IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: REAL INDUSTRY, INC., *et al.*,[1] Debtor.	Chapter 11 Case No. 17-12464 (KJC) Jointly Administered **Related D.I. 529**

AD HOC COMMITTEE OF EQUITY SECURITY HOLDER'S OBJECTION TO DEBTOR'S MOTION FOR AN ORDER (I) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF REAL INDUSTRY'S PROPOSED PLAN OF REORGANIZATION, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (V) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND (VI) GRANTING RELATED RELIEF

The Ad Hoc Committee of Equity Security Holders of Real Industry (the "Ad Hoc Committee"), by and through its undersigned co-counsel, hereby submits this objection (this "Objection") to the *Debtor's Motion for Entry of an Order (A) Approving the Adequacy of Disclosure Statement, (B) Approving the Solicitation and Notice Procedures With Respect to Confirmation of Real Industry's Proposed Plan of Reorganization, (C) Approving the Form of Ballots and Notices in Connection Therewith, (D) Scheduling Certain Dates With Respect Thereto, and (E) Granting Related Relief* [D.I. 529]. In support thereof, the Ad Hoc Committee respectfully states as follows:

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[1] **This objection concerns only Real Industry**. The Debtors jointly administered in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Real Industry, Inc. (3818), Real Alloy Intermediate Holding, LLC (7447), Real Alloy Holding, Inc. (2396), Real Alloy Recycling, Inc. (9798), Real Alloy Bens Run, LLC (3083), Real Alloy Specialty Products, Inc. (9911), Real Alloy Specification, Inc. (9849), ETS Schaefer, LLC (9350), and RA Mexico Holding, LLC (4620). The principal place of business for the Real Alloy Debtors is 3700 Park East Drive, Suite 300, Beachwood, Ohio 44122.

PRELIMINARY STATEMENT

1. On March 1, 2018, pursuant to its agreement with 210 Capital LLC ("210 Capital") and Goldman Sachs Asset Management L.P. or its designee ("GSAM"), Real Industry, Inc. ("Real Industry" or the "Debtor") and its co-proponents, 210 Capital and GSAM (collectively, with the Debtor, the "Proponents"), filed their Plan of Reorganization for Real Industry, Inc. (the "Plan") [D.I. 527] pursuant to chapter 11 of title 11 of the United States Code, §§ 101–1532, as amended (the "Bankruptcy Code") and the disclosure statement with respect to the Plan [D.I. 528] (the "Disclosure Statement").

2. The Disclosure Statement should not be approved because it (a) does not provide "adequate information" as required by section 1125 of the Bankruptcy Code and (b) relates to a Plan which is patently unconfirmable because, among other things, it contains impermissible third-party releases that would prohibit the shareholders (and others) from asserting future claims against non-debtor third parties, as well as overly broad releases by the Debtor to a host of third parties. The treatment of shareholders in the case to date and the proposed procedures lead to the inescapable conclusion that the Plan was filed in bad faith.

3. Although the Proponents extended the filing date for two weeks beyond the deadline set by the 210/GSAM financing and despite its length, the Disclosure Statement that was filed is little more than a placeholder. To cite a just few examples of the material omissions or misleading information marring the Disclosure Statement:

- The Disclosure Statement lacks any financial information that would demonstrate that Proponents would be able to meet the payment obligations under the Plan and cover necessary post-emergence operations.

- There is little or no information at all about either (a) claims against the Debtor in any class or (b) claims the Debtor has against other parties.

- The Disclosure Statement "describes" the settlement with the Preferred Shareholder and the RAIH Recovery by merely repeating the single paragraph provisions that appear in the Plan.

- There is no justification or explanation in the Disclosure Statement for the expansive releases and other protections for current and former officers and directors, among many other non-debtor parties.

- The Debtor touts plan support agreements between the co-proponent and certain shareholders but refuses to disclose them or the identity of the parties.

- The Disclosure Statement fails to mention the Ad Hoc Committee's motion to terminate exclusivity to permit it to file a competing plan, which is substantially less dilutive and leaves the company in a superior position to make acquisitions in the future.

- Although the Disclosure Statement is the first disclosure about the 210 Capital/GSAM financing and equity acquisition, the transactions are only briefly summarized. The Disclosure Statement contains no information about the co-proponents or their plans for the Reorganized Debtor.

- The Disclosure Statement is riddled with incomplete and extremely misleading voting instructions for shareholders that would invalidate the votes of the owners of the shares held in street name that return their ballots directly to the Solicitation Agent based following on these faulty instructions.

4. Each of the Ad Hoc Committee and the U.S. Trustee provided the Debtor with comments to and blacklined versions of the Disclosure Statement and the proposed solicitation procedures. No doubt in the weeks between the filing and the hearing, the Proponents will address certain of these material omissions and the misleading instructions. To the extent that any Plan supplements, or amendments to the Disclosure Statement or Plan may be filed after the objection deadline, the Ad Hoc Committee reserves the right to supplement this objection at or before the hearing.

5. Even if the Proponents cure the defects in disclosure, the Disclosure Statement should not be approved because it relates to a Plan that is patently

unconfirmable and therefore, it would be a waste of resources to move forward with solicitation such that the Court may consider these deficiencies at the disclosure stage. In particular, the Proponents did not propose the Plan in good faith. Instead, they moved forward with a highly dilutive Plan without notice to the shareholders; they opposed shareholder representation; they withheld material information from the Court and the shareholders; and they are seeking to confirm a Plan in violation of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and shareholder's due process rights. To protect the parties who orchestrated and effected these transactions in violation of their duty to shareholders, the Plan provides improper broad overlapping exculpations, Debtor Releases and non-consensual Third Party Releases.

6. Finally, the Proponents' solicitation procedures should not be approved because they are designed to both disenfranchise the common shareholders and coerce an improper third party release. The Proponents ask the Court to approve an abbreviated twenty three day voting period. For those shareholders that hold their shares in street name the voting period is substantially shorter than twenty three days. Receipt of the solicitation package through the nominees may take as long as 16 days. See Declaration of Kenneth Grossman filed simultaneously herewith (the "Grossman Declaration"). The ballots of the beneficial owners must be returned to the nominees for validation and tabulation. In the final step, the nominees must return the master ballot to the Solicitation Agent. The transmission process alone is likely to exceed the entire voting period proposed by the Proponents. Accordingly, the procedures should not be approved solely on the grounds that the dramatically shortened voting period violates the Bankruptcy Rules and the due process rights of the shareholders.

7. Moreover, these procedures should not be approved because they force a non- consensual release of third parties by shareholders. The Plan ties return of the ballots to an expansive third party release. By virtue of the fact that shareholders may not receive the ballot in time to meet the unreasonably short voting deadline, shareholders who "receive a ballot but abstain from voting on the Plan" may actually include a large number of beneficial owners who would not consent to the release, but have no practical opportunity to opt out.

8. For these reasons, as more fully discussed below, the Ad Hoc Committee requests that the Court deny approval of the Disclosure Statement and the solicitation procedures.

RELEVANT FACTS

The Debtor's Notice to Shareholders Has been Selective and Inadequate

9. Throughout this case, the Debtor has been extremely selective in its notice to shareholders. The most significant notices with respect to the relationship among the co-proponents were never served on shareholders.

10. On the Petition Date, the Debtor filed a motion for order approving notification and hearing procedures for certain transfers and declarations of worthlessness with respect to stock [D.I. 12]. In the motion the Debtor sought: (a) approval for the procedures related to certain transfers of, or declarations of worthlessness with respect to stock; (b) enforcement of the prepetition Bylaw Protections and Rights Agreement Protections; and (c) an order directing that any purchase, sale, or other transfer of, or declaration of worthlessness with respect to Stock in violation of the Procedures shall be null and void *ab initio*. According to the *Affidavit of Service* filed on November 27, 2017 [D.I. 72], Prime Clerk served the *Notice of (A) Disclosure Procedures Applicable to*

Certain Holders of Stock, (B) Disclosure Procedures for Transfers of and Declarations of Worthless with Respect to Stock, and (C) Final Hearing on the Application Thereof [D.I. 63] (the "Notice of Interim NOL Order") on the both registered holders of the Debtor's common stock and the Equity Nominees Service list.

11. The notice was calculated to reach the registered holders—individuals or entities that hold the shares in their own name and appear on the registered holder list maintained by a transfer agent. On December 1, 2017, Real Industry filed a list of the registered equity security holders [D.I. 97]. The list includes 765 individual small holders, who hold in the aggregate approximately 200,000 shares, while Cede & Co., the nominee for Depository Trust Company ("DTC"), which holds 28,606,519 shares. Clearly, these holders have been known to the Debtor since the commencement of the case.

12. The notice of the trading prohibition and other shareholder restrictions was also intended to reach the vast number of Real Industry common shares that are held by financial institutions and brokers (the "DTC Participants") that process and clear trades through DTC on behalf of beneficial owners. Although the beneficial owners of the shares held by various DTC Participants are not known to the Debtor, the process by which these individuals and entities are to receive proper notice through the DTC Participants was certainly known to the Debtor. The Debtor properly served both the registered holders and the equity nominee list one time on or about December 1, 2017 to limit the shareholders' trading rights and the ability to take worthless stock deductions. In sum, when the Debtor wanted to restrict the shareholders, it knew how to effect proper service.

13. However, on December 27, when the Debtor filed a motion [D.I. 207] for approval of $4 million of debtor in possession financing with an outside investor, Goldman Sachs & Co. LLC ("Goldman"), which included a commitment from the lender to acquire 49% of the common shares subject to lender-approved milestones to confirmation of a plan, the Debtor did not serve notice of the proposed transactions on the shareholders.

14. On the same date that the Ad Hoc Committee filed its objection to the Goldman financing, the Debtor filed a motion for approval of an **unsolicited** proposal from 210 Capital and another Goldman affiliate (the "210/GSAM Proposal"). The terms offered by the 210/GSAM proposal increased the obligations of the Debtor for unnecessary financing, preserved the lender advantages, including plan approval rights, sealed Goldman's right to finance future acquisitions, and substantially diluted the existing shareholders. The agreement with 210 Capital changed again at the hearing on approval of the financing and gave 210 Capital a break-up fee that included 49% of the common stock. According to the *Affidavit of Service* [D.I. 360] regarding the *Notice of Filing of Revised Proposed Real Industry, Inc. DIP Financing Order and Related Documents* [D.I. 329] and the *Affidavit of Service* [D.I. 408] regarding the *Notice of Filing of Final Real Industry, Inc. DIP Credit Agreement* [D.I. 394], none of the iterations of the financing proposal and equity disposition were served on the shareholders. The Debtor served only the core service list, which consists almost in its entirety of parties in interest in the Real Alloy cases. The Debtor also placed the Real Alloy Creditors' Committee in the role of observer and monitor over DIP expenses and trading violations.

15. As the Court will recall, the Ad Hoc Committee objected to Debtor's proposed notice with respect to the DIP Financing and the equity commitment and the Debtor vigorously opposed noticing the shareholders. In fact, in retrospect, the Debtor converted its burden to provide adequate notice to shareholders into the Ad Hoc Committee's obligation to object timely to inadequate notice. Moreover, the Debtor failed to disclose to the Court that they had prepared and used a service list for the equity holders the previous month. As a result, the Debtor were able to move forward with the 210 Capital/GSAM transaction without notice to constituents most directly affected by the transaction.

The Debtor Misled the Parties With Respect to the Aleris Interest

16. On February 26, 2018, this Court held a hearing on the Ad Hoc Committee's motion for appointment of an Official Equity Committee. The Debtor opposed the Ad Hoc Committee's request primarily on the grounds that under strict application of the absolute priority rule any recovery to the common stock holders was precluded by the $30 million priority over the common stock attributed to the Preferred Stock. The Debtor also characterized any challenge to the Preferred Share's redemption rights or its ability to preserve the NOLs on conversion as merely a "hold up." *See Debtors' Objection to the Ad Hoc Committee's Motion for an Order Directing the Appointment of an Official Equity Committee Pursuant to Section 1102 of the Bankruptcy Code* [D.I. 486-3]. The Debtor's financial advisor also opined in sworn testimony that the $30 million liquidation preference was inviolate.

17. Late in the evening on March 1, 2018, the Proponents filed the Plan and Disclosure Statement.[2] Had the Debtor been forthright in its disclosures three days earlier, the Court and parties in interest would have known that a key feature of the Proponents' Plan is the settlement with Aleris that allows the Debtor to offset, in large part, a claim for damages against Aleris. The Debtor's claim (real or contrived) purportedly arises under the original 2015 purchase agreement between Aleris and Real Industry and provides an offset against Aleris' liquidation preference. Instead of being the absolute obstacle to the shareholder's recovery that the Debtor led the Court and individual shareholders to believe, as a practical matter, the Aleris liquidation preference was subject to a material compromise that surfaced miraculously in full detail 72 hours later.[3]

The Plan

18. In summary, the Plan provides for payment in full of any secured and unsecured creditors and classifies primary equity into three classes—Class 4 consists of the holders of the Preferred Shares, Class 5 consists of certain holders of common shares, and Class 6 is designated as a "Convenience Class" for holders of 100 or less common shares.

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[2] The Plan and Disclosure Statement were filed two weeks after the DIP Financing milestone had passed. 210 Capital has waived the filing milestone four times. The Disclosure Statement describes the waivers as follows: "On February 16, 2018, Real Industry and the DIP Lenders agreed to extend the Plan/DS Milestone from February 16, 2018 to February 20, 2018. On February 20, 2018, Real Industry and the DIP Lenders agreed to further extend the Plan/DS Milestone from February 20, 2018 to February 22, 2018. On February 22, 2018, Real Industry and the DIP Lenders agreed to further extend the Plan/DS Milestone from February 22, 2018 to March 2, 2018." Disclosure Statement.

[3] The settlement with Aleris is easily incorporated into the shareholder sponsored plan funded by a rights offering.

19. The Debtor has invented a convenience class for the small holders of the common stock presumably for the purpose of reducing the number of registered holders and permitting the company to issue the new common stock under the securities laws exemptions from registration. This may be a benefit to 210 Capital when it is in control of the Reorganized Real Industry, but it is not a benefit to the shareholders.

20. There is no provision in the Bankruptcy Code permitting a convenience class for common stock. Section 1122(a) sets forth the basic classification principles for both claims **and** interests. Section 1122 speaks to an exception to the basic rule solely for claims. Section 1122(b) of the Bankruptcy Code permits a plan to "designate a separate **class of claims** consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience." 11 U.S.C. § 1122(b) (emphasis added). Section 1122(b) provides a mechanism for reducing the costs and other burdens of soliciting the votes of a large number of small claims if the class (provided the class is unimpaired) or paying those claims out over time. In this case, the Plan Proponents propose to solicit the votes of the small holders. The Debtor proposes to pay these equity holders in cash (at less than market value) solely for the purpose of avoiding SEC registration obligations and "going dark" after confirmation of the Plan.

21. The most significant substantive provisions of the Plan (other than the Aleris settlement) are the releases of former and current officers, directors, professionals and other non-debtor parties. The Plan includes all three interrelated, but distinct types of non-debtor releases available in the context of a chapter 11 plan to protect third parties.

22. The Plan sets forth the scope of exculpation provisions in the plan by defining “Exculpated Parties” as follows:

> Exculpated Parties include: (a) the Debtor; (b) the Reorganized Debtor; and (c) with respect to each of the foregoing parties in clauses (a) and (b), each of such Entity’s current and former partners, officers, directors, principals, employees, agents, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, together with their respective successors and assigns, in each case in their capacity as such, and only if serving in such capacity.

Plan Exhibit A. No. 63.

23. The exculpation provision appears to release the lengthy list of covered parties from liability for acts or omissions relating to both the Real Industry and Real Alloy cases during the administration of the cases and post emergence. It covers “any cause of action, claim or other assertion of liability for any act or omission in connection with, relating to, or arising out of the Chapter 11 Cases, the filing of the Chapter 11 Cases, the Restructuring Transactions, the formulation, preparation, dissemination, negotiation, administration, implementation or filing of, as applicable, the Disclosure Statement, the Plan, the Plan Supplement, the DIP Loan, the DIP Loan Documents, or any other related Document or contract, instrument, release or other agreement or document created or entered into in connection with any of the foregoing, the pursuit of Confirmation, the pursuit of consummation of the Plan, the issuance of New Common Stock or other securities pursuant to the Plan, or the distribution of property under the Plan.” (emphasis added). The provision also absolves the officers, directors and professionals from lability for the improper voting procedures they have proposed.

24. Both the Debtor Release and the Third Party Release extend to each of the following:

> (i)(a) the Debtor, (b) the Reorganized Debtor, and (c) with respect to each of the foregoing parties in clauses (i)(a) and (i)(b), each of such Entity's current and former partners, officers, directors, principals, employees, agents, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, together with their respective successors and assigns, in each case in their capacity as such, and only if serving in such capacity; and (ii)(a) the DIP Lenders, (b) the SPA Investors, (c) Aleris, and (d) with respect to each of the foregoing Persons described in clauses (ii)(a) through (ii)(b), each of such Person's current and former partners, officers, directors, principals, employees, agents, managed funds, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, together with their respective successors and assigns, in each case in their capacity as such, and only if serving in such capacity.

Plan at Ex. A-10.

25. The Debtor's proposed Plan purports to release and discharge:

> claims, interests, obligations, rights, suits, damages, losses, costs and expenses, actions, Causes of Action, remedies, and liabilities of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, suspected or unsuspected, matured or unmatured, fixed or contingent, existing or hereafter arising, in law, equity or otherwise that are based in whole or part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtor, the Chapter 11 Case, the Restructuring Transactions, the Plan or the Disclosure Statement, or any prepetition claim that could have been asserted by or on behalf of the Debtor or the Estate or the Reorganized Debtor against the Released Parties, and any of their respective current and former affiliates, officers, directors, professionals, advisors, accountants, attorneys, investment bankers, consultants, employees, agents and other representatives (but solely in their capacity as such), including, but not limited to, all Avoidance Actions.

Plan at Art. X, Section E.

26. There is no description of the claims the Debtor may have against various parties, including the Real Alloy debtors or former officers and directors. However, among other claims, there may be claims for improper allocation of expenses to Real Industry. The Statement of Financial Affairs for Real Industry [D.I. 226] that was filed on January 9, 2018 reveals, for example, that Real Industry paid the former offers of both Real Industry and Real Alloy over $6 million in the year before the filing and made payments to professionals immediately before the filing in connection with the bankruptcy of over $1,000,000. No similar payments are reflected on the statements of the Real Alloy debtors. Real Industry also acknowledges that it has a claim against the Real Alloy debtors for $7,000,000 net of operating expenses owed them, which the Debtor is apparently releasing. Furthermore, there is no carve out or exception for claims the Debtor may want to assert against parties seeking payment on claims from the Debtor.

27. The Plan also includes a broad third party release by Releasing Parties defined as "all Holders of Interests entitled to vote on the Plan who either (1) vote to accept the Plan, or (2) **receive a ballot but abstain from voting on the Plan**; (i) all Holders of Interests entitled to vote on the Plan who vote to reject the Plan but do not elect on their ballot to opt out of the Third-Party Release." Plan at Ex. A-10. (emphasis added). The release in Article X, section E of the Plan covers a broad range of known and unknown claims:

> …any and all claims, interests, obligations, debts, rights, suits, damages, causes of action, remedies, and liabilities whatsoever, including any derivative claim asserted or that could be asserted on behalf of the Debtor and/or

> Reorganized Debtor, including, but not limited to, all Avoidance Actions, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, that such Releasing Party would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtor, the Chapter 11 Case, the Restructuring Transactions, the Plan, or the Disclosure Statement, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between the Debtor and any Releasing Party, the restructuring of Claims and Interests prior to or in the Chapter 11 Case, the negotiation, formulation, preparation, implementation or administration of the Plan, the Plan Supplement, the DIP Loan, the DIP Loan Documents, the New Organizational Documents, or any other related Documents, the Purchase and Sale Agreement, any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date….

Plan at Art. X, Section E.

28. The Disclosure Statement provides no explanation or justification for the repetitive and expansive releases and discharges.

29. Furthermore, by virtue of the fact that shareholders may not receive the ballot in time to meet the voting deadline, shareholders who "receive a ballot but abstain from voting on the Plan" may actually include a large number of beneficial owners who would not consent to the release, but have no opportunity to opt out.

THE DISCLOSURE STATEMENT DOES
NOT CONTAIN ADEQUATE INFORMATION

30. Courts have emphasized the importance of adequate disclosure in connection with proposed chapter 11 plans, stating that, given the reliance creditors, shareholders and bankruptcy courts place on disclosure statements, "we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information." *Oneida Motor Freight, Inc. v. United Jersey Bank,*

848 F.2d 414, 417 (3d Cir. 1988); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.,* 337 F.3d 314, 321 (3d Cir. 2003) (citing 11 U.S.C. § 1125(a)(1) and observing that the proponent of the proposed plan has "an affirmative duty to provide creditors [and shareholders] with a disclosure statement containing 'adequate information' to 'enable a creditor [or shareholder] to make an informed judgment'" about the proposed plan). Full disclosure to shareholders is particularly important in this case, as the shareholders have been left in the dark with respect the 210 Capital/GSAM transaction throughout the case.

31. Although courts assess adequacy on a case-by-case basis, a disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible . . . alternatives so that [creditors] can intelligently accept or reject the Plan." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988); *see also In re A.H. Robins Co., Inc.*, 880 F.2d 694, 696 (4th Cir. 1989). The Disclosure Statement, filed on March 1, falls far short of the standard.

32. The settlement with Aleris, for example, is "described" in a single paragraph taken in its entirety from the Plan. *See* Plan Article IX, section B; Disclosure Statement at Section VIII, I, 2. Similarly, the description of the RAIH Recovery, which appears to be the completely hypothetical recovery from the Real Alloy debtors added to the DIP Order to satisfy an objection of the Ad Hoc Committee, is taken without explanation of any kind directly from the Plan provision. *See* Plan at Ex. A, No. 41

33. There is no information about the Debtor's current financial situation, including the amount necessary to satisfy claims and fund pre and post emergence

operations. The Debtor's Monthly Operating Report shows an ending cash balance for the month of February 2018 at $7,322,159.00. The Disclosure Statement does not describe how the cash on hand and the $12 million purchase price payable by 210 Capital will be used.

34. Despite the lengthy biographies of the remaining directors, the Disclosure Statement fails to disclose that two of the four directors (Messrs. Bynoe and McIntosh) are also employed by Equity Group Investments, the private investment firm of Sam Zell, who controls approximately 7% of the Real Industry common shares through one or more funds and has been widely identified as a person in control of the debtor and that a third director, William Hall, is on the advisory board of the Zell-Lurie Institute at the University of Michigan. The Disclosure Statement fails to disclose whether there are any agreements between the Plan Proponents and any Zell-related entities, or what role the remaining officers and directors played in the formulation of the Plan and the expansive insider releases.[4]

35. Significantly, the Disclosure Statement does not adequately describe certain potentially valuable assets, the value of which may ultimately inure to the benefit of shareholders. The Debtor is required to disclose information about assets or causes of action which could generate income for the estate. Here, the Debtor has provided insufficient information with respect to assets, including the NOLs, avoidance actions, other claims, which could potentially benefit the estate and ultimately, the shareholders. *See e.g.*, *Krystal Cadillac-Oldsmobile*, 337 F.3d at 321–22 (stating that a disclosure

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[4] Although post emergence employment agreements are not described or discussed in Disclosure Statement, the Plan contemplates that current management with continue post emergence with the Reorganized Debtor as "Continuing Officers."

statement did not contain adequate information when it failed to include causes of action which could generate significant assets for the estate).

36. Similarly, the Disclosure Statement fails to provide any justification or explanation for the releases of officers, directors and others by way of exculpation, debtor release or third party release.

37. The transactions with 210 Capital are also given short shrift in the Disclosure Statement *See* Disclosure Statement at Section VII.B. Common shareholders must have information about their position in the post emergence entity in addition to the number of shares allocated to them. Confirmation of the Proponents' Plan will dilute common shareholders and leave them as minority shareholders holding restricted and unregistered new common stock in an acquisition vehicle governed and operated by 210 Capital. 210 Capital is an entity with fiduciary duties to the shareholders of two other new companies with acquisition strategies and tax attributes exactly like the Debtor's. Nowhere does 210 Capital or the Debtor explain how the Reorganized Debtor with 210 Capital at the helm will manage this potential conflict of interest.

38. Finally, the Plan Proponents refuse to disclose plan support agreements with shareholders.

39. Because the disclosure statement does not satisfy the most basic disclosure requirements of Section 1125, it cannot be approved. At a minimum, the basic information described above must be included in the Disclosure Statement in order to enable shareholders to make an informed decision when voting to accept or reject the Plan. In its absence, the Disclosure Statement is legally deficient.

THE DISCLOSURE STATEMENT CANNOT BE
APPROVED BECAUSE THE PLAN IS UNCONFIRMABLE

40. Even if the Disclosure Statement was both clear and informative, which it is not, it should not be approved because it relates to a Plan that is patently unconfirmable.

41. In its decision in *In re American Capital Equipment LLC*, the Third Circuit held that a bankruptcy court can determine at the disclosure statement stage that a Chapter 11 plan is unconfirmable without first holding a confirmation hearing. 688 F.3d 145 (3rd Cir. 2012). The Court followed numerous courts in this jurisdiction and elsewhere that determined to resolve confirmation issues at the disclosure statement stage before proceeding with solicitation on the grounds that the court's equitable powers under 11 U.S.C. § 105 "surely enable it to control its own docket" and thus, a "[c]ourt [should] not proceed with the time-consuming and expensive proposition of hearings on a disclosure statement and plan when the plan may not be confirmable because it does not comply with [confirmation requirements]." *Id.* (quoting *In re Kehn Ranch, Inc*., 41 B.R. 832, 832–33 (Bankr. S.D. 1984)). A plan is patently unconfirmable where (1) confirmation "defects [cannot] be overcome by creditor voting results" and (2) those defects "concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing." *Id.* at 155 (quoting *In re Monroe Well Serv*., 80 B.R. 324 (Bankr. E.D. Pa 1987)). *See also In re Hyatt*, 509 B.R. 707 (Bankr. D.N.M. 2014) (classification scheme rendered plan unconfirmable); *In re K Lunde, LLC*, 513 B.R. 587 (Bankr. D. Col. 2014) (classification scheme rendered plan unconfirmable). The Third Circuit found that the plan filed in *American Capital* was not

confirmable not because it violated a clear cut classification rule, but rather because it was not filed in good faith as required by section 1129(a)(3) of the Bankruptcy Code.

42. In determining whether a plan was proposed in good faith "the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re WR Grace & Co*., 729 F.3d 332, 346 (3d Cir. 2013). The good faith standard in section 1129(a)(3) generally requires that the plan be "consistent with the Bankruptcy Code" and "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code . . . with the most important feature being an inquiry into the 'fundamental fairness' of the plan." *In re Hercules Offshore, Inc.*, 565 BR. 732 (Bankr. D. Del. 2016) (quoting *Am. Capital*, 688 F3d at 157) (and then quoting *In re Coram Healthcare Corp*., 271 B.R. 228 (Bankr. D. Del 2001)). Courts have recognized that the good faith inquiry may focus more on the process of plan development than on the content of the plan itself. *See, e.g*., *Quigley, Inc.*, 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010) (parent bought enough votes for the plan to be accepted); *In re Bush Indus*., 315 B.R. 292 (Bankr. W.D.N.Y. 2014) (debtor negotiated a lock up agreement that included a revised employment agreement for the debtor's CEO).

43. The conduct of the Debtor throughout the case with respect to the shareholders, as detailed above, militates against a finding that the plan process was undertaken in good faith. Once 210 Capital appeared with apparent Goldman backing, the Debtor was determined to leave shareholders in the dark, to negotiate deals one on one to reach the requisite vote, and to shut down opposition at any cost. The actions of

the Debtor on the record are sufficient even without discovery of the behind the scene deals to establish that Proponents cannot meet the good faith standard.

44. Moreover, the proposed Plan includes impermissibly broad releases in favor of non-debtor third parties that violate applicable law and cannot be approved absent unusual circumstances that are clearly not present in this chapter 11 case.

The Releases Render the Plan Unconfirmable

45. As this Court noted in *In re Abeinsa Holding, Inc.*, 562 B.R. 265 (Bankr. D. Del. 2016), the Bankruptcy Code permits a debtor to settle or adjust "any claim or interest belonging to the debtor or to the estate" provided the release is a valid exercise of the debtor's business judgment and is fair, reasonable and in the best interest of the estate. *See* 11 U.S.C. § 1123(b)(3)(A). The shield of the business judgment rule is subject to limitations. First, settlement of claims against insiders, like other transactions involving the debtor's insiders, must be subject to heightened scrutiny. In addition, in determining whether a debtor's release of claims against third parties is appropriate, courts in the Third Circuit generally consider five additional factors, most of which are not present here:

> (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
>
> (2) a substantial contribution to the plan by the non-debtor;
>
> (3) the necessity of the release to the reorganization;
>
> (4) the overwhelming acceptance of the plan and release by creditors and interest holders;
>
> (5) the payment of all or substantially all of the creditors and interest holders under the plan.

In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999) (*citing In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)); *see also In re*

Indianapolis Downs, LLC, 486 B.R. 286, 303 (Bankr. D. Del. 2013) (applying same standard); In re Wash. Mut., Inc., 442 B.R. 314, 346 (Bankr D. Del. 2011) (applying same standard).

46. The Debtor Releases proposed in the Plan are overly broad and inappropriate under the circumstances. The Disclosure Statement does not provide any reason why the releases are essential to the reorganization, whether the released parties made any contribution to the Plan and it does not even attempt to establish how the releases satisfy the remaining factors. The Debtor simply cut and pasted the Plan release provisions into the Disclosure Statement without more.

47. The Third Party Plan releases are even more problematic. The Third Circuit in *Gillman v. Continental Airlines* did not establish a *per se* rule against third party releases. 203 F.3d 203 (3d. Cir 2000). It left open the possibility that under extraordinary circumstances a small subset of non-consensual third-party releases might be confirmable if the "hallmarks" of permissible non-consensual releases—"fairness, necessity to the reorganization, and specific factual findings to support these conclusions"—were present. *See also United Artists Theatre Co. v. Walton*, 315 F.3d 217, 227 (3d Cir. 2003) (in addition to a demonstration of fairness, necessity to the reorganization, and specific factual findings to support these conclusions, there must be evidence that the releases "were given in exchange for fair consideration"). Third party releases are not to be routinely granted. *See Wash. Mut.*, 442 B.R. at 351 (citing *Continental Airlines*, 203 F.3d at 212); *In re Exide Techs.*, 303 B.R. at 72 ("non-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases'").

48. Like the Debtor Releases in the Plan, the Third-Party Releases included in the Plan are overly broad and inappropriate under the circumstances and, therefore, cannot satisfy the Third Circuit standard. The Disclosure Statement provides no explanation why the third-party releases are reasonable or necessary. Instead, it only recites verbatim the release provisions included in the Plan. It does not explain that the effect of these third-party releases would be to improperly insulate the Debtor's current and former officers, directors and the lenders and other related parties from any and all pre-petition causes of action without any showing that the releases are necessary. Finally, because of the truncated voting procedures the releases are effectively nonconsensual.

49. The Ad Hoc Committee is aware that in *Hercules Offshore*, 565 BR. 732 (Bankr. D. Del. 2016), this Court reviewed and approved similar plan releases in connection with confirmation of the debtors' chapter 11 plan. That plan involved a complex settlement with the first lien lenders—approved, as it was shown, by a special committee of independent directors—that, among other things, transferred all of the debtors' assets to a wind down entity, permitted a 100% recovery to the general unsecured claimants, subordinated the first lien lenders' claims to provide $15 million guaranteed payment to common stockholders, and reduced the amount of the first lien lenders' claim by $32.5 million. There was substantial evidence surrounding the Board's implementation of a plan of action consistent with their fiduciary duties. There was also clear evidence of the lender's contribution.

50. In this case, there is no such evidence of a well-conceived plan of action for the benefit of the Real Industry constituents by the Board. The Plan allows 210

Capital and the Debtor's current management to acquire a unique and valuable acquisition vehicle at the expense of the existing shareholders. Furthermore, the lender's funding contributes little, if anything, to the estate or the case. The DIP financing and equity investment provide financing for the lender as the Debtor's post-petition majority shareholder.

51. Accordingly, the Ad Hoc Committee submits that the releases contained in the Plan are impermissible as a matter of law under applicable Third Circuit case law and the Plan is therefore unconfirmable on its face.

THE SOLICITATION PROCESS CANNOT BE APPROVED BECAUSE IT DISENFRANCHISES THE SHAREHOLDERS

52. The solicitation process proposed by the Plan Proponents is consistent with their fundamental disregard of shareholder due process rights. The Debtor proposes to shorten the voting period to twenty three days, notwithstanding the fact that it may not even be possible to accomplish the transmission of solicitation packages to the beneficial owners of the common shares and the return and tabulation of the ballots within that time frame, let alone give shareholders an opportunity to make an informed decision whether to accept or reject the Plan and agree to or reject the releases.

53. Basic due process, as outlined by the Supreme Court, requires "notice reasonably calculated under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Tr. Corp.*, 339 U.S. 306, 314 (1950). In a bankruptcy context, a creditor or shareholder is entitled to adequate notice before its rights are changed by operation of law. *City of New York v. New York and New Hampshire Railroad Co.,* 344 U.S. 293, 297 (1953). Due process in bankruptcy requires

that notice be given to a party whose property rights ae being affected so that he or she may have his or her day in court. *Stanley Jacobs Prod., Ltd. v. 9472541 Can. Inc. (In re Thane Int'l, Inc.,)* Adv. Pro. No. 17-50476 (KG), 2018 Bankr. Lexis 464, *17 (Bankr. D. Del. Feb. 28, 2018); *Power Contr., Inc. v. Reinhert (In re Reinhert),* 467 B.R 830 (Bankr. W.D. Pa. 2012) (sale not binding on party without proper notice).

54. In addition to the constitutional requirements, the Bankruptcy Rules govern the timing and scope of notice required for consideration of a disclosure statement. In particular, the Bankruptcy Rules address the issue of notice to beneficial owners of securities held in street name. Fed. R. Bankr. P. 3017(e) requires the Court to consider procedures for transmission of the solicitation of the beneficial holders of equity securities, determine the adequacy of proposed procedures, and fashion appropriate procedures to protect the voting rights of the beneficial owners of the securities. Bankruptcy Rule 3017(e) states: "At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, determine the adequacy of the procedures, and enter any orders the court deems appropriate." The Advisory Committee notes to Rule 3017(e) state in relevant part:

> Subdivision (e) is designed to ensure that appropriate measures are taken for the plan, disclosure statement, ballot and other materials which are required to be transmitted to creditors and equity security holders under this rule to reach the beneficial holders of securities held in nominee name . . . In most cases, the plan proponent will not know the identities of the beneficial holders and therefore it will be necessary to rely on the nominal holders of the securities to distribute the plan materials to the beneficial holders.

55. A debtor's balloting process must efficiently facilitate voting by the ultimate beneficial owners. The mere gesture of giving notice is not enough if it does not present sufficient time to for the party to vote or protect its interest.

56. The experience of shareholders in this case is that delivery of a notice from Prime Clerk to the DTC Participants and, subsequently, to the beneficial owner can easily take sixteen days, leaving only seven days for voting and return via the same process. *See* Grossman Declaration. The time frame is unreasonably short. *See In re Southland Corp*, 124 B.R 211 (Bankr. N.D. Tex. 1991) ("In this case, the solicitation materials were dated October 5, 1990, and by the testimony of a witness, were not mailed to the creditors and preferred shareholders until the 9th or 10th of October, 1990. The expiration date for acceptance or rejection was October 22, 1990. The Court finds that there were only eight (8) business days allowed for the transmission of the materials by brokers to their customers (beneficial owners) and for the original receipt, analysis and vote by the actual owners of the claims or stock….The Court finds that an unreasonably short time was prescribed for the votes to accept or reject. For that reason the acceptances and rejections will not be deemed accepted nor counted as to the Plan."); *see also In re Pioneer Finance Corp*., 246 B.R. 626, 633 (Bankr. D. Nev. 2000). When the parties to be solicited are holders of publicly traded securities, concerns about notice are heightened because the entity entitled to actually vote to accept or reject the reorganization plan is generally not accessible (or, oftentimes, known) through traditional methods of solicitation.

57. Instead of increasing the solicitation period to accommodate the practicalities of soliciting holders of publicly traded securities beyond the normal

solicitation period, the Plan Proponents propose to dramatically shorten the period. The justifications for the truncated procedures, the DIP milestones and the cost of filing a Form 10-Q, are outweighed by the constitutional and legal solicitation requirements.

58. In the event that the Plan Proponents make the necessary changes to the Plan, Disclosure Statement and solicitation procedures to enable the solicitation process to go forward, the Ad Hoc Committee respectfully requests permission to include a letter to shareholders with its recommendation regarding voting on the Plan.

CONCLUSION

WHEREFORE, the Ad Hoc Committee respectfully requests that the Court deny the Proponents' request for approval of the Disclosure Statement and solicitation procedures and grant such other and further relief as the Court deems just and proper.

Dated: March 23, 2018
Wilmington, Delaware

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