UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	
	: Chapter 11
	:
	: Case No. 15-12507-LSS
NEWBURY COMMON ASSOCIATES, LLC *et al*,	:
	:
	: Jointly Administered
Debtors.	:
	:
	: **Hearing Date: April 3, 2017 at 2:00 p.m.**
	: **Objection Deadline: March 27, 2017 at 4:00 p.m.**[1]

UNITED STATES TRUSTEE'S OMINBUS OBJECTION TO DISCLOSURE STATEMENT FOR JOINT PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE FOR PROPCO DEBTORS AND HOLDCO DEBTORS AND OBJECTION TO PLAN DEBTORS' MOTION FOR ORDER (A) APPROVING THE DISCLOSURE STATEMENT; (B) APPROVING THE FORM AND MANNER OF NOTICE OF CONFIRMATION HEARING; (C) APPROVING PROCEDURES FOR THE SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT THE PLAN; (D) APPROVING NOTICE AND OBJECTION PROCEDURES IN RESPECT THEREOF; AND (E) GRANTING RELATED RELIEF

Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), through his undersigned attorneys, objects to the Disclosure Statement for Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code for PropCo Debtors and HoldCo Debtors (the "Disclosure Statement", D.E. 1589), and to Plan Debtors' Motion for Order (A) Approving the Disclosure Statement; (B) Approving the Form And Manner of Notice of Confirmation Hearing; (C) Approving Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan; (D) Approving Notice and Objection Procedures In Respect Thereof; And (E) Granting Related Relief ("Solicitation Procedures Motion", D.E. 1614)[2] and states as follows:

[1] Extended to March 29, 2017 at 4:00 p.m. for the U.S.Trustee
[2] Terms shall have the same meaning given them in the Plan, Disclosure Statement or Solicitation Procedures Motion unless otherwise noted herein.

PRELIMINARY STATEMENT

1. This Court should not approve the Disclosure Statement or enter an order approving the solicitation procedures as currently drafted, because the Disclosure Statement does not contain adequate information as required by 11 U.S.C. 1125. As amended to-date,[3] the Disclosure Statement and proposed solicitation procedures have the following deficiencies:

a. The Disclosure Statement lacks adequate financial exhibits to enable a claimant or interest holder to readily determine potential dividends;

b. The Disclosure Statement fails to disclose the net proceeds from property sales and remaining funds on hand post-confirmation;

c. The Disclosure Statement contains inadequate disclosure of proposed settlements; and

d. The Disclosure Statement contains inadequate disclosure of the disposition of those jointly-administered debtors not included in the Plan.

2. The Disclosure Statement and solicitation procedures should also not be approved, because the Plan contains provisions rendering it patently unconfirmable:

a. The Plan would provide a discharge to the Debtors, which is not permitted in a liquidation plan for a non-individual debtor;

b. The Plan's exculpation clause includes improper parties, and attempts to effectuate a prospective release;

[3] The Debtors and the U.S. Trustee have made significant progress in resolving many concerns as reflected in the proposed revisions to the Plan and Disclosure Statement filed on March 24, 2017 (D.E. 1651, "Proposed Plan Revisions" (D.E. 1651-1) or "Proposed Disclosure Statement Revisions" (D.E. 1651-2) as the case may be). Among the changes to the Plan, there is no longer mention or treatment of the proof of claim filed by Dechert LLP, the Debtors' original counsel (a secured claim of $224,968.20 and an unsecured claim of $1,015,526.34). The U.S. Trustee reserves all rights with respect to any and all issues affecting Dechert's claim.

c. The Plan includes inappropriate third party releases and limitations on liability;

d. The Plan would provide for inappropriate settlements; and

e. The Plan calls for creation of an Investor Trust, but the beneficiaries would include entities that did not invest in any of the Investor Trust Debtors.

3. Due to the deficiencies outlined above and discussed further in the following pages, the United States Trustee urges that the Court not approve the Disclosure Statement as drafted, and require that it be amended so as to provide adequate information to voters as required by 11 U.S.C. 1125. The United States Trustee also urges that certain problematic aspects of the Plan be addressed at this time, so that the various requirements of 11 U.S.C. 1129 can be satisfied if the Debtors otherwise obtain the necessary acceptances from those who cast votes on the Plan.

JURISDICTION

4. 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.

5. 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); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

6. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Plan and Disclosure Statement and the issues raised in this objection.

STATEMENT OF FACTS

A. Introduction

7. This Statement of Facts contains four sections. The first recites facts pertinent to the overall case, as well as certain provisions of the Plan and Disclosure Statement. The remaining three sections recite facts pertinent to the settlements proposed under the Plan with OnBoard Investors and Ares Management.

B. Plan and Disclosure Statement

8. The U.S. Trustee has not appointed an Official Committee of Unsecured Creditors in this case as there was insufficient interest from the unsecured creditor body.

9. The Plan and Disclosure Statement indicate that the Debtors have been conducting plan related negotiations with a group of investors defined as the Participant Investors (Plan at I.1.59). At no time have the Participant Investors filed a Bankruptcy Rule 2019 Statement with the Court.

10. Three of the Debtors, Newbury Common Associates, Newbury Common Member Associates, and Seaboard Realty, LLC are not Plan Debtors. Page 5 of the Disclosure Statement indicates that their cases may be converted to Chapter 7 or dismissed.

There is no further discussion as to the disposition of these debtors anywhere in the Disclosure Statement.

11. The Debtors have sold a number of properties as outlined at pages 10 through 18 of the Disclosure Statement. The Disclosure Statement does not clearly disclose the amounts of any net proceeds of sale for each of the properties sold. For example, the discussion of the hotel properties on pages 6-7 and on page 10 does not provide any information regarding disposition of the Marriott Courtyard except to disclose that the mortgage was paid in full when the property was sold.

12. Plan Section 7.2 (c) refers to Schedule D to the Disclosure Statement, "Distribution Escrow Account; Payment Waterfall." Schedule "D", filed on March 22, 2017 (D.E. 1645). It sets forth "Total Estimated Cash Available," and how such funds will be allocated, including amongst each Plan Debtor's Escrow Sub-Account, for distribution to certain creditors in accordance with the Plan. However, there is no transparency regarding calculations supporting such amounts.

13. Although the Disclosure Statement shows a range of recoveries for General Unsecured Claims, it is unclear whether that range is uniform across all debtors, or varies from debtor to debtor.

14. Section I.1.43 defines Investor Claim, among other things, as a claim: "(ii) on account of a putative equity investment in a Plan Debtor, or (iii) received from an entity controlled by John J. DiMenna or any equityholder or creditor claiming through such a DiMenna controlled entity. Section I.1.48 defines Investor Trust Debtors as a select group

composed of some HoldCo Debtors, and some PropCo Debtors.[4] All holders of Investor Claims will share in any distributions from the Investor Trust. The Disclosure Statement does not explain why entities that were not investors in the Investor Trust Debtors should be paid from the Investor Trust.

15. Section I.1.59 of the Plan defines and identifies a group of Participant Investors. This group will nominate a proposed Investor Trustee and a proposed Investor Trust Committee.

16. The heart of the Plan for the holders of Investor Claims and Equity Interests is the creation of an Investor Trust (I.1.50). The Investor Trust Assets will be funded with $1,000,000 on the Effective date along with the Investor Trust Causes of Action and any ultimate proceeds therefrom. These latter assets include any litigation claims of the debtors that are not released through the Plan. Some of the proposed features of the Investor Trust include: (a) Holders of Investor Claims (Class 6) and holders of Equity Interests (Class 7) will be the trust beneficiaries (Plan, Section 7.3(d)); (b) prospective exculpation for the Investor Trustee and Investor Trust Committee for their conduct (Plan Section 7.3(l)); and, (c) the ability to resolve claims: "…without any further notice to or action, order, or approval by the Bankruptcy Court..."(Plan, 9.1).

17. The Disclosure Statement does not identify or value any potential Investor Trust Causes of Action or how it is that holders of claims and interests in Classes 6 and 7 are to share as beneficiaries *pari passu* in the Investor Trust. Nor does the Disclosure Statement address the various legal and factual reasons why entities that may not be Investors or

[4] The included HoldCo Debtors are: 88 Hamilton Avenue Member Associates, Park Square West Member Associates, PSWMA I, PSWMA II, and Seaboard Hotel Member Associates. The included PropCo Debtors are: 88 Hamilton Avenue Associates, Park Square West Associates, and Seaboard Hotel Associates.

claimants of the Investor Trust Debtors should be permitted to share in distributions from the Investor Trust.[5]

18. Plan Section 5.6 (b) provide as follows for Investor Claims: "If Class 6 accepts the Plan, each Holder of an Investor/Equity Claim in Class 6 shall receive, in full satisfaction and discharge thereof, treatment as a Released Party under the Plan. Further, each Holder of an Investor Claim in Class 6 against one of the Investor Trust Debtors shall receive a beneficial interest in the Investor Trust, as determined in accordance with the Investor Trust Agreement." Section 5.7(b) of the Plan provides for identical treatment to Equity Interests. Plan Section 1.79 includes within the definition of Releasing Parties: "…(e) all Holders of Investor Claims; and (f) all Holders of Equity Interests."

19. Section 7.1(a) of the Plan reads in pertinent part as follows:

> Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, the Plan incorporates the "Plan Settlement," which is a compromise and settlement of numerous debtor-creditor issues designed to achieve an economic resolution of Claims against and Interests in the Plan Debtors (including Intercompany Claims and Intercompany Interests), Claims that may be asserted against the Released Parties, and an efficient resolution of these Chapter 11 Cases. The Plan Settlement effects the following:
>
> - The allowance, compromise, treatment and satisfaction of (i) all claims asserted or which may be asserted against the Plan Debtors and the other Released Parties by the Settling Lenders and (ii) all claims asserted or which may be asserted against the Settling Lenders by the Plan Debtors and the other Releasing Parties;
> - The compromise, treatment and satisfaction of (i) all claims asserted or which may be asserted against the Plan Debtors and the other Released Parties by the Holders of Investor Claims and Equity Interests (other than Subordinated Interests) and (ii) all claims asserted or which may be asserted against the Holders of Investor Claims and Equity Interests (other than Subordinated Interests) by the Plan Debtors and the other Releasing Parties;

[5] The Proposed Plan Revisions at Section 7.3(d) now provides: "For the avoidance of doubt, Holders of Investor Claims against and Equity Interests in any Debtor that is a Plan Debtor but is not an Investor Trust Debtor shall not be a Trust Beneficiary on account of such Investor Claim or Equity Interest." In other words, the proposed Revised Plan addresses this issue but now does not explain why claims with disparate treatment are now being included in the same class.

…

> Confirmation will constitute the Bankruptcy Court's approval of the Plan Settlement under Bankruptcy Rule 9019 and section 1123 of the Bankruptcy Code, and shall constitute a finding that the compromises and settlements under the Plan Settlement are in the best interests of the Plan Debtors, their Estates, their creditors and other parties-in-interest, and are fair, equitable and within the range of reasonableness.

…

20. In regard to releases, the Plan defines "Released Parties" to include Holders of Mortgage Claims that do not reject the Plan, Holders of Investor Claims and Equity Interests that vote for the Plan, and retained Professionals. "Releasing Parties" includes all Holders of Investor Claims and all Holders of Equity Interests without regard to consent. Plan Section 11.4 purports to provide the Released Parties with a release and discharge from the Releasing Parties. Plan Section 11.5 proposes to exculpate undefined parties from liability in connection with the case.

C. OnBoard Investors, LLC

21. The Disclosure Statement describes a settlement of the claim of OnBoard Investors, LLC for a substantial contribution pursuant to Bankruptcy Code Section 503(b)(3)(4) in the amount of $350,000 in fees and $3,893.42 ("OnBoard Claim", D.E. 1262]. The Debtors and creditors UCF I and CPR objected to the OnBoard Claim for reasons that included the claim did not discuss how the services benefitted the estate. Although it sets forth that the claim will receive payment of $175,000, the Disclosure Statement does not explain the basis for allowance of the claim.

E. Ares Management LLC

22. Page 34 of the Disclosure Statement describes a settlement of the claims of Ares Management, LLC for an administrative expense in the amount of $152,058.98

("Ares Claims"), based on an alleged substantial contribution. There is no supporting documentation attached to the Ares proofs of claim, including the dates the services were allegedly rendered. Ares Management, LLC has never appeared in this case. Although it sets forth that the Ares claims will receive payment of $85,000, the Disclosure Statement does not explain the basis for allowance of the Ares claims.

F. Solicitation Procedures Motion

23. The U.S. Trustee expressed a number of concerns to the Debtors regarding the Solicitation Procedures Motion. The Debtors have provided the U.S. Trustee with a proposed revised form of Order which adequately addresses a majority of the issues raised.

24. The Solicitation Procedures Motion proposes that if no votes are cast in a given class, then the class will be deemed to accept the Plan.

25. The Solicitation Procedures Motion proposes that the holders of satisfied claims will not be entitled to vote. There is no proposed procedure to notify any affected claimant that their claim has been paid in full and they are not being allowed to vote for or against the Plan.

ARGUMENT

Summary of Argument

26. In general outline, the Plan would distribute the net proceeds available from the sale of the various real properties, pay administrative and priority claims, pay the Settling Lenders $9.4 million, fund the Investor Trust with $1,000,000, and distribute the remaining proceeds to the creditors of each PropCo debtor to the extent any proceeds exist. Distributions to Investor Claims or Equity Interests will only be made from the Investor Trust if there is any ultimate recovery.

27. The plan provides for mutual releases between the Class 6 and 7 claims and interests and the Debtors, since the holder of a claim or interest in these classes who accepts the Plan will be released from claims against the holder in exchange for a release of the Released Parties by the Investor Claims and Equity Interests classes. Given these mutual releases, it is difficult if not impossible to estimate the value of any viable claims the Investor Trust may bring against third parties. The Investor Trust will not be required to report to the Court for any purpose, including the settlement of any claim or any distributions to creditors.

28. The Disclosure Statement contains inadequate data to enable a creditor or investor or equity holder to ascertain what they might receive and when they might receive it. For this and many other reasons outlined below, the Disclosure Statement does not contain adequate information within the meaning of Section 1125.

29. The Disclosure Statement should also not be approved because the Plan contains multiple provisions that render the Plan patently unconfirmable, including but not limited to:

- Seeking a discharge in a liquidating case;
- Granting third party releases without providing parties in interest the chance to opt out of the third party releases; and
- The proposed OnBoard Investors and Ares Management settlements are not proposed in good faith.

I. The Disclosure Statement Fails to Provide Adequate Disclosure

30. Section 1125 of the Bankruptcy Code prohibits solicitation of votes on a reorganization plan prior to court approval of a written disclosure statement, which contains "adequate information." *See* 11 U.S.C. § 1125(b).

31. "Adequate information" is defined in section 1125 as being:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a)(1).

32. The disclosure statement requirements of Section 1125 are "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (*citing Oneida Motor Freight, Inc. v. United Jersey Bank* (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

33. "Adequate information" under § 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with debtors over proposed plans. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988). The disclosure obligations of Section 1125(b) tie directly to the confirmation requirements of Section 1129(a)(5), which allow the Court to confirm a plan only if the following disclosure requirements are met:

> The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or *a successor* to the debtor under the plan; and

> the appointment to, or continuance in, such office of such individual is consistent with the interests of creditors and equity security holders and with public policy; and
>
> the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

11 U.S.C. § 1129(a)(5)(A-B)(emphasis added). The plan must disclose and the Court must approve the identity and affiliations of any individuals who will serve as post-confirmation management not only of the debtor, but also of "a successor to the debtor under the plan." *Id*

34. The U.S. Trustee has been in discussions with the Debtors regarding revisions to the Disclosure Statement ("D.S."). While definitive language may not have been reached as to many items, the U.S. Trustee and the Debtors have made significant progress in addressing some of the deficiencies to the Disclosure Statement. Thus, the U.S. Trustee believes there is agreement to revise or add to the Disclosure Statement text as follows:[6]

a) Provide examples for the proposed definition of Investor Claim, such as a description of what is meant by "putative investor" (Plan 1.43,);

b) Explain why Investor or Equity claimants who do not hold a claim or equity in a particular Investor Trust Debtor will be able to share in the Investor Trust assets (Plan 1.48, 5.6, Plan 7.3(d));[7]

c) Explain how class consent may serve as a basis for nonconsensual third party releases (Plan 1.79, 11.4,);

d) Address how Diserio can be paid a larger percentage of its fees than other estate professionals (Plan 4.2);

e) Clarify that each PropCo and HoldCo Debtor will solicit ballots from each class as separate entities (Plan 12.3);

[6] Many of these items are not presently addressed in the Disclosure Statement, or are addressed in a cursory manner.
[7] The Proposed Plan Revisions at Section 7.3(d) now provides: "For the avoidance of doubt, Holders of Investor Claims against and Equity Interests in any Debtor that is a Plan Debtor but is not an Investor Trust Debtor shall not be a Trust Beneficiary on account of such Investor Claim or Equity Interest." In other words, the proposed Revised Plan addresses this issue but now the Proposed Revised Disclosure Statement does not explain why claims with disparate treatment are now being included in the same class.

f) Clarify that Bankruptcy Code Section 1123(b)(3) allows a debtor to settle claims it can assert against third parties but does not allow a debtor to satisfy claims against the debtor (Plan 7.1, D.S. 31-36);

g) Revise the discussion of each proposed settlement described at Plan 7.1(c) and the related discussion at pages 34 and 36 of the Disclosure Statement;

h) Eliminate prospective exculpation (Plan 7.3(l));

i) Disclose the U.S. Trustee's Motion to Appoint Examiner and that the motion was denied;

j) Expand discussion regarding the Participant Investors and why they should be given the exclusive privilege to appoint the proposed Investor Trust Committee (Plan 6.3, D.S. p.28);

k) Discuss how the proposal to appoint a Wind-Down Administrator may constitute appropriate corporate governance under applicable law (Plan Section 7.4, D.S. pp. 69-7);

l) Describe the causes of action that may be available to the Investor Trust and provide some range of estimated value of recovery (D.S. 62-66);

m) Provide disclosure regarding the proposed disposition of Debtors Newbury Common Associates, Newbury Common Member Associates, and Seaboard Realty, LLC who are not Plan Debtors (not currently addressed).

35. In addition to the various tables and schedules that were not included in the filed Plan and Disclosure Statement, the Debtors have included or provided (or agreed to do so) further tables and schedules as follows:

a) A silo by silo analysis itemizing the distribution of proceeds from the sale of the real properties to the distribution scheme of the Plan;

b) List the Mortgage Claims and amount of potential deficiency claims;

c) Identify the source or sources of funding for the Settling Lender Escrow Account and the Investor Trust;

d) Provide an estimate of the dollar amount of claims in each class;

e) The sources and funding of the Wind Down Account;

f) The sources and funding of the amounts to pay Professional Claims;

g) The sources and funding of the amounts to pay the express settlements identified at Plan Section 7.1(b)(c);

a) The Disclosure Statement does not contain sufficient information regarding the proposed Wind Down Administrator or Wind Down Agreement.

II. Release and Exculpation Issues for Confirmation

36. There are numerous ways in which the third party releases, the Debtor releases and exculpations set forth in the Plan are contrary to the standards set forth by this Court in *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011), *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), and other applicable law, as detailed below.

A. Third Party Releases

37. Some Courts in this District have determined that third party releases of non-debtors should be allowed provided that they are consensual. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011), *citing, inter alia, In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (holding that the release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan).

38. There are also certain categories of persons and entities included among the Released Parties, such as the Debtors' directors, officers and employees, that the Third Circuit Court of Appeals and this Court have already determined are not entitled to non-

consensual third party releases. *See Cont'l,* 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"); *Wash. Mut.*, 442 B.R. at 354 ("[T]here is no basis for granting third party releases of the Debtors' officers and directors , ... [as] [t]he only 'contribution' made by them was in the negotiation of the Global Settlement and the Plan, [which] activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and will be exculpated) . . . ."); *In re Genesis Health Ventures,* Inc., 266 B.R. 606–07 (Bankr. D. Del. 2001) ("[T]he officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization."). The same logic applies to third party releases of the Debtors' professionals who, like the Debtors' directors and officers, will be protected by the exculpation provision. *See Wash. Mut.*, 442 B.R. at 354.

39. The Plan includes all Holders of Investor Claims and all Holders of Equity Interests within the definition of Releasing Parties. Unlike all other holders of claims entitled to vote on the Plan, the Holders of Investor Claims and Holders of Equity Interests are *not* provided the opportunity to opt out of the Third Party Releases. The essence of the Plan is thus to effect mutual releases from the Holders of Investor Claims and Holders of Equity interests. This should be spelled out in no uncertain terms for the relevant portions of the creditor and equity holder body.[8]

40. Another effect of this proposal is that imposing involuntary releases upon the Holders effects a discharge. In a liquidating case, the Debtors by statute are not

[8] The U.S. Trustee reserves discussion as to whether or not a proposal for mutual releases may constitute adequate consideration to support a proposed third party release such as the one proposed here.

entitled to a discharge. The Debtors must establish a record supporting the validity of the non-consensual third party releases for each party to be released. The U.S. Trustee reserves argument on this issue until the record at the confirmation hearing is closed.

B. Debtors' Releases

41. The Plan provides releases by the Debtors and their estates of many non-debtor parties, including Holders of Mortgage Claims that do not reject the Plan, the Holders of Investor Claims, Holders of Equity Interests who vote for the Plan, and retained Professionals. Pursuant to *Tribune,* 464 B.R. 126 (Bankr. D. Del. 2011), and *Washington Mutual,* 442 B.R. 314 (Bankr. D. Del. 2011), among others, the five factors set forth in In re *Zenith Elecs. Corp.,* 241 B.R. 92, 110 (Bankr. D. Del 1999) and *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994) must be considered. *See Tribune* 464 B.R. at 186; *Wash. Mut.*, 442 B.R. at 346; *In re Spansion,* 426 B.R. 114, 142-43, n. 47 (Bankr. D. Del. 2010); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004). Neither the Plan nor the Disclosure Statement address whether any of the *Zenith* factors are met for any of the parties who will receive releases from the Debtors. Absent a showing, and appropriate finding by the Court, that each proposed Released Party has made a substantial contribution to the Plan,[9] and that the other elements of *Zenith* have been met, the releases given by the Debtors render the Plan not confirmable.

C. Exculpation

42. Plan Section 11.5 proposes to exculpate parties from conduct taking place during the case, without identifying the exculpated parties, rendering the exculpation

[9] An example of a "substantial contribution" can be found in *Coram*, where this Court, after examining the *Zenith* factors, allowed the debtors to release noteholders who had contributed $56 million in funding to the plan, which funds allowed the debtors to repay in full all creditors other than the noteholders, as well as make a significant distribution to the debtors' shareholders. 315 B.R. at 335.

provision impermissibly broad by including non-estate fiduciaries and covering actions taken not only during the Chapter 11 case, but also pre-petition and post-confirmation. *See Wash. Mut*., 442 B.R. at 350-51 (holding that "[t]he exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers"). *See also In re PWS Holding Corp*., 228 F.3d 224, 246 (3d Cir. 2000) (the creditors' committee, its members and estate professionals may be exculpated under a plan for their actions in bankruptcy case, except for willful misconduct or gross negligence). Additionally, Proposed Plan Revision Section 7.3(m) provides: "In no event shall the Trustee or the Investor Trust Committee or any member thereof be liable for indirect, punitive, special, incidental or consequential damage or loss (including but not limited to lost profits) whatsoever, even if it has been informed of the likelihood of such loss or damages and regardless of the form of action." This sentence vitiates in its entirety the exclusions from exculpation or indemnification for willful misconduct, gross negligence or bad faith.

III. Discharge Issues

A. Bankruptcy Code Section 1141 Issues

43. The Plan is contrary to Section 1141(d)(3) of the Bankruptcy Code, by providing the corporate Debtors with the equivalent of a discharge. Section 7.1(a) of the Plan provides that: "Confirmation will constitute the Bankruptcy Court's approval of the Plan Settlement under Bankruptcy Rule 9019 and section 1123 of the Bankruptcy Code…." Section 1123(b)(3)(A) states that a plan may provide for: "the settlement or adjustment of any claim or interest belonging to the estate;" it does not authorize a plan to force involuntarily a "settlement" of claims against the estate, as doing so would effect a discharge.

IV. Specific Settlement Issues

A. OnBoard Investors, LLC; Ares Management LLC

44. Section 503(b)(3)(D) provides administrative-expense status for the actual, necessary expenses of a creditor, indenture trustee, equity security holder, or ad hoc committee that makes a substantial contribution in a chapter 11 case. Section 503(b)(4) provides administrative expense status for the reasonable fees and actual, necessary expenses of such entity's attorneys and accountants.

45. Section 503(b)(3)(D) must be narrowly construed. *See In re Worldwide Direct, Inc.*, 334 B.R. 112, 122 (Bankr. D. Del. 2005) (quoting *In re Granite Partners*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997)). A benefit that the estate receives as an incident to a creditor's protecting its own interests is not substantial. *See Lebron v. Mechem Financial Inc.*, 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 v. Mechem Financial Inc.*, 27 F.3d at 944 (citations omitted).

74. OnBoard Investors, LLC and Ares Management must prove by a preponderance of the evidence that each has made a substantial contribution. *See In re Buckhead America Corp.*, 161 B.R. 11, 15 (Bankr. D. Del. 1993). Applications for payments on account of alleged substantial contributions must be separately approved by the Court based

on a full evidentiary record and appropriate showing under Section 503(b)(3), rather than simply allowed through acceptance of a plan.

V. Solicitation Procedures Issues

80. The U.S. Trustee has several concerns regarding the Solicitation Procedures Motion.

81. Paragraph 13 of the proposed Solicitation Procedures Order proposes that holders of claims that have been satisfied will not receive voting package. The Motion does not address how any such creditor will be given notice and an opportunity to object that they have been fully satisfied.

82. Paragraph 28 of the proposed Solicitation Procedures Order provides that if there are no votes made in a voting class, the class will be deemed to have accepted the Plan. This is contrary to Bankruptcy Code Section 1126(c) providing that a class of claims accepts a plan if a majority in number and two-thirds in dollar amount of claims of those voting vote for the Plan. If any impaired class votes to accept the Plan, then any other impaired or rejecting classes are subject to the cramdown provisions of Bankruptcy Code Section 1129(b).

83. Paragraph 26(f) of the proposed Solicitation Procedures Order would permit the Debtors y to allow contingent late filed claims to vote if the Debtor consents in writing. Paragraph 40 would allow the Debtors to: "…waive any defect in any Ballot at any time, whether before or after the Voting Deadline, and without notice." The collective effect of these two provisions would permit the Debtors to effectively ignore their own proposed voting rules, presumably to obtain a desired result. This should not be permitted, particularly

in a case where the Debtors lack the oversight of an official committee possessed with fiduciary duties.

CONCLUSION

84. The Disclosure Statement should not be approved, and the Plan should not be confirmed. The Disclosure Statement contains numerous material omissions rendering it inadequate, and the Plan contains provisions rendering it facially unconfirmable.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying approval of the Disclosure Statement, denying the Solicitation Procedures Motion, and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: March 29, 2017
Wilmington, Delaware

Respectfully submitted,

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