UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

In re:	**)**	
	)	**Chapter 11**
New England Building Materials, LLC,	**)**	**Case No. 12-20109**
	)	
Debtor.	**)**	

DEBTOR'S OBJECTION TO APPROVAL OF *REVISED* DISCLOSURE STATEMENT WITH RESPECT TO OFFICIAL COMMITTEE OF UNSECURED CREDITORS' FIRST AMENDED PLAN DATED SEPTEMBER 24, 2012, AND INCORPORATED MEMORANDUM OF LAW

The Debtor continues to object to the Disclosure Statement With Respect To Official Committee Of Unsecured Creditors' First Amended Plan Dated September 24, 2012, notwithstanding its revision today (the "Revised Committee Disclosure Statement" and the "Committee Plan"). Although the Committee has now disclosed that Olim, Inc. does not support its plan or agree to the terms of any option or other purchase of securities, the Revised Disclosure Statement remains entirely inadequate, and the Committee has entirely failed to adequately address the securities problem created by its plan. In fact, notwithstanding a revision, there is nothing new in this regard, other than the Committee's declaration that it sees no problem.

A. The Committee Revised Disclosure Statement Fails to Address, Let Alone Resolve the Prohibition Against Solicitation Of Acceptances Of the Committee Plan Under Federal And State Securities Laws.

In the Revised Committee Disclosure Statement, the Committee addresses the failure of its plan and revised Disclosure Statement to comply with federal and state securities registration requirements with this statement: "The Committee believes that the issuance and transfer of the interests is wholly exempt from securities laws under the Bankruptcy Code and/or applicable

securities laws". Apparently, this belief is based on the assertion by the Committee that neither its plan nor disclosure statement are an "offer" for securities.

Of course they are; membership equity interests in a limited liability company such as the Debtor is a classic type of security. The Committee concedes that these interests are securities, but somehow its plan is claimed not to be an "offer". Yet the Committee fails to refer to the applicable definitions, contained in federal law, in 15 U.S.C. § 77(b)(3), or in State law, 32 M.R.S.A. § 16102(26). Thus, the federal definition is as follows:

> The term "offer to sell," "offer for sale," or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

Maine law has a virtually identical definition, contained in 32 M.R.S.A. § 16102(26):

> "Offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value.

Clearly, the Committee's attempts to get creditors to exchange their claims, in full satisfaction thereof, for issuance of the Debtor's new securities to be held on their behalf by the liquidating trust is an "attempt" or "offer" to "dispose" of a security for value, or utilizing other terms of the definition, it is a "solicitation of an offer to buy a security or an interest in a security for value". Simply put the Committee Plan solicits creditors to "buy" a security by exchanging their claims for membership interests in the Debtor. Actually the Committee is offering two exchanges of securities, first the acquisition of the security in exchange for debt, and later the sale of the securities so acquired for cash, in a re-sale to Olim. There can be no serious argument that the Committee Plan is not an "offer to sell" securities (twice) as that term is defined in applicable statutes.

Perhaps of greater importance, however, is that the Committee misses the point altogether. The issue at this stage is not whether the issuance or transfer of securities is lawful or not, but whether the ***offer*** to creditors, made in the Committee Plan, to accept equity securities of the debtor in satisfaction of their claims is lawful, without registration of the offer, or an available exemption. Section 1145 of the Bankruptcy Code, where properly invoked, exempts securities issued by a Debtor in the context of a plan of reorganization from the registration requirement of section 5 of the federal Securities Act of 1933 and any state registration law. Section 5 of the Securities Act of 1933 is codified in 15 U.S.C. § 77(e)(c). The relevant part is subsection (c):

> (c) It shall be unlawful for any person, directly or indirectly, ***to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy*** through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security… (Emphasis added)

Similarly, Maine's Blue Sky law, 32 M.R.S.A. § 16301 provides as follows:

> It is unlawful for a person ***to offer or sell a security in this State*** unless:
>
> 1. **Federal covered security.** The security is a federal covered security;
> 2. **Exempt from registration.** The security, transaction or offer is exempted from registration under sections 16201 to 16203; or
> 3. **Registered.** The security is registered under this chapter. (Emphasis added)

Clearly, the prohibition of both Section 5 of the Securities Exchange Act of 1933 and Section 16301 of Maine's Blue Sky laws (not to mention the Blue Sky laws of states other than Maine in which creditors reside) is against the ***offer*** of the securities in question without registration or exemption. Furthermore, the federal statute prohibits the use of any means of communication, such as the U.S. mail, in order to make an offer that is not registered. The very mailing of the Revised Committee Disclosure Statement will violate federal and state law.

In *U.S. Securities and Exchange Commission v. Universal Express, Inc.*, 475 F. Supp. 2d 412 (S.D. N.Y. 2007), the United States District Court for the Southern District of New York decided a case regarding the alleged unlawful offering of securities and the failure of registration of the offer, where the offeror claimed, among other things, exemption under 11 U.S.C. § 1145(a). In that case, the Court held that:

> Section 5 of the Securities Act of 1933, *15 U.S.C. § 77e*, prohibits any person from offering or selling a security in interstate commerce unless it is registered. To prove a violation of *Section 5* requires establishing three prima facie elements: (1) That the defendant directly or indirectly sold ***or offered to sell securities***; (2) that no registration statement was in effect for the subject securities; and (3) that interstate means were used in connection with ***the offer or sale. … Registration of a security is "transaction-specific," in that the requirement of registration applies to each act of offering or sale;*** proper registration of a security at one stage does not necessarily suffice to register subsequent offers or sales of that security. (Emphasis added) *Id.* at 421.

Clearly, for present purposes, the relevant prohibition is against "offering" the securities, and using any means of communications, including the U.S. mail to effectuate such an offer. Furthermore, offering securities without registration cannot be excused by alleged "good faith" of the offeror, such as the offeror's belief that it is doing nothing wrong:

> Any claim that they "acted in good faith" is irrelevant, as proof of scienter is not required to establish a violation of *Section 5*. *Id.* at 424.

The Committee's belief that "the issuance and transfer of the interests is wholly exempt from securities laws" misses the point entirely. It is not the issuance of securities, nor their transfer that is in question at this stage of the case, and the Committee's beliefs do not matter. It is the Committee's proposed ***offer*** to unsecured creditors to exchange debt for an interest in securities and its proposed communication of that offer by mail or otherwise, that is regulated by federal and state law—laws with which the Committee has demonstrated no intention to comply.

Finally, apart from the fact that the Committee is focusing on the wrong issue, it points to no available exemption from registration. There is no analysis; no citation to statutory or case

authority, not even an effort to obtain the views of the SEC or the Maine Bureau of Securities. There is no amendment of the Committee Plan in an effort to bring about compliance with Section 1145 or bring it within an available exemption, if there is one. It remains the case that the securities issued on behalf of creditors under the Committee Plan will be held by a liquidating trustee on behalf of the creditors, who then promises to sell the securities for the benefit of each of the unsecured creditors. Thus under the Committee Plan, as it remains at this time, the liquidating trustee plainly "offers to sell securities offered or sold under the plan for the holders of such securities". This clearly makes the liquidating trustee an underwriter within the meaning of 11 U.S.C. § 1145(b)(B) (if not other subparts of Section 1145(b)), which makes the exemption from registration inapplicable. There is no other state or federal exemption that would apply, given that the offerees are a group of approximately 440 creditors.

B. Apart From The Unlawful Solicitation Of Acceptances Of The Committee Plan, The Committee Revised Disclosure Statement Is Inadequate and Misleading.

It is easy to see why the transaction proposed by the Committee is not exempt from the protections of federal and state securities law. Under the Committee Plan, the liquidating trustee is proposing that creditors acquire securities issued by the Debtor for $250,000, and the Committee promises that they will be held and sold by a liquidating trustee, for the account of unsecured creditors, at a tidy profit. What disclosure is made about the prospects for selling the securities for more than $250,000? Nothing, but the fervent belief of the Committee that when the time comes, Olim would enter into an option agreement with the Committee on the same terms as it now has with UV. And what disclosure is made about the prospects that Olim would exercise its option, even if it entered into an option agreement with the liquidating trustee? None.

If Facebook had offered securities in its recent IPO at $38 per share, and the only disclosure it made in connection with the offer was its fervent conviction that the shares would be worth more at a later date, or even its fervent conviction that someone would enter into an option agreement at a later date for the purchase of shares at a higher price, then it would be obvious that such a disclosure would be wholly inadequate, entirely misleading and would never pass muster. The Committee has disclosed no more about its proposed share transaction; in fact, such disclosure as it has made is much less—It is convinced that Olim will enter into an option agreement, but it has no indication from Olim that such would be the case; in fact, every indication is to the contrary. Nor does it have any indication that any such option would be exercised. Indeed, all indications are that Olim has no intention of entering into an option agreement, nor does it share the view that it would or should enter into the same option agreement with the Committee as it currently has with UV. In Olim's view, UV adds value that the Committee cannot offer.

CONCLUSION

Apart from the fact that solicitation of acceptances and depositing the Revised Committee Disclosure Statement in the U.S. mail would violate federal and state securities laws, it is plain that the Committee has made no appropriate disclosure about the two securities transactions that it wants creditors to buy into—the purchase for $250,000, and the sale for a greater amount. The Revised Committee Disclosure Statement would never pass muster for a securities offering of any kind; it is based on nothing but unsubstantiated speculation about share value. The Revised Committee Disclosure Statement should not be approved because using it to solicit acceptances would violate both federal and state law, and on its own merits, it is a grossly misleading and inadequate disclosure of a securities offering.

DATED: October 1, 2012

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CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties and at the addresses set forth on the Service List attached hereto, on October 1, 2012.

/s/ Holly C. Pelkey
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