IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	:	Chapter 11
In re:	:	
	:	Case No. 16-10283 (LSS)
OUTER HARBOR TERMINAL, LLC	:	
	:	
Debtor.[1]	:	
	:	**Re: D.I. 532 & 537**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTOR'S MOTION FOR ENTRY OF ORDER (A) CONDITIONALLY APPROVING THE COMBINED PLAN AND DISCLOSURE STATEMENT FOR SOLICITATION PURPOSES ONLY, (B) ESTABLISHING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT COMBINED PLAN AND DISCLOSURE STATEMENT, (C) APPROVING THE FORMS OF BALLOTS AND SOLICITATION MATERIALS, (D) ESTABLISHING VOTING RECORD DATE, (E) FIXING THE DATE, TIME AND PLACE FOR THE CONFIRMATION HEARING AND THE DEADLINE FOR FILING OBJECTIONS THERETO, AND (F) APPROVING RELATED NOTICE PROCEDURES

The Official Committee of Unsecured Creditors (the "Committee") appointed in the Chapter 11 bankruptcy case of Outer Harbor Terminal, LLC, debtor and debtor in possession ("Debtor"), hereby submits this objection (the "Objection") to the *Debtor's Motion for Entry of Order (A) Conditionally Approving the Combined Plan and Disclosure Statement for Solicitation Purposes Only, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Combined Plan and Disclosure Statement, (C) Approving the Forms of Ballots and Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time and Place for the Confirmation Hearing and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures* ("Motion"). In support of its Objection, the Committee submits:

[1] The last four digits of the Debtor's federal tax identification number are 2070. The Debtor's principal place of business is located at 1599 Maritime Street, Oakland, CA 94607.

I. INTRODUCTION

The Committee strongly opposes the Motion and approval on any level of the Combined Plan and DS as they are currently drafted. The Committee requests that the Court deny the Motion for at least the following reasons:

- The Debtor's Motion is an attempt to rush confirmation without allowing the input of the Committee.
- The Combined Plan and Disclosure Statement cannot be approved or confirmed if they deprive the Committee of their right under 11 U.S.C. § 1103 to investigate the Debtor's assets.
- The Combined Plan and DS unjustly coerce creditors to provide releases to Debtor and Debtor's insiders without any real justification;
- The Plan and DS Fail to properly describe potential significant avoidance actions against insiders;
- The Plan and DS fail to disclose the significance to unsecured creditors of the allowance of the K-Line claim; and
- Debtor has gerrymandered the classification of claims to cram down interests of general unsecured creditors without their consent.

II. STATEMENT OF FACTS

1. On February 1, 2016 (the "Petition Date"), Debtor filed a voluntary petition for bankruptcy under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). See Docket Number 1.

2. On March 4, 2016, Debtor filed its Statement of Financial Affairs ("SOFA") as required by the Bankruptcy Code. See Docket Number 147.

3. On May 31, 2016, September 28, 2016, and December 22, 2016, Debtor filed motions to extend the periods in which the Debtor is the only party permitted to (i) file a Chapter 11 Plan and Disclosure Statement and (ii) solicit acceptances of those documents (the "Exclusivity Motions"). See Docket Numbers 285, 397, 492.

4. The Exclusivity Motions were each granted (the "Exclusivity Orders"). See Docket Numbers 302, 408, 502.

5. The final Exclusivity Order extended Debtor's exclusive periods within which to file a plan and solicit acceptances to March 27, 2017 and May 26, 2017, respectively.

6. On November 4, 2016, Debtor filed the *Debtor's Objection to Proof of Claim Filed by Kawasaki Kisen Kaisha, Ltd. (Claim No. 22)* (the "K-Line Claim Objection"), which Kawasaki Kisen Kaisha, Ltd. ("K-Line") opposed on December 2, 2016. Debtor filed a reply in support of its objection on January 9, 2017.

7. The K-Line Claim, which was filed on April 4, 2016, originally claimed approximately $13.3 million and was later reduced to approximately $5.4 million.

8. On January 27, 2017, the United States Trustee appointed the Committee.

9. The Committee met and elected its counsel on January 30, 2017.

10. On February 10, 2017, Committee's proposed attorneys each filed employment applications with the Court. These applications are set for hearing on March 10, 2017.

11. On February 13, 2017, Debtor filed the *Debtor's Combined Chapter 11 Plan of Liquidation and Disclosure Statement* (the "Combined Plan and DS").

12. On February 14, 2017, Debtor filed the Motion, which seeks, in part, to conditionally approve the Combined Plan and DS, with a February 28, 2017 objection deadline.

13. On February 21, 2017, the Court ruled on the K-Line Claim Objection and related

pleadings. The Court found that Debtor is liable for the claim and that further proceedings are necessary to determine the proper amount of damages. Memorandum at p. 13 [Dkt. No. 547].

14. On February 28, 2017, K-Line filed *Kawasaki Kisen Kaisha, Ltd.'s Motion for Allowance of Administrative Claim* (the "K-Line Admin Claim Motion") [Dkt. No. 554].

III. ARGUMENT

A. DEBTOR'S MOTION IS AN ATTEMPT TO RUSH CONFIRMATION WITHOUT ALLOWING INPUT FROM THE COMMITTEE

15. This case was filed over a year ago, on February 1, 2016. Since then, Debtor has filed three motions to extend its exclusive period within which to file a Chapter 11 Plan and Disclosure Statement. See Docket Numbers 285, 397, 492. The latest motion was granted on January 9, 2017; it extended Debtor's exclusive period in which to file a plan through and including March 27, 2017. Order Granting the Debtor's Motion for Entry of an Order Further Extending the Exclusive Periods During Which Only the Debtor May File a Chapter 11 Plan and Solicit Acceptances Thereof at ¶ 2 ("Extension Order") [Dkt. No. 502]. It also extended the Debtor's period within which to solicit acceptances of a plan through and including May 26, 2017. Id. At the time of Committee formation, Debtor had yet another exclusivity motion pending in which the Debtor expressly stated it did not intend to file a plan/disclosure statement until June 2017.

16. On January 27, 2017, the Committee in this case was appointed by the United States Trustee. Then, on February 13, 2017, only 17 days after the Committee was appointed and well before the Committee could even have its counsel's employment application heard by the Court, Debtor suddenly files the Combined Plan and DS. It seems that Debtor was in no great rush to confirm a plan until the Committee was appointed. Now, Debtor has not only filed a Combined Plan and DS, but it wants the Court to conditionally approve it immediately so that it

can start soliciting votes.

17. Debtor seems to be pushing this through before the Committee even has time to fully understand the background in this case, let alone the entire Combined Plan and DS and Motion. As stated, Committee has not yet even had its counsel's employment applications heard by the Court. If Debtor is allowed to solicit votes on the Combined Plan and DS so quickly, the Committee will be significantly prejudiced. The process must be slow enough to allow the Committee to understand all of the facts of the case and investigate the substantial potential preferential and/or fraudulent transfers that exist.

B. THE COMBINED PLAN AND DS CANNOT BE APPROVED OR CONFIRMED IF THEY DEPRIVE THE COMMITTEE OF THEIR RIGHT UNDER 11 U.S.C. 1103 TO INVESTIGATE THE DEBTOR'S ASSETS

18. 11 U.S. Code Section 1103 says that …" (c) A Committee appointed under section 1102 of this title may - … (2) investigate the acts, conduct, assets, liabilities and financial condition of the debtor…and any other matter relevant to the case or the formulation of a plan.". The Combined Plan and DS cannot be approved and confirmed if they deprive the Committee of their right to investigate avoidance actions related to the Debtor's insiders. The fact that the Combined Plan and DS grants releases to the insiders instead of assigning the avoidance actions to the Committee for investigation and prosecution should be enough for the Court to deny approval of the Combined Plan and DS and deny confirmation of the Plan.

19. The only way to resolve this issue is to strike any releases to insiders from the Combined Plan and DS and to assign the avoidance actions to the Committee. If the Debtor refuses to make these changes to the Combined Plan and DS, then the Court should allow the Committee a 180 day period to investigate the conduct of the insiders and no plan of reorganization should be confirmed before the 180 day Committee investigation period is up.

C. THE COMBINED PLAN AND DS UNDULY COERCE VOTERS TO RELEASE

POTENTIAL CLAIMS AGAINST DEBTOR AND ITS INSIDERS

20. The Combined Plan and DS provides for what Debtor calls "Third Party Releases." Combined Plan and DS at § XII.C. In this section, the Combined Plan and DS states that various parties, including each holder of an allowed claim that votes or is deemed to vote in favor of plan confirmation, releases any and all claims that they may have against, among others, Debtor and Debtor's insiders. The Third Party Releases (and other release provisions included in the Combined Plan and DS) purport to release Debtor and its insiders from any and all claims arising from all conduct, including pre-petition conduct. Id. This release is purportedly given "for good and valuable consideration, the adequacy of which is hereby confirmed." Id.

21. Earlier in the Combined Plan and DS, Debtor claims that its affiliates (as that term is defined in the Bankruptcy Code) have agreed to release their claims against Debtor in exchange for the Third Party Releases. Id. at § III.F. These "Affiliate Claims" are currently asserted in the amount of $8,187,100, according to Debtor. Id. The Committee is left to assume that Debtor did some sort of analysis that determined the value to the estate of providing the Third Party Releases in exchange for a waiver of the Affiliate Claims. There is no discussion or evidence of any such analysis within the Combined Plan and DS, though. In fact, Debtor sort of slips in the release of pre-petition conduct without ever mentioning the extreme sums transferred by Debtor pre-petition, mostly to the very parties who are being released. There is simply not enough information provided by Debtor to justify the Third Party Releases.

22. Aside from the fact that the Third Party Releases are completely unjustified given the information Debtor has chosen to make available, the procedure that Debtor wants to use to procure the releases is simply wrong. A holder of an allowed claim can only opt out of the Third Party Releases if it abstains from voting on the plan or votes against the plan. Thus, Debtor is

forcing those who vote for the plan to accept the Third Party Releases. Debtor is also forcing those who do not vote for the plan to affirmatively opt out of the Third Party Releases. This is coercive and unjust, particularly where Debtor has not adequately explained why the Third Party Releases are necessary or even helpful to Debtor's successful exit from bankruptcy.

D. THE COMBINED PLAN AND DS MATERIALLY MISREPRESENT DEBTOR'S FINANCIAL POSITION WITH RESPECT TO PROPOSED DISTRIBUTIONS

23. There are two material misrepresentations with respect to Debtor's financial affairs within the Combined Plan and DS. First, the Combined Plan and DS completely fail to mention over $25 million in potentially recoverable transfers that were made to insiders within the one year prior to the Petition Date. Second, Debtor mentions the K-Line claim and refers to ongoing proceedings related to it, but does not adequately address the impact of the K-Line claim being allowed or disallowed in various amounts.

i. The Plan and DS Fail to Properly Describe Potential Significant Avoidance Actions Against Insiders

24. The Committee strongly objects to any approval, conditional or otherwise, of the Combined Plan and DS until they are amended to properly disclose pre-petition payments made to insiders of Debtor. The Combined Plan and DS as currently filed fail to provide "adequate information" to creditors about Debtor's financial picture, in violation of 11 U.S.C. § 1125.[2] In its Statement of Financial Affairs ("SOFA"), Debtor lists payments of over $25 million to insiders made within one year before filing its bankruptcy case. See SOFA at Part 2, Question 4

[2] The Bankruptcy Code defines "adequate information" as it pertains to a disclosure statement as: 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 the 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).

and corresponding attachment thereto [Dkt. 147]. A review of the Combined Plan and DS reveals that these payments are not even mentioned.

25. In fact, the Combined Plan and DS fail to mention anything about adversary proceedings or avoidance actions at all. There is no disclosure of the $25 million transferred to insiders, which is inexcusable given it may be the most substantial asset left in Debtor's estate. These transfers to insiders need to be investigated by a third party as possible preferential and/or fraudulent transfers. As discussed infra, the Committee intends to investigate them in the course of its duty to the creditor body.

26. The only responsible thing to do with what is perhaps Debtor's most valuable asset is to thoroughly investigate it prior to soliciting any votes. This would allow Debtor to give creditors a full picture of exactly what might be recoverable from insiders, which would provide creditors with a more complete and accurate background before voting on a Plan. Debtor is too conflicted to attempt to investigate any transfers to insiders, but that does not mean that Debtor can fail to disclose them. Debtor must give the Committee time to fulfill its duty and investigate these transfers to find out what they are worth before soliciting any votes.

27. The Committee intends to and will investigate the $25 million in transfers to insiders that were made in the year prior to the Petition Date. However, the Committee is also concerned that there may be additional recoverable transfers to insiders that occurred within the four-year period covered by California's version of the Uniform Fraudulent Transfer Act ("UFTA"). No transfers from this period of time have been disclosed by Debtor in its SOFA, the Combined Plan and DS, or anywhere else. Any and all potentially recoverable preferential or fraudulent transfers must and will be investigated. It is imperative that these investigations take place before any solicitation of votes. Otherwise, Debtor will be presenting a very incomplete

and misleading picture of its finances to creditors, in violation of the Bankruptcy Code. 11 U.S.C. § 1125(b).

ii. The Plan and DS Fail to Disclose the Significance to Unsecured Creditors of the Allowance of the K-Line Claim

28. The K-Line Claim was originally filed in this case as a general unsecured claim, which would put it on equal footing with the rest of the general unsecured creditors in terms of receiving distributions. However, following the entry of the Memorandum by the Court finding that Debtor is liable for some amount of damages on the K-Line Claim, K-Line filed the K-Line Admin Claim Motion. All of this took place after Debtor filed its Combined Plan and DS and Motion, despite Debtor knowing that proceedings related to K-Line's large claim were ongoing.

29. Whether due to oversight, overconfidence in its K-Line Claim Objection, or something else, Debtor fails to take into account that the K-Line Claim might eventually be found to be an administrative claim in the Combined Plan and DS. It fails to warn general unsecured creditors of the consequences of the K-Line claim being paid ahead of the claims of general unsecured creditors. If the K-Line claim is allowed as an administrative claim, the effect on distributions to general unsecured creditors would be great. The Combined Plan and DS must be amended to disclose the potential risks.

E. DEBTOR HAS GERRYMANDERED THE CLASSIFICATION OF CLAIMS TO CRAM DOWN INTERESTS OF GENERAL UNSECURED CREDITORS WITHOUT THEIR CONSENT

30. The Combined Plan and DS provide seven separate classes of claims. Four of the seven classes are listed as impaired: Class 4 – Port Claim; Class 5 – General Unsecured Claims; Class 6 – Affiliate Claims; and Class 7 – Equity Interests. Combined Plan and DS at § V. The Port Claim listed in Class 4 was created by a settlement agreement between Debtor and the Port of Oakland (the "Port"). See Order Approving (I) Settlement Agreement with the Port of

Oakland, (II) Rejection of Agreements with the Port of Oakland and (III) Abandonment of Surplus Assets (the "Port Order") [Dkt. No. 173]. The Settlement Agreement itself is attached to the Port Order at Exhibit 1.

31. The Port had originally filed a claim against Debtor in a substantial amount for its alleged prepetition damages. Debtor and the Port negotiated for some time to resolve the claim and came to the Settlement Agreement. The main exchanges in the Settlement Agreement involved Debtor surrendering certain equipment and making certain payments to the Port and the Port releasing its claim against Debtor. However, instead of taking a complete release, as would have been expected, Debtor instead granted the Port a $1.00 claim. The Settlement Agreement explicitly provides that the $1.00 Port claim would be a separately classified, impaired claim and that the Port would agree to support any plan filed by Debtor, regardless of its contents. Settlement Agreement at ¶ 19.

32. The Bankruptcy Code requires, when a plan has a class of impaired claims, that "at least one class of claims that is impaired under the plan has accepted the plan" before the plan can be confirmed. 11 U.S.C. § 1129(a)(10). If a debtor's actions allow the debtor to reclassify claims "in order to reduce the number of votes required for confirmation," that is impermissible class gerrymandering. In re Machne Menachem, Inc., 223 Fed.Appx. 119, 121 (3d Cir. Apr. 19, 2007).

> The critical confirmation requirements set out in . . . Section 1129(a)(10) . . . would be seriously undermined if a debtor could gerrymander classes. A debtor could then construct a classification scheme designed to secure approval by an arbitrarily designed class of impaired claims even though the overwhelming sentiment of the impaired creditors was that the proposed reorganization of the debtor would not serve any legitimate purpose.

John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Associates, 987 F.2d 154, 158 (3d Cir. 1993). In addition to the Third Circuit, the Fourth, Fifth, and Eighth Circuits have all

rejected debtors' attempts to force a cram down on unwilling impaired creditors by creating false classes. See In re Bryson Properties, XVIII, 961 F.2d 496 (4th Cir. 1992), cert. denied, 506 U.S. 866 (1992); In re Greystone III Joint Venture, 948 F.2d 134 (5th Cir. 1991), cert. denied, 506 U.S. 821 (1992); In re Limber Exch. Bldg. Ltd. Partnership, 968 F.2d 647 (8th Cir. 1992).

33. Port's $1.00 claim is specifically designated as an impaired, separate class that is deemed to accept the Plan in the Settlement Agreement, which was signed almost a year before the Plan was even filed with the Court. The creation of this claim and its assignment to its own class are transparent attempts by Debtor to gerrymander classes. Debtor is clearly setting itself up for success with its plan no matter how general unsecured creditors feel about it. This behavior exhibits the ultimate bad faith by Debtor, which is violating its fiduciary duty to serve its creditor body. As such, the Combined Plan and DS violate the Bankruptcy Code and is ultimately unconfirmable. 11 U.S.C. § 1129(a)(3).

i. If Allowed to Remain as a Separate Class/Claim, the Port of Oakland Class/Claim Should be Deemed an Unimpaired Class/Claim for Voting Purposes

34. As additional evidence of Debtor's bad faith, it is unclear if the Port claim even is impaired. It is listed as impaired because the Settlement Agreement states that it will be listed that way and because it serves Debtor's interest. However, the Port bargained for and agreed in the Settlement Agreement to accept a $1.00 claim. The Combined Plan and DS provide that the Port will have a $1.00 claim. There is no showing that the claim is impaired at all. Thus, Class 4 should be deemed unimpaired if it is permitted to remain.

IV. CONCLUSION

Wherefore, the Committee respectfully requests that the Court deny the Motion and grant any other and further relief that it may deem just and proper.

DATED: February 28, 2017
Wilmington, Delaware

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