IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
ENERGY FUTURE HOLDINGS CORP., *et al.*,	:	Case No. 14-10979 (CSS)
	:	
	:	Jointly Administered
	:	
Debtors.	:	**Hearing Date: February 14, 2017 at 10:00 a.m.**
	:	**Objections Due: February 3, 2017 by 4:00 p.m.**

THE UNITED STATES TRUSTEE'S OBJECTION, RESPONSE AND RESERVATION OF RIGHTS WITH RESPECT TO THE SEVENTH AMENDED JOINT PLAN OF REORGANIZATION OF ENERGY FUTURE HOLDINGS CORP., *ET AL*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE AS IT APPLIES TO THE EFH AND THE EFIH DEBTORS (D.I. 10535, 10551)

Andrew R. Vara, the Acting United States Trustee for Region 3 (the "U.S. Trustee"), hereby files this Objection, Response and Reservation of Rights ("Objection") to the Seventh Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH Debtors and the EFIH Debtors (the "E-Side Plan") (D.I. 10535, 10551).[1]

PRELIMINARY STATEMENT

The E-Side Plan cannot be confirmed to the extent that it seeks approval of the payment of the reasonable fees and expenses of both the EFH and EFIH Indenture Trustees[2] without those

[1] Unless otherwise defined herein, capitalized terms shall have the same meaning and context as those capitalized terms included in the E-Side Plan or any other referenced, relevant or cited document or pleading.

[2] American Stock Transfer & Trust Company is the indenture trustee (the "EFH Unsecured Notes Trustee") for the $1.864B in unsecured EFH Legacy Notes, $60M in EFH LBO Notes and $5.0M in the EFH Unexchanged Notes; and a guaranty related to $63.467M of unsecured EFIH notes. American Stock Transfer & Trust Company is also a member of the Official Committee of Unsecured Creditors for the EFH and EFIH Debtors (D.I. 3313). UMB Bank, NA is the indenture trustee (the "EFIH Unsecured Notes Trustee") for the $1.566B of unsecured EFIH 11.25%/12.25% Senior Toggle Notes (the "PIK Notes") and $2.0M of unsecured EFIH Unexchanged Notes. The EFH Legacy Note Claims are provided for in Class A4 of the Plan, The EFH Unexchanged Note Claims are provided for in Class A5 of the Plan and the EFH LBO Note Primary Claims are provided for in Class A6 of the Plan. The 11.25%/12.25% Senior Toggle Notes and the EFIH Unexchanged Notes Claims are provided for in Class B6 of the Plan.

payments being authorized by the Bankruptcy Code and which payment would otherwise be inconsistent with prior rulings by this Court in these Chapter 11 cases.

Absent additional evidence, amendments or revisions to the E-Side Plan and the proposed E-Side Confirmation Order consistent with these concerns, the Court should deny confirmation of the E-Side Plan to the extent of this Objection.[3]

JURISDICTION

1. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this Objection.

2. Pursuant to 28 U.S.C. § 586(a) (3), the "U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the "U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the "U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest).

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised in this Objection.

FACTUAL BACKGROUND

4. On April 29, 2014, the Debtors commenced these Chapter 11 cases.

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[3] To the extent necessary or otherwise required, this Objection shall also serve as an objection to the EFIH Unsecured Creditor Plan Support Agreement (D.I. 10530) as defined *infra*, and for the reasons set forth herein.

5. On April 14, 2015, the Debtors filed their initial plan of reorganization and disclosure statement (collectively, the "Initial Documents") (D.I. 4142 & 4143). On December 1, 2015, and subsequent to several amendments to the Initial Documents, the Debtors filed the Sixth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan") (D.I. 7187)[4].

6. On November 3, 2015, the Court commenced the hearing on the confirmation of the Plan in accordance with Bankruptcy Rules 3017 and 3018 and sections 1126, 1128, and 1129 of the Bankruptcy Code and after many hours and several days of trial, on December 3, 2015, this Court announced its findings and made certain rulings on the record. (D.I. 7255).

7. On December 9, 2015[5], the Court entered the Amended Order Confirming the Sixth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*, Pursuant to Chapter 11 of the Bankruptcy Code (the "First Confirmed Plan") (D.I. 7235, 7285).

8. On or about May 1, 2016, upon information and belief, written notice was delivered to the Debtors and other relevant parties notifying the Debtors and such parties of the occurrence of a Plan Support Termination Event (as defined in the Plan Support Agreement[6]), the delivery of which notice caused the First Confirmed Plan to not become effective.

9. On May 1, 2016, the Debtor filed a Joint Plan of Reorganization and Disclosure Statement of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 8355, 8356), and after several amendments, the Debtors filed a Second Amended

[4] On December 6, 2015, the Debtors filed a Modified Sixth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 7235).

[5] On December 9, 2015, this Court also entered the Order Granting the Motion of Energy Future Holdings Corp., et al to Approve a Settlement of Litigation Claims and Authorize the Debtors to Enter into and Perform under the Settlement Agreement. (D.I. 7243).

[6] The Order Authoring the Debtors to Enter Into and Perform Under the Plan Support Agreement was entered on September 18, 2015 (D.I. 6097).

Joint Plan of Reorganization of Energy Future Holdings Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 8745).

10. On August 5, 2016 the Debtors filed a Third Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 9199).

11. On August 23, 2016 the Debtors filed another Third Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 9374).

12. The Third Amended Joint Plan of Reorganization as it applies to the TCEH Debtors and the EFH Shared Services Debtors (the "T-Side Plan")[7] was confirmed on August 29, 2016 (D.I. 9421).

13. On May 24, 2016, this Court entered the Order Scheduling Certain Hearing Dates and Deadlines and Establishing Certain Dates and Deadlines and Establishing Certain Protocols in Connection with the Confirmation of Debtors' Joint Plan of Reorganization and the Approval of Debtors' Disclosure Statement (D.I. 8514) (the "Scheduling Order"). The Scheduling Order was supplemented on July 8, 2016 with respect to the T-Side Plan (D.I. 8882). On August 24, 2016, the Scheduling Order, as modified with respect to the Third Amended Plan as it applies to the EFH and EFIH Debtors, was entered. (D.I. 9381)

14. On September 21, 2016, the Debtors filed the Plan and the Disclosure Statement for the Fourth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al.*,

[7] The Disclosure Statement related to the New Plan is the Third Amended Disclosure Statement for the Second Amended Joint Plan of Reorganization of Energy Future Holdings Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the TCEH Debtors and EFH Shared Services Debtors filed on June 16, 2016 (D.I. 8747, 8753) and approved by Court order on June 17, 2016 (D.I. 8761).

Pursuant to Chapter 11 of the Bankruptcy Code as it applies to the EFH Debtors and EFIH Debtors (D.I. 9616)[8].

15. On December 1, 2016 the Debtors filed the Plan and the Disclosure Statement for the Fifth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH Debtors and EFIH Debtors (D.I. 10290, 10293).

16. On December 28, 2016 the Debtors filed the Plan and the Disclosure Statement for the Sixth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH Debtors and EFIH Debtors (D.I. 10446, 10453).

17. On January 3, 2017 the Debtors filed the E-Side Plan and the Disclosure Statement for the Seventh Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH Debtors and EFIH Debtors (D.I. 10518, 10520).

18. On January 3, 2017, the Debtors filed a Notice of the Filing of that Certain Plan Support Agreement, Dated January 2, 2017 by and Between the EFH/EFIH Debtors, the PIK Notes Trustee[9], and Certain Creditor Parties Thereto (the "EFIH Unsecured Creditor Plan Support Agreement") (D.I. 10530) (*see also*, fn. 3 *supra*.)

19. On January 4, 2017, the Debtors filed the E-Side Plan and the Disclosure Statement for the Seventh Amended Joint Plan of Reorganization of Energy Future Holdings

[8] On September 21, 2016, the Debtors filed the Notice of Hearing to Consider Confirmation of the Chapter 11 Plan as it Applies to the EFH/EFIH Debtors and Related Voting and Objection Deadlines (D.I. 9620).

[9] UMB Bank, NA, the EFIH Unsecured Notes Trustee is also the PIK Notes Trustee.

Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH Debtors and EFIH Debtors (D.I. 10533, 10535)[10].

20. Akin to previously-filed plans, the E-Side Plan provides for the payment of certain fees as follows:

> On the EFH Effective Date, the EFH Plan Administrator Board shall (a) pay no less than the EFIH Base Payment Amount and (b) not dispute that such EFIH Base Payment Amount (including any fees owed to Centerview, financial advisor to the EFIH Unsecured Notes Trustee, pursuant to the terms of Centerview's engagement agreement with the EFIH Unsecured Notes Trustee, including any fees owed upon consummation of a "Transaction" (as defined in that certain original engagement letter, dated March 10, 2015)), are reasonable and allowed claims under the EFIH Unsecured Note Indentures. The payment of such amounts to the EFIH Unsecured Notes Trustee in accordance with the terms of the EFIH Unsecured Creditor Plan Support Agreement shall not be subject to disgorgement, setoff, recoupment, reduction or reallocation of any kind and is without prejudice to the EFIH Unsecured Notes Trustee's subsequent exercise of any charging lien. The payment of the EFIH Base Payment Amount shall be considered a "charging lien advance" pursuant to Sections 6.12, 6.13 and 7.07 of the EFIH Unsecured Note Indentures.
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> The EFH Plan Administrator Board shall pay from the EFH/EFIH Distribution Account the reasonable and documented fees and expenses allowed under the EFH Notes Indentures; provided, however, that such fees and expenses shall be subject to approval by the Fee Committee, with respect to the reasonableness of such documented fees and expenses in their reasonable discretion, and the Bankruptcy Court; provided further, however, that such fees and expenses shall be paid on the EFH Effective Date or as soon as reasonably practicable thereafter following Fee Committee and Bankruptcy Court approval thereof; provided, further, that, for the avoidance of doubt, such fees and expenses shall not be included in the amount of any Allowed Claims under the EFIH Unsecured Notes Indentures or the EFH Notes Indentures. In addition, the EFIH Unsecured

[10] On January 4, 2017, the Court approved the Disclosure Statement related to the E-Side Plan and entered the Supplemental Order (A) Binding Holders of Claims and Interests to Their Prior Ballots, Pursuant To Section 1127 of The Bankruptcy Code and Bankruptcy Rule 3019, (B) Approving the Revised EFH/EFIH Disclosure Statement, (C) Approving the Procedures and Timeline for the Limited Resolicitation of Votes on the Plan, and (D) Approving the Manner and Forms of Notice Related Thereto was entered on January 4, 2017 (D.I. 10560). In addition, the Debtors filed a solicitation version of the E-Side Plan on January 4, 2017 (D.I. 10551) along with an Amended Disclosure Statement (D.I. 10564).

> Notes Trustee shall have the right to seek payment of all or a portion of the EFIH Unsecured Notes Trustee Fees and Expenses from the EFH/EFIH Distribution Account if there are sufficient amounts in the EFH/EFIH Distribution Account to provide a 100% recovery to the Holders of Allowed EFIH Unsecured Note Claims, which fees and expenses application shall be subject to approval by the Fee Committee, with respect to the reasonableness of such documented fees and expenses in their reasonable discretion, and the Bankruptcy Court.

E-Side Plan, Article VI. Section R.1.

21. In essence, Article VI. Section R.1 of the E-Side Plan provides for the

- payment of the accrued and unpaid fees and expenses of the EFIH Unsecured Notes Trustee, including all reasonable professional fees and expenses, in accordance with the terms of the EFIH Unsecured Creditor Plan Support Agreement[11];

- payment of the reasonable and documented fees and expenses allowed under the EFH Notes Indentures which includes the fees and expenses of the EFH Notes Trustee.

- In addition, the EFIH Unsecured Notes Trustee has the right to seek payment of all or a portion of the EFIH Unsecured Notes Trustee Fees and Expenses from the EFH/EFIH Distribution Account if there are sufficient amounts in the EFH/EFIH Distribution Account to provide a 100% recovery to the Holders of Allowed EFIH Unsecured Note Claims.

E-Side Plan, Article IV. Section R.1.[12]

22. The problem with Article IV. Section R.1. of the E-Side Plan is that it provides for the payment of the afore-mentioned fees and expenses without enunciating or specifying the

[11] Section 7(k)(1)(i)-(iii) of the EFIH Plan Support Agreement provides for the payment of the accrued and unpaid fees of the PIK Notes Trustee, including all reasonable professional fees and expenses, without prejudice to the rights of the PIK Indenture Trustee to further exercise its charging lien pursuant to the EFIH Unsecured Notes Indenture.

[12] On January 27, 2017, the Debtors filed an Amended Plan Supplement as it Relates to the EFH Debtors and EFIH Debtors for the Seventh Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (D.I 10729). Exhibit D to that Amended Plan Supplement provides for more detailed treatment of non-retained professionals. To the extent that the subject fees and expenses will be properly paid pursuant to the respective charging liens in accordance with the applicable indenture to recover payment of fees and expenses, the U.S. Trustee has no objection, however, the U.S. Trustee otherwise objects as set forth herein.

legal basis or justification for such payments under the Bankruptcy Code. Article IV. Section R.1. also runs contrary to prior rulings by this Court in these cases.[13]

LAW AND ANALYSIS

A. General Standards

23. In order to obtain confirmation, a plan proponent has the burden to establish compliance with all the requirements of section 1129(a) of the Bankruptcy Code (the "Code"). *See* 11 U.S.C. § 1129(a). The plan proponent bears the burden of proof with respect to each and every element of section 1129(a). *See, e.g. In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001); *In re Wash Mut.*, 442 B.R. 314, 328 (Bankr. D. Del. 2011).

B. The E-Side Plan Provides for the Payment of Non-Estate Retained Professionals Without Adequate Disclosure or Legal Justification

24. Article IV. Section R.1. of the E-Side Plan provides for the payment of the fees and expenses of the EFIH and EFH Notes Indenture Trustees. But, the E-Side Plan does not provide sufficient legal justification or information concerning the statutory requirements imposed by the Bankruptcy Code that authorizes such payments.

25. In particular, the EFIH Notes Indenture Trustee and the EFH Notes Indenture Trustee professional fee payments relate to parties and professionals whose compensation is specifically statutorily governed by 11 U.S.C. §§ 503(b)(3)(D), 503(b)(4) and 503(b)(5) of the Code. Although such professionals might be eligible to be compensated from the bankruptcy estate, section 503 imposes detailed requirements that must be met before approval and payment,

[13] As may be alluded to in other documents, it is understood that the EFH and EFIH Notes Indenture Trust documents provide for the payment of such fees and expenses as part of the Indenture Trustee's charging liens. To the extent that such fees and expenses are paid pursuant to and in accordance with the charging liens asserted upon the respective creditors E-Side Plan distributions, the U.S. Trustee has no objection where a creditor's plan distribution, subject to a proper and valid charging lien, is so sur-charged in accordance with such indenture as may be applicable.

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including the timely filing of a request for payment by the professional, *see* 11 U.S.C. § 503(a); notice and a hearing before the court, *see* 11 U.S.C. § 503(b); a showing that such expenses were "actual" and "necessary," *see* 11 U.S.C. § 503(b)(3); a showing that the creditor, unofficial committee, or indenture trustee has made a "substantial contribution" to the bankruptcy case, *see* 11 U.S.C. § 503(b)(3)(D); and a finding by the court that any compensation paid to an attorney or accountant is "reasonable." *See* 11 U.S.C. § 503(b) (4).

26. Additionally, such party's right to payment under section 503(b) is not automatic but "depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir.1999). It is not clear what legal justification supports or authorizes the payment of such fees under the E-Side Plan or whether the subject professionals are required and could satisfy section 503(b)[14].

27. In these cases, these professionals must satisfy the requirement that such indenture trustees, and their professionals, have made a "substantial contribution" to the bankruptcy case.

[14] Section 503(b) (3) (D) of the Bankruptcy Code provides for the allowance administrative expenses of the estate for the "actual, necessary expenses" incurred by a "creditor" or an "equity security holder... in making a substantial contribution in a case." Section 503(b) (4) provides for the allowance for the "reasonable compensation for professional services rendered by an attorney or an accountant if an entity whose expense is allowable under" section 503(b) (3). Section 503(b)(5) permits the allowance of reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a Chapter 11 case based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title. These provisions are governed in this District by the Third Circuit's decision in *Lebron v. Mechem Financial, Inc.*, 27 F.3d 937 (3d Cir. 1994). A creditor makes a substantial contribution if its efforts provide an "actual and demonstrable benefit to the debtor's estate and the creditors." *Lebron v. Mechem Financial Inc.*, 927 F.3d at 943-44 (citation omitted) (quoting *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988)). *See also In re Worldwide Direct, Inc.*, 334 B.R. at 121. However, a benefit that the estate receives as an incident to a creditor's protecting its own interests is not a substantial contribution. *See Lebron*, 27 F.3d at 944. *See also In re Essential Therapeutics, Inc.*, 308 B.R. 170, 174 (Bankr. D. Del. 2004) ("Inherent in substantial contribution, however, is the requirement that the benefit received by the estate be more than incidental to the applicant's self-interest."). Creditors are presumed to act in their own interest "until they satisfy the court that their efforts have transcended self-protection." *Lebron*, 27 F.3d at 944 (citations omitted). The activities that a Section 503(b)(3)(D) applicant has engaged in are "presumed to be incurred for the benefit of the engaging party and are reimbursable if, but only if, the services 'directly and materially contributed' to the reorganization." *Lebron v. Mechem Financial Inc.*, 27 F.3d at 943-44 (citation omitted).

28. In particular, this Court previously ruled,[15] among other things, that:

> Thus, courts have found that a creditor or ad hoc committee of creditors is entitled to payment of its professional fees and expenses by virtue of making a substantial contribution to the bankruptcy case, see *Davis v. Elliot Management Corp In Re: Lehman Brothers Holding Inc.*, 508 BR 283 of 296 Southern District New York 2014. But the Court must make an independent determination as to the existence of the substantial contribution and whether the fees and expenses are reasonable. It cannot defer to the Debtor's business judgment.

Transcript of December 3, 2015 Hearing, Tr. 35: 16-25; 36: 1.[16]

29. The fact that the payments of such professional fees are proposed as part of a chapter 11 plan does not relieve the third-party professionals of their obligation to comply with the requirements of section 503, which is the "sole source" of authority to pay post-petition professional fees on an administrative basis. *Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.)*, 508 B.R. 283, 290 (S.D.N.Y. 2014). In *Lehman*, the court roundly rejected

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[15] In *In re Continental Airlines, Inc.*, 279 F.3d 226 (3d Cir. 2002), the Third Circuit describes the law on "claim and issue preclusion" which were formerly known as "res judicata and collateral estoppel" in the Circuit. 279 F.3d at 332. The Third Circuit described the concepts as follows:

> Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.

Id. (quoting *New Hampshire v. Maine*, 532 U.S. 742 (2001)). The "two doctrines share the 'dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.'" *Id.* (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). The doctrines may be implicated here as they were in *Continental*, because the Court will be asked to rule on "an issue that was unambiguously identified, properly presented and ably and vigorously argued by extremely able counsel of all parties." 279 F.3d at 233 (3d Cir. 2002).

[16] In addition, see Paragraphs 118, 119 and 122 of the Order Confirming the Sixth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 7244); Paragraphs 142 and Sections K, L, M and P of the Order Granting the Motion of Energy Future Holdings Corp., *et al* to Approve a Settlement of Litigation Claims and Authorize The Debtors to Enter into and Perform under the Settlement Agreement (D.I. 7243) and the Transcript of the December 3, 2015 Hearing, Tr. 34: 11-18; Tr. 34: 19-23; Tr. 35: 16-25; Tr. 36: 1; Tr. 36: 7-14; Tr. 37: 15-25; Tr. 38: 1-4; and Tr. 38: 12-21.

an attempt by certain committee members to circumvent section 503(b)(4) by seeking payment under a "permissive" plan provision which purported to pay third-party professional fees without regard to whether they could be authorized under section 503. As that court explained, plans pay only claims and administrative expenses:

> Although the Bankruptcy Code does not explicitly forbid payments [of] professional fees that are not administrative expenses, no such explicit prohibition is necessary. Reorganization plans exist to pay claims and expenses . . . Therefore, the Individual Members' professional fee expenses are either administrative expenses or not, and if the latter, they cannot be paid under a plan.

Id. at 293. Indeed, the court recognized that any contrary result "could lead to serious mischief," since it would allow plan proponents to distribute the estate's assets without regard to the Bankruptcy Code's priority scheme. *Id.*

30. The *Lehman* court's reasoning applies with equal force here. Like the fees at issue in *Lehman*, the third-party professional fees "are either administrative expenses or not." *Id.* Because the third-party professionals seek to enjoy the benefits of administrative priority under section 503—the sole possible source of statutory authorization permitting them to be paid by the Debtors in full on the Effective Date—they must also comply with the disclosure obligations and substantive limitations imposed by that section.

31. Even possibly apart from the applicability of section 503(b), Article IV. Section R.1. of the E-Side Plan cannot be approved because it violates 11 U.S.C. § 1129(a) (4) of the Code.[17] That section provides that a court may approve a chapter 11 plan only if, among other

[17] To be clear, the U.S. Trustee does not suggest that section 1129(a)(4) may be used as a substitute for review under section 503(b). *See Lehman*, 508 B.R. at 294 n.9 (rejecting argument that section 1129(a)(4) could be used to authorize fees prohibited by section 503(b)). But even assuming that any of the proposed fees did fall outside the scope of section 503(b), they would nevertheless remain subject to the more general disclosure and court approval requirements of section 1129(a)(4). Under section 105(a) cannot be used to override the prohibitions of another section of the Code. *See In re Combustion Engineering, Inc.*, 391 F.3d 190, 236 (3rd Cir. 2004) ("The general grant of equitable power contained in § 105(a) cannot trump specific provisions of the Bankruptcy Code, and must be exercised within the parameters of the Code itself"); *see also Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) ("We have

things, the court finds that any payment made by the debtor "for services or for costs and expenses" in connection with the case has either "been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a) (4). In these cases, such fees and expenses can only either be paid pursuant to the proper application of an applicable charging lien or section 503(b).

32. Accordingly, the U.S. Trustee submits that the Court should not approve the confirmation of the E-Side Plan unless Article VI. Section R.1. of the E-Side Plan and the proposed E-Side Plan Confirmation order are amended and revised to: (i) set forth the legal and factual basis for the reasonableness of such payment; (ii) clarify that professionals subject to section 503(b), including without limitation professionals of the Indenture Trustees, shall be compensated only to the extent compensation is authorized and actually approved and awarded under section 503(b); and (iii) provide a reasonable opportunity for the U.S. Trustee and other parties-in-interest to object to such fees on any grounds, including without limitation the professionals' failure to satisfy the requirement of any portion or part of section 503(b).

CONCLUSION

33. As detailed above, the E-Side Plan is not presently confirmable because it seeks approval of certain relief that is contrary to applicable law, controlling precedent and the law of these cases.

34. The U.S. Trustee reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required

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long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code.") (citations omitted).

and to assert such other grounds as may become apparent upon further factual discovery and cross-examine any and all witnesses in support of the E-Side Plan.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order consistent with this Objection and/or granting such other relief as this Court deems appropriate, just and appropriate.

Dated: February 2, 2017
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
REGION 3

By: */s/ Richard L. Schepacarter*
Richard L. Schepacarter
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Room 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (Fax)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Energy Future Holdings, Inc., *et al.*,	Case No. 14-10979 (CSS) (Jointly Administered)
Debtors.	**Related to D.I. 10535, 10551**

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, the United States Trustee's Objection, Response and Reservation of Rights with Respect to the Seventh Amended Joint Plan of Reorganization of Energy Future Holdings Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH and EFIH Debtors (D.I. 10535, 10551) was caused to be served upon the following persons *via* email and/or regular mail upon the parties listed below:

Edward O. Sassower, P.C.
Stephen E. Hessler, Esquire
Brian E. Schartz, Esquire
Chad J. Husnick, Esquire
Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022-4611
Email: esassower@kirkland.com
Email: shessler@kirkland.com
Email: chusnick@kirkland.com
Email: bschartz@kirkland.com

Daniel J. DeFranceschi, Esquire
Jason M. Madron, Esquire
Richards, Layton & Finger
One Rodney Square, P.O. Box 551
Wilmington, DE 19899
Email: defranceschi@rlf.com
Email: madron@rlf.com

Mark E. McKane, Esquire
Michael P. Esser, Esquire
Anna Terteryan, Esquire
Justin Sowa, Esquire
Kirkland & Ellis LLP
555 California Street
San Francisco, CA 94104
Email: mark.mckane@kirkland.com
Email: Michael.esser@kirkland.com
Email: anna.terteryan@kirkland.com
Email: Justin.sowa@kirkland.com

James H. M. Sprayregen, Esquire
Marc Kieselstein, Esquire.
Brenton Rogers, Esquire
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
Email: Brenton.Rogers@kirkland.com
Email: James.Sprayregen@kirkland.com
Email: Marc.Kieselstein@kirkland.com

John P. Melko, Esquire
Gardere Wynne Sewell, LLP
Wells Fargo Plaza, Suite 3400
1000 Louisiana
Houston, TX 77002
Email: jmelko@gardere.com

Benjamin L. Stewart, Esquire
Bailey Brauer PLLC
Campbell Centre I
8350 N. Central Expy, Suite 935
Dallas, TX 75206
Email: bstewart@baileybrauer.com

Ellen W. Slights, AUSA
United States Attorney's Office
District of Delaware
1007 N. Orange Street, Suite 700
Wilmington, DE 19801
Email: Ellen.slights@usdoj.gov

William P. Bowden, Esquire
Gregory A. Taylor, Esquire
Ashby & Geddes, PA
500 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899
Email: wbowden@ashby-geddes.com
Email: gtaylor@ashby-geddes.com

Mark Minuti, Esquire
Saul Ewing LLP
222 Delaware Avenue
Suite 1200
P.O. Box 1266
Wilmington, DE 19899
Email: mminuti@saul.com

Adam G. Landis, Esquire
Matthew B. McGuire, Esquire
Landis Rath & Cobb LLP
919 Market Street
Suite 1800
Wilmington, DE 19801
Email: landis@lrclaw.com
Email: mcguire@lrclaw.com

Jeremy W. Ryan, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
6th Floor
P.O. Box 951
Wilmington, DE 19801
Email: jryan@potteranderson.com

Marc J. Phillips, Esquire
Manion Gaynor & Manning LLP
The Nemours Building
1007 North Orange Street
10th Floor
Wilmington, DE 19801
Email: mphillips@mgmlaw.com

Karen C. Bifferato, Esquire
Kelly M. Conlan, Esquire
Connolly Gallagher LLP
1000 West Street, Suite 1400
Wilmington, DE 19801
Email: kbifferato@connollygallagher.com
Email: kconlan@connollygallagher.com

Mark L. Desgrosseilliers, Esquire
Womble Carlyle Sandridge & Rice, LLP
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801
Email: mdesgrosseilliers@wcsr.com

Pauline K. Morgan, Esquire
Joel A. Waite, Esquire
Ryan M. Bartley, Esquire
Andrew L. Magaziner, Esquire
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
Email: pmorgan@ycst.com
Email: jwaite@ycst.com
Email: rbartley@ycst.com
Email: amagaziner@ycst.com

Derek C. Abbott, Esquire
Andrew R. Remming, Esquire
Erin R. Fay, Esquire
Morris Nichols Arsht & Tunnell LLP
1201 North Market Street, Suite 1600
Wilmington, DE 19801
Email: dabbot@mnat.com
Email: aremming@mnat.com
Email: efay@mnat.com

Chris Simon, Esquire
Michael J. Joyce, Esquire
Cross & Simon, LLC
913 N. Market Street, 11th Floor
Wilmington, DE 19899
Email: mjoyce@crosslaw.com
Email: csimon@crosslaw.com

Mark S. Chehi, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899
Email: mark.chehi@skadden.com

Howard A. Cohen, Esquire
Robert K. Malone, Esquire
Drinker Biddle & Reath LLP
222 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Email: Howard.cohen@dbr.com
Email: Robert.malone@dbr.com

Michael G. Busenkell, Esquire
Gellert Scali Busenkell & Brown, LLC
913 N. Market Street, 10th Floor
Wilmington, DE 19801
Email: mbusenkell@gsbblaw.com

Kathleen M. Miller, Esquire
Smith, Katzenstein & Jenkins LLP
800 Delaware Avenue, Suite 1000
P0 Box 410
Wilmington, DE 19899
Email: kmiller@skjlaw.com

Stephen M. Miller, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19899
Email: smiller@morrisjames.com

Jeffrey M. Schlerf, Esquire
L. John Bird, Esquire
Fox Rothschild LLP
919 North Market Street, Suite 300
Wilmington, DE 19801
Email: jschlerf@foxrothschild.com
Email: jbird@foxrothschild.com

Mark E. Felger, Esquire
Cozen O'Connor
1201 North Market Street, Suite 1001
Wilmington, DE 19801
Email: mfelger@cozen.com

Daniel K. Astin, Esquire
Joseph J. McMahon, Jr., Esquire
Ciardi Ciardi & Astin
1204 North King Street
Wilmington, DE 19801
Email: dastin@ciardilaw.com
Email: jmcmahon@ciardilaw.com

William Chipman, Esquire
Mark D. Olivere, Esquire
Chipman & Brown, LLP
1007 North Orange Street, Suite 1110
Wilmington, DE 19801
Email: chipman@chipmanbrown.com
Email: olivere@chipmanbrown.com

Michael D. DeBaecke, Esquire
Stanley B. Tarr, Esquire
Blank Rome LLP
1201 Market Street, Suite 800
Wilmington, DE 19801
Email: Debaecke@blankrome.com
Email: Tarr@blankrome.com

Kathleen A. Murphy, Esquire
Buchanan Ingersoll & Rooney PC
919 North Market Street, Suite 150C
Wilmington, DE 19801
Email: kathleen.murphy@bipc.com

Kurt F. Gwynne, Esquire
Kimberly E.C. Lawson, Esquire
Reed Smith LLP
120l N. Market Street, Suite 1500
Wilmington, DE 19801
Email: kgwynne@reedsmith.com
Email: klawson@reedsmith.com

Sarah Kam, Esquire
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, NY 10022
Email: skam@reedsmoth.com

Daniel K. Hogan, Esquire
The Hogan Firm
1311 Delaware Avenue
Wilmington, DE 19806
Fax: 302-656-7599
Email: dkhogan@hoganlaw.com

Kevin M. Capuzzi, Esquire
Pinckney, Weidinger, Urban & Joyce LLC
1220 North Market Street, Suite 950
Wilmington, DE 19801
Email: kcapuzzi@pwujlaw.com

Christopher A. Ward, Esquire
Justin K. Edelson, Esquire
Shanti M. Katona, Esquire
Polsinelli PC
222 Delaware Avenue, Suite 1101
Wilmington, De 19801
Email: cward@polsinelli.com
Email: jedelson@polsinelli.com
Email: skatona@polsinelli.com

James E. Huggett, Esquire
Amy D. Brown, Esquire
Margolis Edelstein
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
Email: jhuggett@margolisedelstein.com
Email: abrown@margolisedelstein.com

Kramer Levin Naftalis & Frankel, LLP
Thomas Moers Mayer, Esquire
Philip Bentley, Esquire
Joshua K. Brody, Esquire
1177 Avenue of the Americas
New York, New York 10036
Email: tmayer@kramerlevin.com
Email: pbentley@kramerlevin.com
Email: jbrody@kramerlevin.com

Stephanie Wickouski, Esquire
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-3300
Email: stephanie.wickouski@bryancave.com

Secretary of State
Division of Corporations
Franchise Tax
P.O. Box 898
Dover, DE 19903
Email: corp@delaware.gov

Hugh M. McDonald, Esquire
Louis A. Curcio, Esquire
Brett D. Goodman, Esquire
Troutman Sanders LLP
405 Lexington Avenue
New York, NY 10174
hugh.mcdonald@troutmansanders.com
louis.curcio@troutmansanders.com
brett.goodman@troutmansnaders.com

Andrew M. Calamari, Esquire
New York Regional Office
Securities & Exchange Commission
3 World Financial Center, Suite 400
New York, NY 10281-1022
Email: NYROBankruptcy@SEC.GOV

Jeffrey L. Jonas, Esquire
Andrew P. Strehle, Esquire
Howard Siegel, Esquire
Brown Rudnick LLP
One Financial Center
Boston, MA 02111
Email: jjonas@brownrudnick.com
Email: astrehle@brownricnick.com
Email: hsiegel@brownrudnick.com

Edward S. Weisfelner, Esquire
Brown Rudnick LLP
Seven Times Square
New York, NY 10036
Email: eweisfelner@brownrudnick.com

Steven Kazan
Kazan McClaim Satterler & Greenwood
Jack London Market
55 Harrison Street, Ste. 400
Oakland, CA 94607
Email: skazan@kazanlaw.com

Rachel Obaldo, Esquire
John Mark Stern, Esquire
Office of the Texas Attorney General
Bankruptcy & Collections Division
P. O. Box 12548
Austin, TX 78711-2548
Email: Bk-robaldo@texasattorneygeneral.gov

Russell L. Munsch, Esquire
Munsch Hardt Kopf & Harr, P.C.
3050 Frost Bank Tower
401 Congress Avenue
Austin, TX 78701-4071
Email: rmunsch@munsch.com

Hal F. Morris, Esquire
Ashley Flynn Bartram, Esquire
Bankruptcy Regulatory Section
Bankruptcy & Collections Division
P.O. Box 12548
Austin, TX 78711-2548
Email: hal.morris@texasattorneygeneral.gov
Email: ashley.bartram@texasattorneygeneral.gov

Elizabeth Banda Calvo, Esquire
Perdue, Brandon, Fielder, Collins & Mott
P.O. Box 13430
Arlington, TX 76094-0430
Email: ebcalvo@pbfcm.com

Kevin M. Lippman, Esquire
Munsch Hardt Kopf & Harr, P.C.
500 N. Akard Street, Suite 3800
Dallas, TX 75201-6659
Email: klippman@munsch.com

Philip D. Anker, Esquire
George W. Shuster, Jr., Esquire
Wilmer Cutler Pickering Hale and Don LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Email: philip.anker@wilmerhale.com
Email: george.shuster@wilmerhale.com

Owen M. Sonik, Esquire
Perdue, Brandon, Fielder, Collins & Mott
1235 North Loop West, Suite 600
Houston, TX 77008
Email: osonik@pbfcm.com

Fredric Sosnick, Esquire
Ned S. Schodek, Esquire
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
Email: fsosnick@shearman.com
Email: nschodek@shearman.com

Benjamin W. Loveland, Esquire
Wilmer Cutler Pickering Hale and Don LLP
60 State Street
Boston, MA 02109
Email: benjamin.loveland@wilmerhale.com

Geoffrey Gay, Esquire
Lloyd Gosselink Rochelle & Townsend,PC
816 Congress Avenue, Suite 1900
Austin, TX 78701
Email: ggay@lglawfirm.com

Michael A. McConnell, Esquire
Clay Taylor, Esquire
Katherine Thomas, Esquire
Kelly Hart & Hallman LLP
201 Main Street, Suite 2500
Fort Worth, TX 76102
Email: michael.mcconnell@kellyhart.com
Email: clay.taylor@kellyhart.com
Email: katherine.thomas@kellyhart.com

Peter S. Goodman, Esquire
McKool Smith
One Bryant Park, 47th Floor
New York, NY 10036
Email: pgoodman@mckoolsmith.com

Harold L. Kaplan, Esquire
Mark F. Hebbeln, Esquire
Lars A. Peterson, Esquire
Foley & Lardner LLP
321 North Clark St., Ste. 2800
Chicago IL 60654
Email: mhebbeln@foley.com
Email: hkaplan@foley.com
Email: lpeterson@foley.com

Jeffrey S. Sabin, Esquire
Bingham McCutchen LLP
399 Park Avenue
New York, NY 10022-4689
Email: jssabin@venable.com

Paul D. Moak, Esquire
McKool Smith
600 Travis Street, Suite 7000
Houston, TX 77002
Email: pmoak@mckoolsmith.com

Desiree M. Amador, Esquire
Office of the General Counsel
Pension Benefit Guaranty Corp.
1200 K Street, NW
Washington, DC 20005-4026
Email: amador.desiree@pbgc.gov

Julia Frost-Davies, Esquire
Christopher L. Carter, Esquire
Bingham McCutchen LLP
One Federal Street
Boston, MA 02110-1726
Email: julia.frost-davies@bingham.com
Email: christopher.carter@bingham.com

James Prince, Esquire
Omar J. Alaniz, Esquire
Thomas E. O'Brien, Esquire
Baker Botts LLP
2001 Ross Avenue
Dallas, TX 75201
Email: jim.prince@bakerbotts.com
Email: omar.alaniz@bakerbotts.com
Email: tom.obrien@bakerbotts.com

Edward M. King, Esquire
Frost Brown Todd LLC
400 W. Market Street, 32nd Floor
Louisville, KY 40202
Email: tking@fbtlaw.com

George N. Panagakis, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
155 North Wacker Drive, Suite 2700
Chicago, IL 60606
Email george.panagakis@skadden.com

Jay M. Goffman, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
Email: jay.goffman@skadden.com

Lee Gordon, Esquire
McCreary, Veselka, Bragg & Allen, PC
P.O. Box 1269
Round Rock, TX 78680
Email: lgordon@mvbalaw.com

Alan W. Kornberg, Esquire
Kelly A. Cornish, Esquire
Brian S. Hermann, Esquire
Jacob A. Adlerstein, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019
Email: akornberg@paulweiss.com
Email: kcornish@paulweiss.com
Email: bhermann@paulweiss.com
Email: jadlerstein@paulweiss.com

David E. Leta, Esquire
Snell & Wilmer LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
Email: dleta@swlaw.com

Richard G. Mason, Esquire
Emil A. Kleinhaus, Esquire
Austin T. Witt, Esquire
Wachtell, Lipton, Rosen & Katz
51 West 52 Street
New York, NY 10019
Email: rgmason@wlrk.com
Email: eakleinhaus@wlrk.com
Email: atwitt@wlrk.com

Brad Eric Scheler, Esquire
Gary L. Kaplan, Esquire
Matthew M. Roose, Esquire
Fried, Frank, Harris, Schriver & Jacobson
One New York Plaza
New York, NY 10004
Email: brad.scheler@friedfrank.com
Email: gary.kaplan@friedfrank.com
Email: matthew.roose@friedfrank.com

Dennis F. Dunne, Esquire
Evan R. Fleck, Esquire
Milbank, Tweed, Hadley & McCloy LLP
One Chase Manhattan Plaza
New York, NY 10005
Email: efleck@milbank.com
Email: ddunne@milbank.com

Richard C. Pedone, Esquire
Amanda D. Darwin, Esquire
Lee Harrington, Esquire
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110
Email: rpedone@nixonpeabody.com
Email: adarwin@nixonpeabody.com
Email: lharrington@nixonpeabody.com

William P. Weintraub, Esquire
Kizzy L. Jarashow, Esquire
Goodwin Procter LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
Email: wweintraub@goodwinproctor.com
Email: kjarashow@goodwinproctor.com

Michael L. Schein, Esquire
Vedder Price PC
1633 Broadway, 47th Floor
New York, NY 10019
Email: mschein@vedderprice.com

Marshall S. Huebner, Esquire
Benjamin S. Kaminetzky, Esquire
Elliot Moskowitz, Esquire
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
Email: marshall.huebner@davispolk.com
Email: ben.kaminetzky@davispolk.com
Email: elliot.moskowitz@davispolk.com

John A. Harris, Esquire
Jason D. Curry, Esquire
Quarles & Brady LLP
Renaissance One
Two North Central Avenue
Phoenix, AZ 85004-2391
Email: john.harris@quarles.com
Email: jason.curry@quarles.com

Patrick L. Hughes, Esquire
Haynes & Boone, LLP
1801 Broadway Street
Suite 800
Denver, CO 80202
Email: Patrick.hughes@haynesboone.com

J. Christopher Shore, Esquire
Gregory M. Starner, Esquire
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
Email: cshore@whitecase.com
Email: gstarner@whitecase.com

Daniel A. Lowenthal, Esquire
Craig W. Dent, Esquire
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
Email: dalowenthal@pbwt.com
Email: cdent@pbwt.com

Thomas J. Moloney, Esquire
Sean A. O'Neal, Esquire
Humayun Khalid, Esquire
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006
Email: tmoloney@cgsh.com
Email: soneal@cgsh.com
Email: hkhalid@cgsh.com

Stephen C. Stapleton, Esquire
Cowles & Thompson
Bank of America Plaza
901 Main Street, Suite 3900
Dallas, TX 75202
Email: sstapleton@cowlesthompson.com

Scott L. Alberino, Esquire
Joanna F. Newdeck, Esquire
Akin Gump Strauss Hauer & Feld LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, NW
Washington, DC 20036
Email: salberino@akingump.com
Email: jnewdeck@akingump.com

Thomas E. Lauria, Esquire
Matthew C. Brown, Esquire
White & Case LLP
200 South Biscayne Blvd., Suite 4900
Miami, FL 33131
Email: tlauria@whitecase.com
Email: mbrown@whitecase.com

Christine C. Ryan, Esquire
Holland & Knight, PC
800 17th Street N.W.
Suite 1100
Washington, DC 20006
Email: christine.ryan@hklaw.com

Ira S. Dizengoff, Esquire
Abid Qureshi, Esquire
Stephen M. Baldini, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
Bank of America Tower
New York, NY 10036
Email: idizengoff@akingump.com
Email: aqureshi@akingump.com
Email: sbaldini@akingump.com

Donald K. Ludman, Esquire
Brown & Connery, LLP
6 North Broad Street, Suite 100
Woodbury, NJ 08096
Email: dludman@brownconnery.com

Jeffrey R. Fine, Esquire
Dykema Gossett PLLC
1717 Main Street, Suite 4000
Dallas, Texas 75201
Email: jfine@dykema.com

Jonathan L. Howell, Esquire
McCathern, PLLC
Regency Plaza
3710 Rawlins, Suite 1600
Dallas, TX 75219
Email: jhowell@mccathernlaw.com

David Neier, Esquire
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
Email: dneier@winston.com

Michael B. Schaedle, Esquire
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Email: schaedle@blankrome.com

Jon Chatalian, Esquire
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street, NW
Washington, DC 20005
Email: Chatalian.jon@pbgc.com

John R. Ashmead, Esquire
Kalyan Das, Esquire
Arlene R. Alves, Esquire
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004
Email: ashmead@sewkis.com
Email: das@sewkis.com
Email: alves@sewkis.com

John R. Ashmead, Esquire
Kalyan Das, Esquire
Arlene R. Alves, Esquire
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004
Email: ashmead@sewkis.com
Email: das@sewkis.com
Email: alves@sewkis.com

Robert Szwajkos, Esquire
Curtin & Heefner LLP
250 Pennsylvania Avenue
Morrisville, PA 19067
Email: rsz@curtinheefner.com

Monica Blacker, Esquire
J. Scott Rose, Esquire
Jackson Walker, LLP
Weston Centre
112 E. Pecan Street, Suite 2400
San Antonio, TX 78205
Email: mblacker@jw.com
Email: srose@jw.com

Patricia Williams Prewitt, Esquire
Law office of Patricia Williams Prewitt
10953 Vista Lake Court
Navasota, TX 77868
Email: pwp@pattiprewittlaw.com

D. Ross Martin, Esquire
Keith H. Wofford, Esquire
Joshua Y. Sturm, Esquire
Ropes & Gray, LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Email: joshua.sturm@ropesgray.com
Email: ross.martin@ropesgray.com
Email: Keith.Wofford@ropesgray.com

Judy Hamilton Morse, Esquire
Crowe & Dunlevy, PC
20 North Broadway, Suite 1800
Oklahoma City, OK 73102
Email: judy.morse@crowedunlevy.com

Shawn M. Christianson, Esquire
Buchalter Nemer, PC
55 Second Street, 17th Floor
San Francisco, CA 94105-3493
Email: schristianson@buchalter.com

Jordan S. Blask, Esquire
Lara E. Shipkovitz, Esquire
Tucker Arensberg, PC
1500 One PPG Place
Pittsburgh, PA 15222
Email: jblask@tuckerlaw.com
Email: lshipkovitz@tuckerlaw.com

Jody A. Bedenbaugh, Esquire
George B. Cauthen, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
Email: jody.bedenbaugh@nelsonmullins.com
Email: george.cauthen@nelsonmullins.com

Christopher B. Mosley, Esquire
Senior Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, TX 76102
Email: Chris.Mosley@fortworthtexas.gov

Jamie R. Welton, Esquire
Lackey Hershman, LLP
3102 Oak Lawn Avenue, Suite 777
Dallas, TX 75219
Email: jrw@lhlaw.com

Edward Fox, Esquire
Polsinelli PC
900 Third Avenue, 21st Floor
New York, NY 10022
Email: efox@polsinelli.com

Jeanmarie Baer, Esquire
Perdue, Brandon, Fielder, Collins & Mott,
P.O. Box 8188
Wichita Falls, TX 76307
Email: jbaer@pbfcm.com

Jacob L. Newton, Esquire
Stutzman, Bromberg, Esserman & Plifka
2323 Bryan Street, Suite 2200
Dallas, TX 75201
Email: newton@sbep-law.com

James M. Peck, Esquire
Brett H. Miller, Esquire
Lorenzo Marinuzzi, Esquire
Todd M. Goren, Esquire
Samantha Martin, Esquire
Morrison & Foerster
250 W. 55th Street
New York, NY 10019
Email: jpeck@mofo.com
Email: bmiller@mofo.com
Email: lmarinuzzi@mofo.com
Email: tgoren@mofo.com
Email: smartin@mofo.com

Thomas D. Maxson, Esquire
Cohen & Grigsby, P.C.
625 Liberty Avenue
Pittsburgh, PA 15222-3152
Email: tmaxson@cohenlaw.com

Michael G. Smith, Esquire
111 North 6th Street
P.O. Box 846
Clinton, OK 73601
Email: msmith@mikesmithlaw.net

Raymond H. Lemisch, Esquire
Klehr Harrison Harvey Branzburg LLP
919 Market Street, Suite 1000
Wilmington, Delaware 19801
Email: rlemisch@klehr.com

Ari D. Kunofsky, Esquire
Trial Attorneys, Tax Division
U. S. Department of Justice
PO Box 227
Washington, DC 20044
Email: ari.d.kunofsky@tax.usdoj.gov

Cole, Schotz, Meisel, Forman & Leonard
Norman L. Pernick, Esquire
J. Kate Stickles, Esquire
Nicholas J. Brannick, Esquire
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Email: Kstickles@coleschotz.com
Email: NBrannick@coleschotz.com
Email: NPernick@coleschotz.com

Pachulski Stang Ziehl & Jones LLP
Laura Davis Jones, Esquire
Robert J. Feinstein, Esquire
919 N. Market Street, 17th Floor
P.O. Box 8705
Wilmington, DE 19899-8705
Email: ljones@pszjlaw.com
Email: rfeinstein@pszjlaw.com

James H. Millar, Esquire
Drinker Biddle & Reath LLP
1177 Avenue of the Americas
41st Floor
New York, NY 10036-2714
Email: James.Millar@dbr.com

Peter Gilhuly, Esquire
Adam E. Malatesta, Esquire
Lathan & Watkins, LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
Email: peter.gilhuly@lw.com
Email: adam.malatesta@lw.com

Diane Wade Sanders, Esquire
Linebarger Goggan Blair & Sampson, LLP
PO Box 17428
Austin, TX 78760
Email: Austin_bankruptcy@publicans.com

Cole, Schotz, Meisel, Forman & Leonard
Warren A. Usatine, Esquire
25 Main Street
P.O. Box 800
Hackensack, NJ 07602
Email: Wusatine@coleschotz.com

Venable, LLP
Jamie L. Edmonson, Esquire
Daniel A. O'Brien, Esquire
1201 N. Market Street, Suite 1400
Wilmington, Delaware 19801
Email: jledmonson@venable.com
Email: daobrien@venable.com

John P. Dillman, Esquire
Linebarger Goggan Blair & Sampson, LLP
P.O. Box 3064
Houston, TX 77253
Email: Houston_bankruptcy@publicans.com

Davis Lee Wright, Esquire
Natalie D. Ramsey, Esquire
Mark Andrew Fink, Esquire
Mark B. Sheppard, Esquire
Montgomery, McCracken, Walker & Rhoads
1105 N. Market Street
Suite 1500
Wilmington, DE 19081
Email: nramsey@mmwr.com
Email: mfink@mmwr.com
Email: msheppard@mmwr.com
Email: dwright@mmwr.com

Christopher R. Belmonte, Esquire
Pamela A. Bosswick, Esquire
Satterlee, Stephens, Burke & Burke, LLP
230 Park Avenue
New York, NY 10169
Email: cbelmonte@ssbb.com
Email: pbosswick@ssbb.com

Brian D. Glueckstein, Esquire
Andrew Dietderich, Esquire
Michael H. Torkin, Esquire
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Email: dietdericha@sullcrom.com
Email: torkinm@sullcrom.com
Email: gluecksteinb@sullcrom.com

Joseph H. Huston, Jr., Esquire
Steven & Lee, PC
1105 North Market Street, Suite 700
Wilmington, Delaware 19801
Email: jhh@stevenslee.com

Michael A. Paskin, Esquire
Cravath, Swaine and Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Email: mpaskin@cravath.com

David M. Klauder, Esquire
Bielli & Klauder, LLC
1204 N. King Street
Wilmington, DE 19801
Email: dklauder@bk-legal.com

Jeff J. Marwil, Esquire
Mark K. Thomas, Esquire
Peter J. Young, Esquire
Proskauer Rose, LLP
Three First National Plaza
70 W. Madison Street, Suite 3800
Chicago, IL 60602
Email: jmarwil@proskauer.com
Email: mthomas@proskauer.com
Email: pyoung@proskauer.com

John W. Spiegel, Esquire
Seth Goldman, Esquire
Thomas Walper, Esquire
Todd J. Rosen, Esquire
Munger, Tolles & Olson, LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Email: Thomas.Walper@mto.com
Email: Todd.Rosen@mto.com
Email: john.spiegel@mto.com
Email: seth.goldman@mto.com

Michael Friedman, Esquire
Chapman and Cutler LLP
1270 Avenue of the Americas, 30th Floor
New York, New York 10020
Email: friedman@chapman.com

Bradley A. Robins
Greenhill & Co., LLC
Email: brobins@greenhill.com

Jonathan Goldin
Goldin Associates, LLC
Email: jegoldin@goldinassociates.com

Richard Levin, Esquire
Jenner & Block
919 3rd Avenue
New York, NY 10022-3901
Email: rlevin@jenner.com

Michael L. Atchley, Esquire
Matthew T. Taplett, Esquire
Pope, Hardwicke, Christie, Schell, Kelly
500 West 7th Street, Suite 600
Fort Worth, EX 76102
Email: matchley@popehardwicke.com

David P. Primack, Esquire
McElroy, Deutsch, Mulvaney & Carpenter, LLP
300 Delaware Street
Suite 770
Wilmington, DE 19801
Email: dprimack@mdmc_law.com

Michael A. Berman, Esquire
Office of the General Counsel
Washington, DC 20549

Stephen Sakonchick, II, Esquire
Stephen Sakonchick II, PC
6502 Canon Wren Drive
Austin, TX 78746

Jeffrey T. Rose, Esquire
Wilmington Trust FSB
50 South Sixth Street, Suite 1290
Minneapolis, MN 55402

Ronald L. Rowland
Receivable Management Services
PO Box 361505
Columbus, OH 43236

Jason A. Starks, Esquire
Greg Abbott, Esquire
Daniel T. Hodge, Esquire
John B. Scott, Esquire
Ronald R. Del Vento, Esquire
Bankruptcy & Collections Division
P.O. Box 12548
Austin, TX 78711

Sean Lev, Esquire
Office of the General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Secretary of Treasury
820 Silver Lake Boulevard, Suite 100
Dover, DE 19904

EFH_DS_Discovery_Service_List@kirkland.com

/s/Richard L. Schepacarter
Richard L. Schepacarter
Trial Attorney