it proposes third party releases generally prohibited under Second Circuit law. Some of Robertson's objections were not cured by the radical re-write in the November 27th Disclosure Statement.

[7] *See, e.g.,* Disclosure Statement Section 5.12—Management Incentive Program

16. Robertson became involved in the Debtors' bankruptcy when it learned that Excel and its subsidiary Bird Acquisition Corp. ("Bird") had purported to transfer a majority interest in Christine Shipco, which interest was subject to a right of first offer in favor of Robertson ("ROFO"). Bird and Excel also caused Christine Shipco to take significant actions to revise loan documents without board approval or notice to Robertson, who has half the seats on the two-person board.

17. Whether Robertson's ROFO is reinstated, what rights Robertson would have to assert the ROFO going forward, and the status of amendments to the Christine Shipco LLC Agreement and dividends have not been addressed or explained. Given the earlier objections, this lack of clarity on the ROFO issue is conspicuous.

The Disclosure Statement Does not Adequately Explain RMI's Treatment

18. Under the November 27th Disclosure Statement, Robertson's claim for damages from the transfer of interests in Christine Shipco are "Robertson Damages Claims". Also, the same Disclosure Statement states "The Debtors vigorously dispute RMI's position and believe that RMI's claims have no merit." No claim objections have been filed.

19. Under the new Plan only "Eligible Holders" may subscribe to the rights offering, and "eligible" holders means that the claim is not disputed. The Disclosure Statement notes that Robertson has claims against the Debtors, but states there is a dispute. The Disclosure Statement should clarify whether Robertson is an "Eligible Holder", assuming it may be an Accredited Investor.

20. The treatment for Robertson has changed materially—from payment based on a note to a percentage interest in Excel in a tranche(s) of share offerings. This material change changes the taxation and securities consequences to the unsecured creditors generally and

Robertson specifically. This is especially true if the new Holdco is a Marshall Islands entity without publicly traded stock and restrictions on use and a prohibition on dividends.

The Rights Offering is Vague and Confusing

21. The Disclosure Statement should be written such that it is understandable. When a disclosure statement is as prolix as this one, with omitted exhibits, documents that are not attached but critical to understand it, imponderable exhibits, and missing cash flow projections, courts do not approve them.[8]

22. The rights offering states that the Robertson Damage Claim is a Class 8 claim if allowed, which will entitle it to a distribution under Class 8 when allowed. Likewise, Eligible Holders with undisputed claims may subscribe to additional shares. On the other hand, the Disclosure Statement indicates that these rights offerings occur at a moment in time—on the Effective Date when the Debtor contributes shares to Holdco. The Disclosure Statement does not explain what happens if disputed claims are subsequently allowed. Do the holders become Eligible Holders with the ability to acquire shares after the Effective Date? How can the creditors receive a pro-rata distribution of shares when there are pending claims objections? Will shares be held in reserve? Will shares be diluted by future allowance?

23. Robertson is holding a potentially disputed Class 8 claim. All Class 8 holders of disputed claims are entitled to know what will happen once their claims are allowed.

The Plan Still Seeks To Improperly Discharge Claims Against Non-Debtors

24. Excel's non-debtor foreign affiliates have not submitted to this Court's jurisdiction. As they use their foreign status to avoid participating in these cases, those same affiliates seek the benefits of the Debtors' Plan—a discharge of Robertson's claims against them.

[8] *See*, *Rodriguez Gas & Oil Servs.*, *supra*, note 4.

25. Under the Plan, a claim against an affiliate that did not file bankruptcy is still discharged if the claim is 1) related to the bankruptcy filing or planning or 2) related to "the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan or the Plan Supplement, the business or contractual arrangements between any Debtor, Reorganized Debtor, Estate or non-Debtor affiliate and any Released Party." Discharge language appears in several places in the Plan in a clear effort to discharge Robertson's claims against non-debtors.[9] The Plan as written also would discharge Robertson's derivative claims through Christine Shipco against its president.[10]

26. Unless a compromise is reached outside of litigation, Robertson must enforce its rights against the non-debtor affiliates. Robertson's claims include:

- Breach of fiduciary duty and shareholder oppression against Bird for exercising control over Christine Shipco in a manner designed to injure Robertson *qua* Robertson.
- Breach of fiduciary duty against Ourania Galanou and personal liability for her *ultra vires* actions.
- Breach of fiduciary duty against Ismini Panyotides for deliberate misrepresentation and/or nondisclosure of facts relating to the actions of Bird relating to the transfer of interests from Bird.
- A determination that Bird does not control Christine Shipco or for a judicial remedy of the shareholder dispute.

This list by no means is a complete litany of Robertson's potential causes of action.

[9] For instance, the Debtors propose to discharge "Impaired Subsidiary Debtor unsecured claims" for no money, unless those claims are based on normal operations. They include any claims against a Subsidiary Debtor held by 1) an insider or 2) a person over whom a United States court could exercise personal jurisdiction.

[10] Derivative suits of affiliates (even those that did not file bankruptcy) would be irrevocably discharged. Plan § 9.5.

27. Excel has not taken the opportunity since the previous objections to state, one and for all, whether it intends to specifically discharge these claims. Indeed, Excel has added new injunction language against, specifically, taking actions against non-debtors.[11]

28. The third party releases and injunctions in the Plan are improper. Moreover, they bring to mind the Supreme Court's recent admonition to review confirmation orders and not sign those with improper third party releases. In *United Student Aid Finds, Inc. v Espinosa*, the Supreme Court dealt with, on an estoppel basis, the improper discharge of a student loan through confirmation of a Chapter 13 plan. The discharge was permitted because the lender failed to challenge it. But the Supreme Court noted that the courts have an independent obligation to examine their orders to ensure discharges follow the law:

> Thus, contrary to the Court of Appeals' assertion, the Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of §§ 1328(a)(2) and 523(a)(8).

559 U.S. 260, 277 (2010).

29. In the Second Circuit, only a handful of unique circumstances justify non-consensual third-party releases of non-debtors.[12] Specifically, "It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate."[13] Even with unique circumstances,

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[11] Parties are enjoined against (all caps in original) "(5) COMMENCING OR CONTINUING IN ANY MANNER ANY ACTION OR PROCEEDING THAT CONTEMPLATES THE SEIZURE OR ARREST OF ANY PROPERTY OF THE DEBTORS, INCLUDING ANY VESSEL WHETHER . . . OF AN ALLEGATION THAT ANY DEBTOR HAS OR HAD CONTROL OF OR WAS ASSOCIATED IN ANY WAY WITH ANY VESSEL OWNED AND/OR OPERATED BY A DEBTOR AND/OR A NON-DEBTOR AND OF ANY VESSEL IN RESPECT OF WHICH AN ALLEGED LIABILITY, INCLUDING A LIABILITY OF ANY THIRD PARTY, WAS INCURRED, OR OTHERWISE."

[12] *In re Johns-Manville Corp*., 517 F.3d 52 (2nd Cir. 2008), *vacated & remanded on other grounds*, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009), *aff'g in part & rev'g in part*, 600 F.3d 135 (2010) (adopting *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995)).

[13] *Johns-Manville* at 66.

only those instances where a bankruptcy court could exercise subject matter jurisdiction over the parties and could comply with constitutional norms permit the discharge.[14]

30. The Plan lacks any of the unique circumstances warranting approval of third-party non-debtor release, the Court cannot exercise subject matter jurisdiction over the foreign parties or disputes under foreign law, and there is a lack of constitutional process for the imposition of these releases.[15] Accordingly, to the extent the Plan relies on the third party releases, the Plan is facially unconfirmable.

31. The Court should not approve the disclosure statement unless the Plan is modified to comply with the law.

CONCLUSION

For the reasons set forth above, Robertson Maritime Investors, LLC respectfully requests that this Court decline to approve the Disclosure Statement and/or require the Debtors to amend it and the Plan and require additional notice to the creditor body with sufficient time to assess the dramatic changes to the recent Disclosure Statement.

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[14] *In re Johns-Manville Corp* at 66 ("a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate"); *In re DBSD North America, Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009), aff'd, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), rev'd on other grounds, 634 F.3d 79 (2d. Cir. 2010).

[15] In limited instances such releases may be possible with an "opt out" provision, or claims may be channeled to a fund, or paid in full. None of those justifications for a third party release are present.

Dated: December 2, 2013
New York, New York

Respectfully Submitted,

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