IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: REVSTONE INDUSTRIES, LLC, et al.,[1] Debtors.	Chapter 11 Case No. 12-13262 (BLS) (Jointly Administered) **Hearing Date: March 20, 2014 at 10:00 a.m. (ET)** **Related Docket Nos.: 1322, 1334**
In re: TPOP, LLC,[2] Debtor.	Chapter 11 Case No. 13-11831 (BLS) **Hearing Date: March 20, 2014 at 10:00 a.m. (ET)** **Related Docket No.: 402**

FIRST SUPPLEMENT TO OBJECTION OF BOSTON FINANCE GROUP TO MOTION OF REVSTONE INDUSTRIES, ET AL. FOR ORDER PURSUANT TO 11 U.S.C. §§ 105 & 363 AND BANKRUPTCY RULE 9019 AUTHORIZING AND APPROVING SETTLEMENT AGREEMENT WITH PENSION BENEFIT GUARANTY CORPORATION

Boston Finance Group, LLC ("**BFG**"), by and through its undersigned counsel, hereby files this first supplement to its preliminary objection [Docket No. 1334] (the "**Preliminary Objection**" and together with this supplement, the "**Objection**") to the Motion Of Revstone Industries, LLC, Et Al. For Order Pursuant To 11 U.S.C. §§ 105 & 363 And Bankruptcy Rule 9019 Authorizing And Approving Settlement Agreement With Pension Benefit Guaranty

[1] The Debtors in the above-captioned Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: Revstone Industries, LLC (7222); Spara, LLC (6613); Greenwood Forgings, LLC (9285); and US Tool and Engineering, LLC (6450). The location of the Debtors' headquarters and the service address for each of the Debtors is 230 N. Limestone St., Suite 100, Lexington, KY 40507.

[2] The Debtor in the above-captioned Chapter 11 case and the last four digits of its federal tax identification numbers are: TPOP, LLC f/k/a Metavation, LLC (5884). The location of the Debtor's headquarters and the service address for the Debtor is 230 N. Limestone St., Suite 100, Lexington, KY 40507.

Corporation [Docket No. 1322] (the "**Settlement Motion**").[3] In support of the Objection, BFG respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider the Objection under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue of these cases and this Objection in this district is proper under 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

A. General Background

2. On December 3, 2012, Revstone Industries, LLC ("**Revstone**") and Spara, LLC ("**Spara**") each filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). On January 7, 2013, Greenwood Forgings, LLC ("**Greenwood**") and US Tool & Engineering, LLC ("**US Tool**" and together with Revstone, Spara and Greenwood, the "**Revstone/Spara Debtors**") each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

3. On July 22, 2013, Metavation, LLC ("**Metavation**" and together with the Revstone/Spara Debtors, the "**Debtors**"), an indirect subsidiary of Revstone, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

4. On December 18, 2012, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "**Creditors' Committee**") in the case of Revstone. No official committee has been appointed in the cases of Spara, Greenwood, US Tool or Metavation. No trustee or examiner has been appointed in any of the Debtors' cases.

[3] To the extent approval of the motion filed by Metavation seeking approval of the Settlement Agreement (as defined herein) [Case No. 13-11831, Docket No. 402] (the "**Metavation Settlement Motion**") would have preclusive effect on the Settlement Motion, BFG objects to the Metavation Settlement Motion.

B. The PBGC Claims and Settlement Motion

5. During the course of these Chapter 11 cases, the Pension Benefit Guaranty Corporation (the "**PBGC**") filed proofs of claim numbered 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 545, 546, 547, 548, 549, 550, 551 and 552 (collectively, the "**PBGC Claims**") against the Revstone/Spara Debtors based on alleged liabilities stemming from four pension plans established by various non-debtor entities (collectively, the "**Pension Plans**" or the "**Plans**"). The face amount of the liquidated portions of the proofs of claim, as amended, total approximately $61 million.

6. Further, the Department of Labor (the "**DOL**") has filed five proofs of claim, numbered 497, 498, 499, 500 and 501, asserting liability against certain of the Revstone/Spara Debtors and alleging breaches of fiduciary duties in connection with allegedly improper or otherwise prohibited transactions entered into on behalf of the Pension Plans. Specifically, the DOL asserts liability against Revstone, Spara and Greenwood in the aggregate amount of approximately $48 million, representing the total amount of funds allegedly improperly used by the Pension Plans for improper or prohibited transactions, plus various unpaid interest and penalties and "lost opportunity costs" associated with these investments. The DOL states that it filed these claims on behalf of certain of the Pension Plans and seeks payment directly to the respective Pension Plans.

7. Further, the Pension Plans sponsored by Metavation (together, the "**Hillsdale Plans**") have filed 10 additional proofs of claim, numbered 240, 241, 242, 243, 244, 245, 246, 247, 248 and 249 (the "**Hillsdale Claims**"). Claims 240 through 247 assert liability against each of the Revstone/Spara Debtors for liability in connection with allegedly unpaid contributions to the Hillsdale Plans. Claims 248 and 249 assert liability against Greenwood for unpaid taxes in

connection with a lease between Greenwood and the Hillsdale Plans and unpaid promissory notes entered into between Greenwood and MIDS, LLC that were assigned to the Hillsdale Plans. Upon information and belief, the Hillsdale Claims assert liabilities duplicative of liabilities asserted in the PBGC Claims.

8. On February 14, 2014, the Debtors filed the Settlement Motion and the Metavation Settlement Motion, pursuant to which the Debtors request entry of an order authorizing and approving the Settlement Agreement, dated as of February 11, 2014, by and among the Debtors, Fairfield Castings, certain of Revstone's and Spara's non-debtor subsidiaries, and the PBGC (the "**Settlement Agreement**").[4] A copy of the Settlement Agreement and the exhibits thereto was attached as Exhibit 1 to the Settlement Motion.

9. The Settlement Agreement contemplates allowing the PBGC Claims and the DOL Claims (collectively, the "**Settled Claims**") at $95 million, setting minimum and projected recoveries on those claims in the amounts of $80 million and $82 million, respectively.[5] Moreover, attached as Exhibit A to the Settlement Agreement is a redacted form of funding schedule (the "**Funding Schedule**") pursuant to which the Revstone/Spara Debtors are anticipated to fund distributions under a plan(s) of reorganization yet to be filed to holders of administrative expenses, almost entirely professionals,[6] as well as priority and unsecured claims. Moreover, although the existence of the funds available to make these projected distributions is

[4] By separate motion, Metavation has sought approval of the Settlement Agreement in its chapter 11 case. See Case No. 13-11831, Docket No. 402 (Bankr. D. Del.).

[5] Although BFG understands that the proposed allowed claim amount of $95 million includes liabilities asserted in the DOL Claims, the PBGC appears to be the only entity granted the allowed claims in the Settlement Agreement. It is unclear whether and in what amount the DOL Claims will be treated as having been allowed under the proposed $95 million allowed claim amount against the Revstone/Spara Debtors.

[6] As set forth in the Distribution Schedule, professionals are estimated to receive from 79% to 100% of projected fees estimated at more than $25 million, while leaving only $6.27 million to distribute to unsecured creditors of Revstone and Spara other than the PBGC, resulting in speculative recoveries for such creditors ranging from 0% to 18% at Revstone, 0% to 37% at Spara and no recoveries at the remaining two Revstone/Spara Debtors, US Tool and Greenwood.

far from certain, as evidenced by the $20 million swing in potential outcomes reflected on Exhibit B to the Settlement Agreement (the "**Distribution Schedule**"), and the mechanism by which these funds actually become available to the Revstone and Spara estates is nowhere to be found, the Debtors have not only guaranteed the PBGC a minimum recovery of $80 million, but also provided them an opportunity to receive $85 million out of potential sale proceeds as well as additional potential recoveries from certain causes of action.

10. Further, attached as Exhibit C to the Settlement Agreement is a form of Plan Support Agreement (the "**Plan Support Agreement**") to be executed by and among the Debtors and the PBGC. Under the Plan Support Agreement, the Revstone/Spara Debtors will propose a Chapter 11 plan of reorganization that not only embodies the Funding and Distribution Schedules, but also requires the PBGC to support broad release and exculpation provisions benefiting the Debtors' management and professionals that have proceeded in the face of conflicting interests, highlighted by, among other things, the disproportionate allocation of sale proceeds to Revstone and, thus, the Debtors' professional fees at Revstone. Additionally, the Plan Support Agreement contains a restriction on the PBGC, an active member of the Creditors' Committee, requiring that it will "not seek, solicit, negotiate, support, or enter into an agreement related to any other Chapter 11 plan in these Chapter 11 cases (an "**Alternative Plan**")" unless the Debtors agree, in writing, that the PBGC may pursue such Alternative Plan. Settlement Agreement, Exhibit C, at ¶ 4(f). Leaving aside the PBGC's statutory ability to enter into an agreement that prohibits it from supporting a plan of reorganization that provides it with a better recovery, such a provision is patently intended to entrench the Debtors' management and their professionals by locking up the PBGC, an active member of the Creditors' Committee that has been privy to confidential and privileged Creditors' Committee information.

11. On February 18, 2014, BFG filed the Preliminary Objection, requesting that this Court (i) disallow and/or estimate at significantly reduced amounts the PBGC Claims for purposes of voting and distribution, and (ii) deny the Settlement Motion. All of the assertions and legal arguments as to why the PBGC Claims are overstated and should be disallowed or estimated at amount tens of millions of dollars less than the proposed allowed amount of $95 million set forth in the Settlement Motion are incorporated herein by reference.

12. On the date hereof, the Creditors' Committee filed an objection to the PBGC Claims, supplementing the Preliminary Objection filed by BFG [Docket No. 1376]. BFG joins in the Committee's arguments for disallowance or reduction of the PBGC Claims set forth in such supplemental objection except to the extent of any disagreement with respect to the interests of the Revstone and Spara estates.

13. Also on the date hereof, the Creditors' Committee filed the Objection Of The Official Committee Of Unsecured Creditors Of Revstone Industries, LLC To Motion Of Revstone Industries, LLC And TPOP, LLC For Order Pursuant To 11 U.S.C. §§ 105 And 363 And Bankruptcy Rule 9019 Authorizing And Approving Settlement Agreement With Pension Benefit Guaranty Corporation (the "**Revstone Committee Objection**"), objecting to approval of the Settlement Agreement because, among other reasons, the Settlement Agreement is not in the best interests of unsecured creditors. BFG hereby incorporates by reference the Revstone Committee Objection as if set forth in full herein.

SUMMARY OF OBJECTION

14. Relying heavily on the "business judgment" of an interested, if not conflicted, Special Committee represented by professionals that are far from disinterested, and the equitable powers of section 105 of the Bankruptcy Code, the Debtors seek this Court's approval of a

purported "settlement" of the contingent, disputed and unliquidated claims of the PBGC and the DOL in a summary proceeding under Bankruptcy Rule 9019, and outside a full trial and without the extensive disclosure and creditor vote that would be required by a plan process. As demonstrated below, this Court should not, indeed cannot, grant the Settlement Motion for the multitude of legal and factual reasons set forth below and in the Revstone Committee Objection and as will be demonstrated at the hearing on the Settlement Motion.

15. As a legal matter, this Court cannot grant the Settlement Motion for two fundamental reasons. First, the Court simply does not have the jurisdiction to approve various essential components of the Settlement Agreement. Indeed, granting certain of the relief requested is inconsistent with this Court's prior rulings on two matters. Second, even if the Court were to only bless the provisions of the Settlement Agreement over which it has jurisdiction, the Court cannot do so outside the process for approving a plan of reorganization.

16. Moreover, even assuming, arguendo, that the Settlement Motion could withstand these legal challenges, the Settlement Motion should be denied on the facts. In particular, as set forth below and in the Revstone Committee Objection and as will be shown at the hearing on the Settlement Motion, the Settlement Agreement is simply not "fair and equitable" because, among other things, the settlement: (i) has not been proposed in good faith; (ii) does not reflect the Debtors' probability of success in litigation with the PBGC and the DOL; (iii) there are simply no difficulties related to collection; (iv) the allowed amount of the PBGC and DOL Claims may be readily resolved in a summary estimation proceeding pursuant to section 502(c); (v) the expense, inconvenience and delay necessarily attending the claims litigation is relatively minor, especially given BFG's willingness to bear the burden of such litigation; and (vi) does not reflect

the interests of the creditors of the four Revstone/Spara Debtors, which interests are of paramount importance to this Court's determination with respect to the Settlement Motion.

OBJECTION

I. THE APPLICABLE STANDARD OF REVIEW

17. The Debtors seek approval of the Settlement Agreement pursuant to sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019. As set forth below, although those are the statutory predicates for the relief requested, the extent of their applicability and the Court's application of the standards thereunder is not as the Debtors set forth.

A. Section 363 Has Limited Applicability To The Settlement Motion.

18. The Debtors contend that Bankruptcy Code section 363(b) is a statutory predicate for the Settlement Motion. In that regard, the Debtors assert that approval of the Settlement Agreement constitutes a reasonable exercise of the Debtors' business judgment under Bankruptcy Code section 363(b) because they have "some articulated business justification for using, selling, or leasing property outside of the ordinary course of business." See Settlement Motion at 15 (citing Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.), 780 F. 2d 1223, 1226 (5th Cir. 1986); accord Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F. 2d 1063, 1071 (2d Cir. 1983)).

19. As this Court is well aware, section 363(b) of the Bankruptcy Code permits a debtor to "use, sell or lease, outside the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b). Although the Settlement Agreement contemplates sales of assets, the assets to be sold are largely, if not entirely, assets of non-debtors. Critically, this Court has already ruled that any such sales are not subject to its jurisdiction or approval under Bankruptcy Code section 363(b). See Transcript of Hearing, Jan. 16, 2014 at 37 ("I believe both consistent with a

proper construction of my jurisdiction as well as to be consistent with my prior rulings in this case, I believe that I do not have the jurisdiction to enter an order requiring that non-Debtor subsidiary to conduct an auction or otherwise to insert myself into the sale process as it relates to this non-Debtor."). Consequently, the Debtors cannot rely on section 363 with respect to any actual or contemplated sales by non-debtors and embodied in the Settlement Agreement.

20. Nor are the Debtors seeking to lease any property of their estates in connection with the Settlement Agreement. Thus, the applicability of section 363 to the Settlement Motion rests entirely on any proposed "use" of estate property by the Debtors. The proposed settlement, however, involves the "use" of very little property of the Debtors' estates. In particular, the Debtors have not sought authority to make distributions of existing estate property on account of the proposed allowed Settled Claims outside a confirmed plan(s) of reorganization.[7] In fact, the only apparent proposed current "use" of the Debtors' property for which the Debtors need Court approval is the Debtors' request to grant the PBGC a fifty percent (50%) share of the Debtors' recoveries on certain causes of action. See Settlement Agreement ¶ 12(c) ("[A]ny net recoveries on litigation claims prosecuted by the Revstone or Spara estates, including the post-confirmation estates, shall be distributed fifty percent (50%) to the PBGC, up to the PBGC Maximum Recovery, and fifty percent (50%) to the Revstone and Spara estates and allocated amongst the estates based on the estate generating such litigation recoveries."). Thus, Bankruptcy Code section 363 has very limited applicability to the Settlement Motion, and, as set forth below, the Court's review of the Debtors' request is far more searching than merely determining whether the Debtors have exercised their business judgment.

[7] To the extent the Debtors do seek to make any such distributions, BFG objects.

B. Approval Of The Settlement Motion Requires The Court To Find That The Proposed Settlement Is Entirely Fair To Each Of The Debtors.

21. Even assuming this Court determines that section 363 of the Bankruptcy Code applies to broader aspects of the Settlement Motion, the Debtors incorrectly state that the Court should simply review the proposed settlement to determine whether the Debtors have "articulated some business justification." See Settlement Motion at 14.

22. As this Court is well aware, the CRO, Mr. DiDonato, his firm, Huron Consulting Services, their counsel, Pachulski Stang Ziehl & Jones, the General Counsel, Daniel Smith, and the "Independent" Special Committee (the "**Debtor Control Group**") control all of the Revstone/Spara Debtors as well as Metavation and directly or indirectly control all of the Debtors' non-debtor subsidiaries. Therefore, the Debtor Control Group stands on all 5 Debtor sides of the Settlement Agreement and has approved not only the proposed allowed claim amount of $95 million at each of the Debtors' estates and undisputed joint and several claims against certain non-debtors, but also (i) the allocation of the payment obligation among each of the Debtors, (ii) the determination to provide the PBGC 50% of the proceeds of any recoveries on certain causes of action; (iii) the allocation of the professional fees to each of the Debtors, although only disclosed for Revstone and Spara, (iv) the proposed "use" of each of the Debtors' existing and projected cash to satisfy the proposed allowed Settled Claim amount, and (v) even the proposed distributions on account of the allowed amount of the Settled Claims from non-debtors.

23. Moreover, the Debtor Control Group has insisted on the PBGC executing the Plan Support Agreement that, among other things: (i) locks-up the PBGC exclusively to a plan proposed by the Debtor Control Group, (ii) entrenches most, if not all, of the Debtor Control Group as post-confirmation management under such a plan; and (iii) binds the PBGC to accept

broad releases and exculpation to the Debtor Control Group pursuant to a plan. Therefore, there can simply be no doubt that the transactions contemplated by the Settlement Agreement constitute an interested transaction that must be reviewed by this Court applying an entire fairness analysis. See, e.g., Official Unsecured Creditors Committee of Broadstripe, LLC v. Highland Capital Mgmt., L.P. (In re Broadstripe, LLC), 444 B.R. 51, 106 (Bankr. D. Del. 2010) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.") (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983)); Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 745-46 (Del. Ch. 2007) ("In this case, because no independent committee approved the transaction, [Defendant] bears the burden of proving the transaction was entirely fair.").

24. Consequently, absent substantive consolidation, this Court may only grant the Settlement Motion if it is "entirely fair" to each of the Debtors and their respective estates and creditors. See Valeant, 921 A.2d at 745-46 ("Before the 1967 enactment of 8 Del. C. § 144, a corporation's stockholders had the right to nullify an interested transaction. To ameliorate this potentially harsh result, section 144 as presently enacted provides three safe harbors to prevent nullification of potentially beneficial transactions simply because of director self-interest. First, section 144 allows a committee of disinterested directors to approve a transaction and, at least potentially, bring it within the scope of the business judgment rule. Second, the transaction may be ratified by a fully informed majority vote of the disinterested stockholders. Finally, the challenged transaction can be subjected to post-hoc judicial review for entire fairness. . . .

Where the self-compensation involves directors or officers paying themselves bonuses, the court is particularly cognizant to the need for careful scrutiny.").[8]

25. To demonstrate the entire fairness of the Settlement Agreement, each Debtor must carry its burden to demonstrate that it is paying a "fair price" (i.e., contributing its respective fair share towards any payment on the allowed Settled Claims), and that the Settlement Agreement is the result of "fair dealing" among the estates and creditors (i.e., respects the separateness of the entities and their individual interests in the Settlement Agreement). See Broadstripe, 444 B.R. at 106 ("'Fair dealing' involves elements such as (i) when the transaction was timed, (ii) how it was initiated, (iii) how it was structured, (iv) how it was negotiated, (v) how it was disclosed to the directors, and (vi) how the approvals of the directors and the stockholders were obtained. 'Fair price' includes such considerations as 'economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.'").

26. Therefore, leaving aside what BFG contends are disabling conflicts and a lack of disinterestedness of the Debtors' professionals, because the Debtor Control Group stands on all sides of the Settlement Agreement and stands to benefit financially and otherwise if the Settlement Agreement is approved, the Settlement Motion must be carefully scrutinized by this Court and only approved if it meets the entire fairness standard with respect to each individual

[8] As Delaware limited liability companies, the Debtors owe traditional fiduciary duties of loyalty and care unless the operating agreement expressly modifies or eliminates those duties and Delaware courts will rely on Delaware's well-developed corporate law to interpret those duties. See William Penn P'ship v. Saliba, 13 A.3d 749, 756 (Del. 2011) (finding that unless duties expressly modified or eliminated, managers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the members of the LLC); Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, Civil Action No. 3658-VCS, 2009 WL 1124451, at n.33 (Del. Ch. Apr. 20, 2009) ("The Delaware LLC Act is silent on what fiduciary duties members of an LLC owe each other, leaving the matter to be developed by the common law. The LLC cases have generally, in the absence of provisions in the LLC agreement explicitly disclaiming the applicability of default principles of fiduciary duty, treated LLC members as owing each other the traditional fiduciary duties that directors owe a corporation."); Edward P. Welch, et al., Folk on the Delaware General Corporation Law, § 18-402.4 (5th ed. supplement 2014) ("Thus, where the limited liability agreement is silent and the [Delaware LLC] Act does not otherwise provide a default rule, Delaware courts have consistently relied on Delaware's well-developed corporate law.").

Debtor. As demonstrated below and as will be demonstrated at the hearing on the Settlement Motion, the Settlement Agreement does not satisfy that standard.

C. The Debtors Cannot Rely On Bankruptcy Code Section 105 To Extend The Jurisdiction Of This Court, Circumvent Applicable Corporate Law, Or Approve Plan Distributions To Unsecured Creditors Outside A Plan Of Reorganization.

27. The Debtors also seek to have the Court approve the Settlement Agreement pursuant to Bankruptcy Code section 105, tacitly conceding that statutory authority for this Court's approval of certain parts of the Settlement Agreement does not exist. The Debtors' reliance on section 105 cannot, however, cure the statutory infirmities that the Settlement Motion faces.

28. As the Court is well aware, pursuant to Bankruptcy Code section 105, this Court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code." 11 U.S.C. § 105. Bankruptcy Code section 105 cannot, however, be used to extend the Bankruptcy Court's jurisdiction, approve a plan of reorganization distribution scheme outside a hearing on confirmation of such a plan, or override applicable non-bankruptcy law where a Bankruptcy Code section does not preempt state law. As demonstrated below and as will be shown at the hearing on the Settlement Motion, that is exactly what the Debtors are seeking to do. For this reason as well, the Settlement Motion cannot be granted.

D. The Settlement Agreement Must Be Approved Under Bankruptcy Rule 9019 With Respect To Each Individual Debtor.

29. Bankruptcy Rule 9019 provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). Moreover, approving a settlement "is within the discretion of the bankruptcy court." In re World Health Alts., Inc., 344 B.R. 291, 296 (Bankr. D. Del. 2006).

30. The Third Circuit has held that due to the "unique nature of the bankruptcy process," before a bankruptcy court exercises that discretion, it must determine that the proposed settlement is "fair and equitable." Will v. NW Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 644 (3d Cir. 2006) ("Settlements are favored, but the unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them."). Courts within the Third Circuit have generally adopted a four factor test for determining whether a settlement proposed pursuant to Bankruptcy Rule 9019 is "fair and equitable." See Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996); see also In re Exide Techs., 303 B.R. 48, 67 (Bankr. D. Del. 2003). The four factors adopted by the Martin court are: (1) the probability of success in litigation, (2) the likely difficulties in collection, (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views. Id.; see also Fry's Metals, Inc. v. Gibbons (In re RF Indus. Inc.), 283 F.3d 159 (3d Cir. 2002).

31. Other courts within the Third Circuit have articulated the standard as involving the seven factors first articulated by the United States Bankruptcy Court for the Southern District of New York in In re Texaco, Inc., 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988). See, e.g., In re Exide Techs., 303 B.R. 48, 67-68 (Bankr. D. Del. 2003); In re Allegheny Int'l, Inc., 118 B.R. 282, 309-10 (Bankr. W.D. Pa. 1990). Those seven factors, some of which overlap the four noted above, are:

> (1) The balance between the likelihood of plaintiff's or defendant's success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures.
>
> (2) The prospect of complex and protracted litigation if the settlement is not approved.

(3) The proportion of the class members who do not object or who affirmatively support the proposed settlement.

(4) The competency and experience of counsel who support the settlement.

(5) The relative benefits to be received by individuals or groups within the class.

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of a settlement.

(7) The extent to which the settlement is truly the product of "arms-length" bargaining, and not of fraud or collusion.

In re Exide, 303 B.R. at 67-68 (quoting Texaco, 84 B.R. at 902).

32. As to the above factors, the Debtors have the burden to prove that they have been satisfied by the preponderance of the evidence. See In re Washington Mut., Inc., Case No. 08-12229 (MFW), 2012 WL 1563880, *3 (Bankr. D. Del. Feb. 24, 2012) ("The Debtors have the burden of proving the elements of . . . Rule 9019 of the Bankruptcy Rules by a preponderance of the evidence."). Critically, absent substantive consolidation, the Debtors must do so for each of the Debtors independently. Here, however, the Debtors cannot carry that burden.

II. THE SETTLEMENT MOTION CANNOT BE APPROVED ON A NUMBER OF LEGAL GROUNDS

A. This Court Does Not Have Jurisdiction To Approve Non-Debtor Asset Sales Or The Distribution Of Proceeds From Non-Debtor Estates To Debtor Estates.

33. By the Settlement Motion, the Debtors apparently seek to not only have this Court approve allowing the Settled Claims at $95 million, but also to approve the various Debtors' funding and payment of such claims. Although the Court plainly has jurisdiction to approve the allowance of the Settled Claims in a certain amount,[9] the Court cannot approve a minimum payment on those Settled Claims, where, as here, the proceeds for such funding are from

[9] As set forth below, BFG contends that each Debtor is not jointly and severally liable for the DOL's breach of fiduciary duty claims and, thus, the inclusion of allowed claim amounts for such claims grossly overstates the liability of certain of the Revstone/Spara Debtors.

distributions made out of sale proceeds generated by non-debtor direct and indirect subsidiaries of Revstone and Spara. Indeed, as this Court has previously determined, it has no jurisdiction with respect to any non-debtor direct or indirect subsidiary sales. See Transcript of Hearing, June 26, 2013 at 36-37 ("But I will tell you that I have gone through carefully the form of order that has been submitted, and I do not believe that absent running the sale process myself that I can make those findings."); [Debtors'] Objection To Angstrom Automotive Group, LLC's Verified Motion For A Temporary Restraining Order And Preliminary Injunction, Main Case No. 12-13262, Adversary Case No. 14-50015 [Docket No. 14] at 10 (Jan. 15, 2014) (quoting transcript of hearing on June 26, 2013 and arguing that the Court lacked sufficient jurisdiction to enter a temporary restraining order or preliminary injunction with regard to the sale of a non-debtor indirect subsidiary of Revstone); Transcript of Hearing, Jan. 16, 2014 at 37 ("I believe both consistent with a proper construction of my jurisdiction as well as to be consistent with my prior rulings in this case, I believe that I do not have the jurisdiction to enter an order requiring that non-Debtor subsidiary to conduct an auction or otherwise to insert myself into the sale process as it relates to this non-Debtor."). Nonetheless, by seeking approval of the Funding and Distribution Schedules, the Debtors seeks this Court's approval of, among other things, the Debtors' distribution of sale proceeds from non-debtors second and third tier subsidiaries, to ensure a minimum recovery on the Settled Claims and to pay other claims and expenses at the holding companies of Revstone and Spara.

34. Worse, pursuant to the Settlement Agreement, the Debtors apparently seek this Court's blessing to use the sale proceeds generated by non-debtor subsidiaries of Spara to make distributions to its sister company, Revstone, for the benefit of Revstone's professionals and creditors. In that regard, as part of the Settlement Agreement, the Debtors seek this Court's

approval of the Funding and Distribution Schedules that ignore the separateness of the legal entities and the obligations imposed upon both the Debtors and non-debtor entities under applicable non-bankruptcy corporate law regarding dividends, distributions and solvency. Although the Bankruptcy Court's jurisdiction may be broad, it simply does not extend that far and for this reason as well, the Settlement Motion cannot be granted.[10]

B. This Court Cannot Approve The Settlement Agreement Because It Constitutes A Sub Rosa Plan Of Reorganization.

35. As set forth in greater detail in the Revstone Committee Objection, the Settlement Motion should also not be granted because the Settlement Agreement constitutes a sub rosa plan. Indeed, by the Settlement Motion, this Court is called upon not only to approve a grossly overstated allowed claim amount giving the PBGC a voting block on any plan of reorganization, but also to approve:

- a minimum distribution to the PBGC of between $80 to $82 million out of debtor and non-debtor sale proceeds;
- an unequal allocation of liability among Debtors and non-debtors for liability to the PBGC for purported "termination premiums," "termination benefits" and breaches of fiduciary duty by non-debtor entities;
- an allocation of professional fees between Revstone and Spara that have yet to have been documented, much less approved by the Court;[11]

[10] To the extent that the Debtors are instead relying on the holders of the Settled Claims to take their recoveries directly from the non-debtor entities and "gift" some of those recoveries back to the Revstone and Spara estates, then that mechanism should not only be made clear, but also be subjected to the plan of reorganization approval process, especially given the legal issues that any such gifting plan would face. See In re Armstrong World Indus., Inc., 432 F.3d 507, 514 (3d Cir. 2005) ("We adopt the District Court's reading of these cases, and agree that they do not stand for the unconditional proposition that creditors are generally free to do whatever they wish with the bankruptcy proceeds they receive. Creditors must also be guided by the statutory prohibitions of the absolute priority rule, as codified in 11 U.S.C. § 1129(b)(2)(B).").

[11] Notably, Revstone/Spara Debtors' counsel has not filed any applications for compensation (monthly, quarterly or otherwise) for time spent after May 31, 2013. Further, upon information and belief, Revstone/Spara Debtors' counsel has not submitted any time records to the Fee Auditor appointed in these case for time spent after May 31, 2013. Nonetheless, the Funding Schedule purports to contain an estimate of professional fees accrued through March, 2014.

- a percentage distribution of additional estate claim recoveries from third parties to be given to the PBGC after the effective date of any plan or reorganization proposed by the Debtors; and

- a Plan Support Agreement that commits the PBGC, a member of the Creditors' Committee: (i) to support exclusively a plan of reorganization filed by the Debtors; (ii) to approve broad plan-type release and exculpation provisions for the Debtors and their professionals, (iii) refrain from encouraging, commencing, prosecuting, joining or otherwise supporting any action to oppose or object to approval of the Debtors' plan and Disclosure Statement.

36. Indeed, pursuant to the Settlement Motion, the Debtors have even gone so far as to attempt to enlist creditor support, by suggesting recovery ranges under as yet to be filed plans of reorganization for Revstone and Spara that are highly speculative and without the required disclosure in a court approved Disclosure Statement, thereby essentially soliciting the sub rosa plan without the protections and requirements of a plan process and adequate disclosure in violation of section 1125(b) of the Bankruptcy Code. Thus, the Settlement Agreement clearly dictates the terms of any plan of reorganization for the Revstone and Spara cases. For this reason, the Settlement Motion should be denied. See In re Louise's, Inc., 211 B.R. 798, 801 (D. Del. 1997) (denying approval of settlement upon finding that its terms "exceed[ed] the boundaries of a Rule 9019 compromise" by, among other things, granting releases of claims that the debtor held for benefit of estate); Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007) ("Under section 363(b) of the Code, '[t]he trustee, after notice and a hearing may use, sell, or lease, other than in the ordinary course of business, property of the estate.' The trustee is prohibited from such use, sale or lease if it would amount to a sub rosa plan of reorganization."); see also In re Capmark Fin. Grp. Inc., 438 B.R. 471, 513 (Bankr. D. Del. 2010) ("A settlement constitutes a sub rosa plan when the settlement has the effect of dictating the terms of a prospective chapter 11 plan.") (internal

citations omitted); Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983) ("[T]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa . . . .").

III. THE DEBTORS CANNOT CARRY THEIR BURDEN UNDER BANKRUPTCY RULE 9019 WITH RESPECT TO THE SPARA AND GREENWOOD DEBTORS

37. As set forth in greater detail in the Revstone Committee Objection, the Settlement Motion should also not be granted because the Debtors cannot carry their burden to demonstrate that the Settlement Agreement is fair and just under the four factor test set forth in Martin. In addition, BFG contends that for the reasons set forth below, the Debtors cannot carry their burden with respect to the Greenwood and Spara Debtors.

A. Spara and Greenwood Are Likely To Prevail In Litigation Against The Claims Filed By The PBGC And The DOL.

38. With respect to the likelihood of prevailing on the merits, the Debtors are quick to contend that this Court is not required to hold a full trial on the merits of the case before approving the Settlement Agreement, but instead need only "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." See Settlement Motion at 16 (quoting In re W.T. Grant, Co., 699 F.2d 599, 608 (2d Cir. 1983) and citing additional cases). BFG contends, however, that under the particular facts of these cases, this Court's analysis cannot be so simple, especially with respect to Spara and Greenwood.

39. First, the Debtors have not cited a case within the Third Circuit, much less a case that binds this Court, to apply the "lowest range of reasonableness" standard. More importantly, as set forth above, based on the Debtors appearing on all sides of the Settlement Agreement, the Court is required to do a more searching inquiry to determine whether the Settlement Agreement

is entirely fair to each of the Debtors' estates and creditors. Further, as the Supreme Court has instructed, in considering whether to approve a compromise, this Court should "apprise [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968). Consequently, because each of the Debtors' circumstances are different, this Court must assess each Debtor's likelihood to succeed in litigation with respect to the Settled Claims. As demonstrated below, the Debtors have not carried their burden on this factor, especially with respect to the Spara and Greenwood Debtors.

40. Although the Settlement Motion and the Settlement Agreement are far from clear, it appears that the Debtors are seeking this Court's approval to allow the Settled Claims in the amount of $95 million against each of the Debtors. As set forth in the Preliminary Objection, BFG contends that the Revstone/Spara Debtors' liability is far less. Moreover, as also set forth in the Preliminary Objection, BFG contends that had the Debtors not been conflicted and acted timely and properly, Spara would have avoided any liability whatsoever. Thus, for these reasons alone, BFG contends that not only is the Debtors' proposed allowed claim amount against the Revstone/Spara Debtors not fair, but also the proposed allowed claim amount of $95 million falls outside the lowest range of reasonableness.

41. Additionally, as set forth above, $41 million of the proposed $95 million allowed amount relates to the Debtors' purported liability on the DOL Claims. Neither Spara nor Greenwood was a fiduciary of the pension plans and therefore they cannot, and do not, have any direct liability to the DOL for any purported breach of fiduciary duty claims. Nor are they jointly and severally liable should those claim be valid. Consequently, Spara and Greenwood are able to demonstrate that the allowed amount of the Settled Claims against them are far less than

$95 million, and thus that $95 million is not even within the lowest range of reasonableness. Therefore, the Settlement Agreement cannot be approved with respect to Spara and Greenwood.

B. The "Paramount Interest" Of The Spara And Greenwood Creditors Warrants Denying The Settlement Motion.

42. Courts in the Third Circuit have interpreted the "paramount interest of creditors" factor to mean giving proper deference to the views of a debtor's creditors. See, e.g., Key3Media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.), 336 B.R. 87, 97 (Bankr. D. Del. 2005); see also In re Nutritional Sourcing Corp., 398 B.R. 816, 836-37 (Bankr. D. Del. 2008) (denying confirmation of a plan because those parties whose rights were severely impacted by settlement incorporated into plan were not afforded meaningful participation in negotiations of settlement). The Third Circuit has held that this requires a finding that the settlement is fair not just as between the settling creditor and the estate, but also as to the other, non-settling creditors. In re Nutraquest, Inc., 434 F.3d at 645; see also In re Spansion, Inc., Case No. 09-10690 (KJC), 2009 WL 1531788, at *3 (Bankr. D. Del. June 2, 2009) ("Under the 'fair and equitable' standard, [the court looks] to the fairness of the settlement to the other persons, *i.e.*, the parties who did not settle."). Indeed, a basic notion of fairness requires consideration of the effect on all involved parties. Iridium Operating, 478 F.3d at 464.

43. The principle that a settlement must treat affected creditors reasonably in order to be "fair and equitable" applies all the more where a settlement is proposed in the context of a liquidation – which is what is contemplated by the Settlement Agreement. "In a liquidating Chapter 11, more deference is shown to the unsecureds' viewpoint than in a reorganization case 'because the principle [sic] underlying rationale for the 'business judgment rule', i.e., that a DIP is entitled to some free reign in fulfilling its perceived mission of aiding the economy . . . is

lacking in such circumstances.'" In re S.N.A. Nut Co., 186 B.R. 98, 105 (Bankr. N.D. Ill. 1995) (citing In re After Six, Inc., 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993) (emphasis added).

44. Furthermore, in the case of In re Exide Techs., this Court rejected a proposed settlement between the debtor and its pre-petition lenders because the unsecured creditors overwhelmingly opposed the proposed settlement, were not included in the negotiation of its terms, and would be directly affected by its implementation. In re Exide Techs., 303 B.R. at 70-71. The Court noted that an important element in the determination of whether a settlement should be approved is whether it was negotiated with, and/or supported by, the creditors' committee, finding, that "[u]nsecured creditors are not voluntary investors in the Debtor and their position on the settlement, under these circumstances, is entitled to substantial weight." Id. at 70 (emphasis added).

45. As set forth in the Revstone Committee Objection, the Revstone unsecured creditors oppose the Settlement Motion. There is no committee appointed for any of the other Revstone/Spara Debtors. BFG is, however, the largest creditor of the Greenwood, US Tool and Spara estates outside of the PBGC. BFG opposes the settlement, has not been involved in the negotiation of the proposed allowed amount of the Settled Claims and has not been party to negotiations regarding the payment on the Settled Claims. Thus, proper deference to the wishes of the Revstone/Spara creditors warrants denying the Settlement Motion.

C. The Settlement Agreement Was Not The Product Of Arm's Length Negotiations By Non-Conflicted Representatives Of The Greenwood And Spara Debtors.

46. Courts in the Third Circuit have also placed particular emphasis on the seventh factor of the Texaco test: "[t]he extent to which the settlement is truly the product of 'arms-length' bargaining, and not of fraud or collusion." In re Exide Techs., 303 B.R. at 68 (citing

Texaco); In re Allegheny, 118 B.R. at 313 ("The final criterion is the extent to which the settlement is truly the product of arm's length negotiations and not of fraud or collusion.").

47. A proposed settlement is not the product of arm's length bargaining where it is driven by motivations other than maximizing recovery of creditors. See Dacotah Mktg. & Research, L.L.C. v. Versatility, Inc., 21 F. Supp. 2d 570, 578 (E.D. Va. 1998) (settlement not arm's length when "the plaintiff no longer seeks to gain as much as possible through settlement, but is otherwise motivated"); see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 (1999) (settlement not arm's length where negotiating party had incentives other than realizing "best possible arrangement" for stakeholders).

48. As set forth above, the Debtors and their professionals are not independent representatives of the Spara and Greenwood estates. Thus, there can be no finding by this Court that the Settlement Agreement as it pertains to Spara and Greenwood was the result of arm's length negotiations by independent representatives. More importantly, the express terms of the Settlement Agreement demonstrate otherwise, including, among others:

- The allowance the Settled Claims in a grossly overstated amount;
- The disproportionate use of potential sale proceeds from a subsidiary of Spara to fund payment of the Settled Claims as well as professional fees and potential creditor recoveries at Revstone; and
- The failure of the Debtors to address the impact of the Settlement Agreement on Greenwood and its creditors.[12]

49. Indeed, the above provisions prove that the Settlement Agreement was not the result of arms' length negotiations, and that together with the Plan Support Agreement, the Debtors and the PBGC have colluded to place unfair burdens on the Spara and Greenwood

[12] For example, although Greenwood presently has cash on hand, the Funding and Distribution Schedules do not expressly address how that cash will be used to pay the proposed allowed Settled Claims and what recoveries the Greenwood creditors might receive under a plan of reorganization.

creditors for their own benefit—payment of professional fees at Revstone and the granting of releases and exculpation insulating the Debtors and their professionals from liability.

D. The Settlement Agreement Was Not Negotiated In Good Faith.

50. As the First Circuit has stated, "[t]he 'best interests' standard under Bankruptcy Rule 9019 contemplates a determination by the bankruptcy court as to whether the proposed settlement was negotiated in good faith." Hicks, Muse & Co. v. Brandt (In re Healthco Int'l), 136 F.3d 45, 53 (1st Cir. 1988); see also In re Endoscopy Ctr. of. S. Nev., 451 B.R. 527, 536 (Bankr. D. Nev. 2011) ("The trustee must demonstrate more than a 'mere good faith negotiation of the settlement' because the court must independently make a finding that the compromise is reasonable, fair and equitable.").

51. As set forth above, the provisions of the Settlement Agreement provide few, if any benefits, to anyone other than the Debtors' professionals, the PBGC and the DOL. Indeed, many of the provisions of Settlement Agreement ignore corporate formalities and the separateness of the entities, reflect overreaching by the PBGC with respect to its asserted claims, and serve to entrench the Debtors' professionals and insulate them from potential liability. Thus, BFG also contends that the Debtors will not be able to demonstrate that the Settlement Agreement was the result of good faith negotiations in which the Debtors attempted to protect the interests of each of the Debtors' estates and those estates' respective creditor constituencies.

RESERVATION OF RIGHTS

52. BFG expressly reserves, and does not waive, its right to supplement this Objection, to object to the Settlement Motion on any additional grounds governing law permits and to raise additional arguments at any hearing to consider the Settlement Motion. Indeed, as of the date for filing this objection, BFG has sought, but not yet obtained, discovery with respect to the Settlement Motion, and expressly reserves and does not waive its right to supplement this

Objection based on such discovery or to seek an adjournment of the Settlement Motion to conduct and conclude discovery.

CONCLUSION

WHEREFORE, BFG respectfully requests that this Court (i) deny the Settlement Motion, (ii) in the alternative, adjourn the hearing on the Settlement Motion until confirmation of a Chapter 11 plan in these cases, and (iii) grant such other relief as is just and proper.

Dated: March 13, 2014
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Gregg M. Galardi, hereby certify that on this 13th day of March 2014, I caused a true and correct copy of the ***First Supplement to Objection of Boston Finance Group to Motion of Revstone Industries, et al. for Order Pursuant to 11 U.S.C. §§ 105 & 363 and Bankruptcy Rule 9019 Authorizing and Approving Settlement Agreement with Pension Benefit Guaranty Corporation*** to be served upon the parties listed on the attached service list in the manner indicated.

/s/ Gregg M. Galardi
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