

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	§ Chapter 11
	§ Case No. 16-11501 (CSS)
MAXUS ENERGY CORPORATION, <i>et al.</i> ,	§
	§ Jointly Administered
Debtors.	§
	§ Re: Docket No. 1058

**LIMITED OBJECTION OF LAKEVIEW BLUFFS, LLC TO DISCLOSURE
STATEMENT FOR DEBTORS' PROPOSED PLAN PURSUANT TO CHAPTER 11 OF
THE UNITED STATES BANKRUPTCY CODE**

Lakeview Bluffs, LLC ("Lakeview Bluffs"), by and through its undersigned counsel, submits this limited objection to approval of the Disclosure Statement for the proposed Plan of the Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code as follows:

Introduction

A. Summary of Lakeview Bluffs' Objection to Disclosure Statement

1. On June 17, 2016 (the "Petition Date"), Tierra Solutions, Inc.¹ (the "Debtor" or "Tierra") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. Lakeview Bluffs and Tierra are parties to a 99-year Ground Lease Agreement dated as of February 21, 2001, as amended by letter agreement on April 8, 2003, and as further amended by a Second Amendment dated March 22, 2004 and Third Amendment dated January 29, 2007 (collectively, the "Ground Lease Agreement") with regard to property located in Painesville, Ohio, presently owned by Tierra. Lakeview Bluffs is the Lessee, and Tierra is the Lessor.

¹ The last four digits of the Debtor's tax payer identification number are 0498. The Debtor's address is 10333 Richmond Avenue, Suite 1050, Houston, Texas 77042.

3. In Section 1 of the Ground Lease Agreement, Tierra agreed as follows:

Lessor demises and leases to Lessee and Lessee leases and takes from Lessor all those certain premises (the "Leased Premises") consisting of (i) the Premises together with all easements appurtenant to the Premises, (ii) the improvements located thereon, and (iii) all rights, interests, duties and responsibilities accruing to the beneficial use and enjoyment of the Premises.

Lessor shall have the right and option, upon written notice (the "Additional Premises Notice") to Lessee, to include within the Leased Premises additional land within the Painesville Site which Lessor acquires after the date hereof. The Additional Premises Notice shall describe the additional land to be included within the Leased Premises and upon the giving of the Additional Premises Notice, the additional land described in the Additional Premises Notice shall, from and after the date of such notice, be deemed to be a part of the Leased Premises for all purposes hereunder. At the request of Lessor, Lessee shall execute an amendment to this Lease evidencing the inclusion of such additional land as a part of the Leased Premises.

4. In Section 9(b), (c) and (d) of the Ground Lease Agreement, Tierra agreed as follows:

(b) Lessor shall hold harmless and indemnify Lessee from and against the following:

(i) Claims against Lessee for injuries or damages arising out of or resulting from the condition of the Leased Premises (including, without limitation, its environmental condition and Claims that Lessee is an owner or operator or other potentially responsible party of the Leased Premises pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as amended or other Applicable Laws) to the extent such condition existed prior to the Effective Date, except to the extent any such injuries or damages result from the negligence or willful misconduct of Lessee;

(ii) Claims against Lessee arising out of any willful misconduct or negligence of Lessor or any breach by Lessor of any warranties, representations or obligations hereunder; provided, however, except as provided in Paragraph 9(b)(iii) below, such indemnification shall not apply to the extent any Claims result from, are attributable to, or arise out of: (a) any willful misconduct or negligence of Lessee or its employees or agents; (b) any delay

attributable to Lessee's conduct; or (c) any breach by Lessee of any warranties, representations or obligations hereunder; and

(iii) Claims against Lessee asserted by any of Lessor's employees, invitees, licensees, agents or representatives (and any such person's spouse or other relatives) arising out of or relating to the use or occupancy of the Leased Premises EVEN IF SUCH CLAIM IS CAUSED OR ALLEGED TO BE CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (BUT NOT THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT) OF LESSEE OR ITS EMPLOYEES OR AGENTS, AND WITHOUT REGARD TO WHETHER A CLAIM AGAINST LESSEE IS THE RESULT OF AN INDEMNIFICATION AGREEMENT WITH A THIRD PARTY.

(c) Lessor specifically releases Lessee and Lessee's shareholders, members, officers, employees, Affiliates and agents from and waives any private right of action provided under CERCLA, common law and any other Environmental Laws to recover or be reimbursed for any liabilities, costs, fees or expenses associated with the presence, prior to the Effective Date, of any Hazardous Materials in, on, under, about or from the Leased Premises. Lessor agrees to accept complete responsibility for the allocation of any response costs under CERCLA, common law and any other Environmental Laws associated with the presence, prior to the Effective Date, of any Hazardous Materials in, on, under, about or from the Leased Premises.

(d) Lessor's and Lessee's indemnities and obligations under this Paragraph 9 shall survive the termination or expiration of this Lease.

5. In Section 10(d) of the Ground Lease Agreement, Tierra agreed as follows:

(d) Lessor shall be entitled to assign or transfer, without the consent of Lessee, its interest in this Lease to its Affiliates, any successors by merger, consolidation or acquisition or to any third party purchaser or successor owner of the Leased Premises; provided, however, no such assignment shall release or relieve Lessor from the performance of the obligations of Lessor hereunder, it being intended that Lessor shall remain liable therefor notwithstanding any such assignment unless otherwise agreed to by Lessee.

6. In Section 11(a)(v) of the Ground Lease Agreement, Tierra agreed as follows:

11. Warranties and Representations.

(a) Lessor represents, warrants and covenants to Lessee that:

...

(v) Lessor and those persons executing this Lease on its behalf have the right and lawful authority to enter into this Lease and perform Lessor's obligations hereunder, and Lessor warrants, represents and covenants that, so long as Lessee is not in default hereunder beyond any applicable cure period, Lessee shall have quiet and peaceful use, enjoyment and occupancy of the Leased Premises.

7. In the Ground Lease Agreement, Tierra agreed to a disposition formula and a termination buyout fee.

8. In Section 24(c) of the Ground Lease Agreement, Tierra agreed as follows:

(c) If Lessor exercises the Lessor Option or if Lessee exercises the Lessee Option, Lessor shall be obligated to pay to Lessee a "Lease Termination Buyout Price" in the following amount:

(i) the Lease Termination Buyout Price shall be \$1,000 if a Lessor Option Event described in Paragraph 24(a)(i), (iii) or (iv) occurs; provided, however, that Lessor shall be obligated to pay the Appraised Value Lease Termination Price for any portion of the Leased Premises which: (1) has received funding pursuant to the Clean Ohio Fund or other Grant; or (2) has been released from the DFFO; or

(ii) the Lease Termination Buyout Price shall be the Appraised Value Lease Termination Price if (1) the Lessor Option is exercised by Lessor pursuant to Paragraph 24(a)(ii) or (v), or (2) the Lessee Option is exercised by Lessee pursuant to Paragraph 24(b).

9. In Section 24(d) of the Ground Lease Agreement, Tierra agreed as follows:

(d) The Lessor Option may be exercised by Lessor at any time commencing with the occurrence of a Lessor Option Event and for so long as such Lessor Option Event continues by giving written notice thereof (the "Lessor Option Notice") to Lessee. The Lessee Option may be exercised by Lessee at any time commencing with the occurrence of

Lessee Option Event and for so long as such Lessee Option Event continues by giving written notice thereof (the "Lessee Option Notice") to Lessor. If the Lease is terminated as a result of the occurrence of a Lessor Option Event described in Paragraph 24(a)(i), (iii) or (iv), this Lease shall terminate upon the giving of the Lessor Option Notice and the following provisions shall not apply, except with respect to any portion of the Leased Premises which has received funding pursuant to the Clean Ohio Fund or other Grant or has been released from the DFFO; otherwise the following provisions shall apply. If the Lease Termination Buyout Price is the Appraised Value Lease Termination Price, then, immediately following the giving of either a Lessor Option Notice or a Lessee Option Notice, the Appraised Value of the Leased Premises shall be determined in accordance with the provisions of Paragraph 25 hereof. The closing (the "Lease Termination Closing") whereby the Lease shall be terminated shall be held at the offices of Lessor on a mutually acceptable date which is (i) if the Lease Termination Buyout Price is the Appraised Value Lease Termination Price, not more than sixty (60) days after the date that the Appraised Value of the Leased Premises is determined pursuant to Paragraph 25 hereof, or (ii) if the Lease Termination Buyout Price is \$1,000, not more than thirty (30) days after the giving of the Lessor Option Notice or Lessee Option Notice, as applicable. At the Lease Termination Closing, Lessee shall execute a Lease Termination Agreement terminating the Lease, together with such other instruments and documents as may be necessary or desirable to effectuate the termination of the Lease and release of any interests of Lessee in and to the Leased Premises. The Lease Termination Buyout Price shall be paid by Lessor to Lessee at the Lease Termination Closing by cashier's check, wire transfer of federal funds or other immediately available funds.

10. In Section 25 of the Ground Lease Agreement, Tierra agreed as follows:

25. Appraisal Provision. If the Lease Termination Buyout Price is the Appraised Value Lease Termination Price, then, immediately following the giving of either a Lessor Option Notice or Lessee Option Notice pursuant to Paragraph 24(d) above, Lessor and Lessee shall attempt to agree in respect of the Fair Market Value of the Leased Premises (or the then remaining portion thereof subject to the terms of this Lease). If Lessor and Lessee are able to agree in respect of the Fair Market Value, then the Appraised Value for purposes hereof shall be the amount agreed upon by Lessor and Lessee as the Fair Market Value. If Lessor and Lessee are unable to so agree within twenty (20) days after the giving of either a Lessor Option Notice or Lessee Option Notice, as applicable, then each of Lessor and Lessee, with ten (10) days after the expiration of such twenty (20) day period, shall appoint an appraiser who shall be a member of the American Institute of Real Estate Appraisers with at least five (5) years experience in appraising commercial real estate property ("MAI"),

and shall notify the other party in writing of the name and address of said appraiser. In the event a party fails or refuses to appoint an appraiser and provide written notice thereof to the other party within such ten (10) day period, the single appraiser appointed shall constitute the sole appraiser for purposes of determining the Appraised Value. In the event both parties appoint an appraiser in accordance with the procedures herein set forth, the two (2) appraisers shall immediately proceed independently to determine the Fair Market Value of the Leased Premises (or the then remaining portion thereof subject to the terms of this Lease) and shall complete their appraisals and deliver a copy thereof to each party within forty-five (45) days after their appointment. If the higher of the two appraisals is no more than 110% of the lower appraisal, the Fair Market Value shall be the average of the two appraisals. If the higher of the two appraisals is more than 110% of the lower appraisal, the two appraisers shall together within fifteen (15) days thereafter appoint a third appraiser who shall be a MAI and a majority of the three (3) appraisers, within forty-five (45) days after the appointment of the third appraiser, shall determine the Fair Market Value and provide written notice thereof to each party. In the event the two (2) appraisers are unable to agree upon a third appraiser, either party shall have the right, upon ten (10) days prior written notice to the other party, to apply to the American Institute of Real Estate Appraisers or to the presiding judge of a court of general jurisdiction of the county in which the Leased Premises are located, or other appropriate tribunal, for the appointment of the third appraiser. In the event a majority of the three (3) appraisers are unable to agree upon the Fair Market Value and provide written notice thereof within forty-five (45) days after the appointment of the third appraiser, then the third appraiser shall provide to each party a copy of the written appraisal of the third appraiser, and the amount obtained by averaging the three (3) appraisals shall constitute the Fair Market Value for purposes hereof. Each party agrees to pay its respective appraiser's fees plus ½ of the third appraiser's fees if appointed plus all cost and attorneys fees incurred by it in any jurisdiction or any proceeding before American Institute of Real Estate Appraisers which is not attributable to the default of the other party. The determination of Appraised Value in accordance with the foregoing shall be final for purposes hereof.

11. Tierra and Lakeview Bluffs entered into a Memorandum of Lease on July 22, 2008 effective February 21, 2001, which was recorded with the Lake County Ohio Recorder's Office on August 1, 2008, File No. 2008R021818. A copy of the Memorandum of Lease is attached to Lakeview Bluffs' Proof of Claim (No. 104) as Exhibit C.

12. As of the date of this Limited Objection, Tierra has not yet stated whether it will

assume or reject the Ground Lease Agreement. Unless Tierra fully and completely honors all of the terms of the Ground Lease Agreement (as amended), and in accordance with the terms of the Ground Lease Agreement (as amended), Lakeview Bluffs has a secured claim in an amount presently estimated to equal to \$275,199,000.00, less any amounts that Tierra is allowed to deduct in accordance with the Ground Lease Agreement (as amended). Unless Tierra fully and completely honors all of the terms of the Ground Lease Agreement (as amended), and in accordance with the terms of the Ground Lease Agreement (as amended), to the extent that Lakeview Bluffs is not secured on part of all of its claim, Lakeview Bluffs has an administrative priority claim in an amount presently estimated to equal to \$275,199,000.00, less any amounts that Tierra is allowed to deduct in accordance with the Ground Lease Agreement (as amended). Unless Tierra fully and completely honors all of the terms of the Ground Lease Agreement (as amended), and in accordance with the terms of the Ground Lease Agreement (as amended), to the extent that Lakeview Bluffs is not secured on part of all of its claim or does not have administrative priority as to its claim, Lakeview Bluffs has an unsecured claim in an amount presently estimated to equal to \$275,199,000.00, less any amounts that Tierra is allowed to deduct in accordance with the Ground Lease Agreement (as amended).

13. The Disclosure Statement fails to satisfy the purpose of 11 U.S.C. § 1125 because it is impossible to determine what treatment Lakeview Bluffs will receive under the Plan. Quite simply, there is no mention of the Ground Lease, the indemnity obligations under the Ground Lease, or how the Debtors' ongoing obligations under the Ground Lease will be treated at all in the Disclosure Statement. Thus, it is unclear whether the Debtor intends to honor its financial and contractual obligations under the Ground Lease after emerging from bankruptcy. To the extent the Ground Lease is assumed or "passes through" bankruptcy in

full force and effect, unmodified and unimpaired by the Plan, it is unclear whether Lakeview Bluffs will have priority claims under 11 U.S.C. §§ 503(b) and 507(a)(1).

Objections to Disclosure Statement

B. General Requirements of Adequate Information.

14. Section 1125(b) of the Bankruptcy Code provides:

An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

11 U.S.C. § 1125(b). “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 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.

11 U.S.C. § 1125 (a)(1). *See also Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) (providing that the information required will necessarily be governed by the circumstances of the case); *In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 29 (S.D.N.Y. 1995) (same). The determination of what constitutes adequate information is subjective, and within the discretion of the Bankruptcy Court. *See Ionosphere Clubs*, 179 B.R. at 29. A disclosure statement should not be approved if it fails to provide sufficient information about risks regarding the means by which a plan is to be funded. *See In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990). A disclosure statement must contain all material information relating to the risks posed to

creditors and equity holders under the proposed plan of reorganization. *See In re Unichem Corp.*, 72 B.R. 95 (Bankr. N.D. Ill. 1987).

C. The Disclosure Statements Fails to Adequately Describe the Proposed Treatment of Lakeview Bluffs Under the Plan.

15. Simply stated, the Disclosure Statement fails to specify the treatment of Lakeview Bluffs under the Plan. Will the Ground Lease be assumed? Will the relationship be unimpaired by the bankruptcy? Do the Debtors seek to impair Lakeview Bluffs' right to use the property that is the subject of the Ground Lease? Are Lakeview Bluffs' indemnity rights as to third parties preserved? The Disclosure Statement does not provide adequate information as to how the Debtor intends to address its contractual obligations to Lakeview Bluffs.

16. Ideally, the Disclosure Statement should provide that Lakeview Bluffs is a holder of a secured claim under the Plan to the extent of the value of its collateral and otherwise is a holder of an administrative claim against the Debtors' estates. Furthermore, the Plan should not prejudice, impair, waive, limit or otherwise affect the respective rights, claims and defenses of Lakeview Bluffs regarding any agreement or collateral that secures Lakeview Bluffs' claims. The Plan should not release, compromise, or otherwise affect in any way Lakeview Bluffs' rights. The Debtors should agree that the Debtors should not be entitled to transfer the property that is the subject of the Ground Lease unless and until Lakeview Bluffs has been paid all amounts due to Lakeview Bluffs or otherwise been provided with adequate protection that Lakeview Bluffs' rights under Section 365(h) of the Bankruptcy Code are not being impaired.

Reservation of Rights

17. Lakeview Bluffs does not waive any, and expressly reserves all, of its rights, defenses, limitations and/or claims under its Ground Lease, applicable law or otherwise. Further, Lakeview Bluffs reserves all of its rights to raise the issues contained in this limited objection and any other related issues in any contested matter and/or adversary proceeding including, without limitation, objections to confirmation of the Plan. Lakeview Bluffs reserves its rights to amend, modify or supplement this limited objection in response to, or as a result of, any discovery being conducted in connection with confirmation of the Plan and/or other submission in connection with the Plan or this bankruptcy case filed by any other party in interest. Finally, Lakeview Bluffs reserves its right to adopt any other objections to approval of the Disclosure Statement filed by any other party in interest.

D. Conclusion

For the reasons set forth above, the Disclosure Statement fails to provide adequate information about material aspects of the Plan and fails to disclose material risk factors associated with the Plan. As a result, the Disclosure Statement does not satisfy the minimum standards required by Section 1125 of the Bankruptcy Code, and should not be approved.

Dated: April 12, 2017
Wilmington, DE

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CERTIFICATE OF SERVICE

I, Christopher P. Simon, hereby certify that on this 12th day of April, 2017, I caused copies of the *Limited Objection of Lakeview Bluffs, LLC to Disclosure Statement for Debtors' Proposed Plan Pursuant to Chapter 11 of the United States Bankruptcy Code* to be served on the below parties via first class mail:

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