

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF KENTUCKY  
BOWLING GREEN DIVISION

IN RE:

INVESTORS CAPITAL PARTNERS II, LP

CASE NO. 12-11675  
CHAPTER 11

DEBTOR IN POSSESSION

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**DEBTOR'S NOTICE AND MOTION REGARDING CERTAIN  
PLAN MODIFICATIONS AND CLARIFICATIONS**

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Comes Investors Capital Partners II, LP, as debtor and debtor in possession (the "Debtor"), by counsel, and pursuant to 11 U.S.C. § 1127 and Fed. R. Bankr. P. 3019, hereby gives notice of certain Plan modifications and clarifications as attached hereto, and hereby moves that same be considered at the Plan confirmation hearing currently scheduled for January 21, 2014. The modifications and clarifications primarily affect the proposed Plan treatment of PBI Bank, Inc., and further clarifies the 'new value' contributions if the Plan is confirmed. The Debtor respectfully states as follows:

**JURISDICTION AND VENUE**

1. On December 19, 2012, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). The Debtor is operating its business as a debtor and debtor in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

2. This Court has jurisdiction over these Chapter 11 cases under 28 U.S.C. §§ 157 and 1334. These matters constitute core proceedings under 28 U.S.C. § 157(b)(2)(A), (L), and (O).

3. The Debtor is a Tennessee limited partnership with its principal assets in Barren County, Kentucky. Accordingly, venue for the Debtor's Chapter 11 case is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

4. No trustee or examiner has been appointed in this Chapter 11 case, and no creditors' committee or other official committee has been appointed.

### **BACKGROUND**

5. On March 19, 2013, the Debtor filed its Plan [Doc 55] and the related Disclosure Statement for Debtor's Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code [Doc 54] (the "Disclosure Statement"). On April 29, 2013, the Court entered an Order [Doc 68] approving the Disclosure Statement, setting June 11, 2013 as the date for the hearing to consider confirmation of the Plan (the "Confirmation Hearing"), and establishing deadlines regarding balloting.

6. On May 9, 2013, the Debtor served the Plan, the Disclosure Statement, the Order [Doc 68] approving the Disclosure Statement, and an official ballot on all creditors and parties in interest.

7. On June 4, 2013, PBI filed its Objection [Doc 79] to confirmation of the Plan (the "PBI Objection").

8. On June 11, 2013, the Court held a hearing in this case and subsequently entered an Order [Doc 81] continuing the Confirmation Hearing to July 2, 2013.

9. On June 28, 2013, the Debtor filed its Memorandum of Law in Support of Confirmation [Doc 92] ("Memorandum"), which included certain modifications to the Plan to seek to improve the treatment of Class 1 (PBI) and address its Objections; to clarify agreed upon Plan treatment language with Class 2 (Alliance Corp.), and to change certain language regarding case closing as requested by the Internal Revenue Service.

10. The Debtor filed its Amended Report of Ballots [Doc 93] on July 1, 2013, which indicates that various classes voted to accept the Plan and that PBI's class (Class 1) is the sole class that voted to reject the Plan.

11. On July 2, 2013, following a hearing, the Court entered an Order [Doc 94] remanding and terminating the Confirmation Hearing pending further order of the Court and setting a telephonic pre-trial conference for July 25, 2013 for purposes of scheduling an evidentiary hearing various aspects of the PBI Objection. Debtor and PBI continued ongoing discussions regarding same.

12. On September 27, 2013, the Debtor filed its Motion to Continue Confirmation Hearing and Related Deadlines [Doc 111]. On October 1, 2013, the Court entered an Order [Doc 114] granting said Motion, scheduling the Confirmation Hearing for November 20, 2013, and setting related pre-hearing deadlines.

13. On November 1, 2013, the Debtor filed its Second Motion to Continue Confirmation Hearing and Related Deadlines [Doc 117]. On November 4, 2013, the Court entered an Order [Doc 118] granting said Motion, scheduling the Confirmation Hearing for December 18, 2013, and setting related pre-hearing deadlines. Due to PBI witness scheduling conflicts, the parties agreed to a final continuance to January 21, 2014, which has been approved by the Court [Doc 123].

14. The Debtor and PBI have been and continue to be in discussions to seek any consensual plan treatment or otherwise to narrow the contested issues at confirmation. While the parties have not reached an agreement, the Debtor has circulated to PBI and has filed simultaneously herewith certain modifications and clarifications to the Plan, to modify the

treatment of PBI's claim and otherwise seek to improve various aspects of the Plan in relation to PBI's treatment, in order to narrow disputed issues.<sup>1</sup>

**RELIEF REQUESTED**

15. As part of the confirmation hearing, the Debtor respectfully requests that the Court determine that resolicitation of votes with respect to the plan as modified and clarified, is unnecessary, approving the notice, and granting such other and further relief as the Court deems just and proper.

16. Pursuant to 11 U.S.C. § 1127(a), a plan proponent may modify its Chapter 11 plan at any time before confirmation, provided that the plan as modified satisfies the requirements of 11 U.S.C. §§ 1122 and 1123, which address plan classification of claims and interests and the requisite contents of a plan. Any proposed modifications must also comply with the requirement in 11 U.S.C. § 1127(c) that creditors receive "adequate information" about the modification. Any modified plan submitted "becomes the plan." 11 U.S.C. § 1127(a). Further, "Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes [the] previous acceptance or rejection." 11 U.S.C. § 1127(d).

17. Fed. R. Bankr. P. 3019(a) provides:

In a chapter . . . 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after . . . [notice and a hearing] . . . that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

The phrase "after a plan has been accepted" as used in Rule 3019 refers to the period prior to confirmation but after acceptances and rejections are solicited. *See In re Dow Corning Corp.*,

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<sup>1</sup> A redlined version of the Plan, as modified, is attached hereto as Exhibit A for ease of reference.

237 B.R. 374, 378 (Bankr. E.D. Mich. 1999) (citing 9 COLLIER ON BANKRUPTCY at ¶ 3019-01 (15th ed. rev. 1999)).

18. Fed. R. Bankr. P. 3019(a) “does not contemplate a resolicitation of acceptances or rejections.” COLLIER ON BANKRUPTCY ¶ 1127.02[3]. If a court determines that proposed modifications do not “adversely change” the treatment of creditors or equity security holders who previously accepted, “it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.” Fed. R. Bankr. P. 3019(a); *see also, e.g. Enron Corp. v. New Power Co. (In re New Power Co.)*, 438 F.3d 1113, 1117-18 (11th Cir. 2006) (bankruptcy court may deem a claim or interest holder’s vote for or against a plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated); *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) (if modification does not ‘materially’ impact a claimant’s treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.).

19. A plan modification is not material unless it “so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider acceptance.” *Am. Solar King* at 824 (quoting 8 COLLIER ON BANKRUPTCY, ¶ 3019.03, p. 3019–3 (15th ed. 1987)). Therefore, “[i]f modifications made to a plan prior to confirmation (but after the ballots have been counted) are minor, impact only a creditor who has been fully involved, and do not adversely impact any other creditor, then it is not necessary to solicit new acceptances.” *In re Sentinel Mgmt. Group, Inc.*, 398 B.R. 281, 301 (Bankr. N.D. Ill. 2008) (citing *In re Sherwood Square Assocs.*, 87 B.R. 388, 390 (Bankr. D. Md. 1988)). Instead, “a court may deem a claim or interest holder’s vote for or against a plan as a corresponding vote

with respect to a modified plan.” *Id.* at 301 (citing *Enron Corp.*, 438 F.3d at 1117-18); 11 U.S.C. § 1127(d)).

20. The Debtor has provided a Notice of the filing of the Plan modifications and clarifications to all creditors and parties in interest as filed herewith, served on all creditors and parties in interest by first-class U.S. mail, postage prepaid. The Debtor states that service of the Notice in the manner set forth herein will provide affected creditors with adequate information and an opportunity to consider the modifications and clarifications in relation to their prior acceptances prior to confirmation if they so desire.

WHEREFORE, the Debtor requests that this Court consider the Plan as modified for confirmation at the scheduled Confirmation Hearing and further approve that adequate and sufficient notice to all creditors and parties in interest has been provided, and granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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COUNSEL FOR DEBTOR

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document was filed and served via the Court's Electronic Case Filing System on December 10, 2013.

/s/ Laura Day DelCotto, Esq. \_\_\_\_\_  
COUNSEL FOR DEBTOR  
AND DEBTOR IN POSSESSION

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