UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LADERA PARENT LLC and LADERA, LLC, Debtors.	Chapter 11 Case No. 16-13382 and 16-13383-mew (Jointly Administered)

OBJECTION TO JOINT DISCLOSURE STATEMENT FOR JOINT PLAN FOR LADERA PARENT LLC AND LADERA, LLC

John O. Desmond, the Chapter 7 trustee ("**Trustee**") of the bankruptcy Estate of Ameritrans Capital Corporation (**"Ameritrans**") and USHA SOHA Terrace, LLC ("**USHA**", collectively with the Trustee, the "**Movants**") hereby object to the Joint Disclosure Statement for Joint Plan for Ladera Parent LLC and Ladera, LLC ("**Ladera**"), dated April 28, 2017 [Doc No. 55] (the "**Disclosure Statement**") filed by the above-mentioned debtors (the "**Debtors**") pursuant to Section 1125 of the Bankruptcy Code, and Rules 3016 and 3017 of the Federal Rules of Bankruptcy Procedures. The Disclosure Statement lacks "adequate information" as required by Section 1125 of the Bankruptcy Code. The viability of the Plan is dependent upon the sale of the Debtors' assets. However, the Disclosure Statement fails to provide the Court and the Debtors' creditors with adequate information concerning (1) the Parking Declaration (as defined below); (2) related pending litigation, claims and other proceedings affecting the assets being sold in order to implement the proposed joint Chapter 11 Plan for the Debtors [Doc. No. 38] (the "**Plan**"); (3) the numerous and flagrant undisclosed unwaivable conflicts of interests; and (4) the disputes regarding the secured claim and whatever agreements have been made with the secured creditors/mortgage holder.

Also, the Plan is not confirmable and does not conform to the requirements of Section 1129 of the Bankruptcy Code and is otherwise inconsistent with applicable law. The Plan is not proposed in good faith and contemplates the sale of assets that are not property of the Debtors' estates free and clear of a prepetition Lis Pendens (as defined below). While as a general rule objections to the details of a proposed plan of reorganization are typically not considered at the disclosure statement stage, courts have held that when the objectionable provisions of a proposed plan render the plan unconfirmable as a matter of law, such objections to the disclosure statement should appropriately be heard. In support of this Objection, the Movants state as follows:

BACKGROUND

1. Pre-petition, SoHa Terrace, LLC ("**SOHA**") was formed for the purpose of developing, marketing and selling certain residential condominium and retail property in New York, namely 2278-2286 Frederick Douglas Boulevard, New York, NY 10027 (the "**SOHA Condominiums**"). 2280 FDB LLC ("**2280 FDB**") was utilized as the owner of the SOHA Condominiums.

2. Ameritrans and USHA were minority members of SOHA pursuant to a certain *Second Amended and Restated Limited Liability Company Operating Agreement of Soha Terrace LLC*, effective as of January 7, 2006.[1] Ameritrans owns at least 6% equity membership interest.

3. RGS Holdings, LLC ("**RGS**") acted as the majority member and also the managing member of SOHA. Hans Futterman ("**Futterman**") is the sole owner of RGS and exclusively controls it. SOHA was dissolved by Futterman on September 2, 2016, unilaterally, and without consultation with SOHA's other members. (With respect to said dissolution, all rights are reserved.)

[1] Ameritrans owns at least a 6% equity membership interest in SOHA. Ameritrans' bankruptcy schedules state that it has participant(s) in its equity interest.

4. In addition to Futterman's control of the SOHA Condominiums, Futterman (through another LLC) also controls the Debtors. The Debtors have a development project across from the SOHA Condominiums.

5. Prepetition, Futterman improperly and unlawfully caused to have 2280 FDB transfer an interest in the 2280 FDB-owned parking garage (the "**Garage**") and rights to Ladera pursuant to certain Off-Site Parking Restrictive Declaration, dated as of October 15, 2015 (the "**Parking Declaration**"). That transfer provided the Debtors the requisite parking necessary to secure valuable rights, permits and substantial credits to construct the Ladera development site.

6. The Parking Declaration evidenced a transfer of a real property right from 2280 FDB to Ladera. The fact that the Parking Declaration is a real property right is evident by, inter alia, the fact that the Parking Declaration is a recorded instrument that runs with the land, as well as the fact that the Parking Declaration purports to alter the Declaration of the 2280 FDB Condominium, which is the real property instrument through which the 2280 FDB Condominium was formed.

7. In addition, the transfer of parking rights evidenced by the Parking Declaration permitted the Debtors to obtain approved plans for their wholly owned project, which plans did not require underground parking, and which further permitted expanded commercial use on the ground and lower levels of the Debtors' development. The value of these real property benefits conferred upon the Debtors by the Parking Declaration is presently unknown, but believed to exceed $10,000,000.00. The Parking Declaration was allegedly transferred by Futterman to the Debtors for no consideration and was ultra vires.

8. The Debtors[2] commenced their proceedings by filing voluntary petitions for relief pursuant to Chapter 11 of the Bankruptcy Code on December 4, 2016. The Debtors filed the Plan on March 29, 2017.

9. On April 4, 2017, the Debtors filed a Motion for Entry of Order (i) Approving Bidding Procedures in Connection with the Proposed Sale of Assets of the Estates and (ii) Authorizing Auction Sale (the "**Sale Procedure Motion**"). As specified in the Sale Procedure Motion, the Debtors sought to sell substantially all of their assets including the Parking Declaration free and clear of all interests, liens, claims, and encumbrances, as well free and clear of the Lis Pendens (as defined below).

10. On April 19, 2017, the Trustee and USHA filed an objection to the Sale Procedure Motion (the "**Sale Procedure Objection**") on several grounds, including their contention that the proposed sale included property that is property of 2280 FDB and not property of the Debtors' estates (reflecting an illegal, impermissible ultra vires transfer from 2280 FDB to the Debtors in violation of New York law as it relates to LLCs).

11. On April 28, 2017, the Debtors filed, among other things, (i) the Disclosure Statement, and (ii) a motion for order approving the Joint Disclosure Statement of the Debtors and related notice. The hearing on the Disclosure Statement is currently scheduled for June 13, 2017.

12. A hearing on the Sale Procedure Motion was held on May 3, 2017 which resulted in a change in the bid procedures, with the substantive disputes among the parties to be scheduled contemporaneously with the hearing on the proposed sale.

[2] Upon information and belief, Futterman is the manager of Ladera LLC and Ladera Parent LLC. Ladera LLC is owned by Ladera Parent LLC (sole member); Ladera Parent LLC is owned by 300W122 Holdings LLC (sole member). Futterman is the sole member of 300W122 Holdings LLC.

A. The Arbitration Proceeding

13. Pre-petition, in April 2013, USHA, individually and derivatively on behalf of SOHA, began a certain arbitration proceeding naming several respondents, including RGS, Futterman, SOHA, 2280 FDB, and Ameritrans[3] (collective, the "**Respondents**"), now pending before Arbitrator Michael Renda, Esq. (the "**Arbitrator**") in the American Arbitration Association, AAA Case No. 13 115 Y 00729 13 (the "**Arbitration Proceeding**").

14. The Arbitration Proceeding involves breaches of fiduciary duty and ultra vires acts by Futterman, both individually and in his capacity as managing member of RGS, including with respect to a fraudulent conversion of funds and other property by RGS, Futterman and other Futterman entities from SOHA and 2280 FDB to the benefit of Futterman and/or entities owned by Futterman directly or indirectly. However as neither Futterman, SOHA nor 2280 FDB informed or provided notice to Ameritrans or USHA until after the Parking Declaration and Garage transfers, the propriety of those transfers were not part of the Arbitration.

15. The several demands made in the Arbitration Proceeding include (i) the removal of RGS as managing member of SOHA, (ii) a forensic audit of SOHA's books and records (among others), and (iii) an award in favor of USHA, as claimant and as an equity owner of SOHA, in an amount to be determined, but not less than $1,000,000.00 in monies owed through December 31, 2013, including interest.

16. USHA, RGS, SOHA, Futterman, and 2280 FDB already stipulated of record that the determination of the Arbitrator would be binding on them. The Arbitrator held hearings in the Arbitration Proceeding between January, 2016 and June, 2016. Thereafter, between June, 2016

[3] The caption incorrectly uses the name "Ameritrans Corp." While Ameritrans was one of the Respondents in the Arbitration proceeding, no claim was made by or against it in such proceeding.

and October, 2016, the parties (other than the Debtor) submitted briefs and their proposed award, findings of fact and conclusions of law as regards to the matters heard by the Arbitrator.

17. In December, 2016, the Arbitrator issued a stay due to Ameritrans' pending bankruptcy, because Ameritrans was a named Respondent.

18. On April 21, 2017, RGS filed a Motion for Relief From the Automatic Stay to Allow Entry of Arbitration Decision Among Non-Debtor Parties (the "**Stay Motion**"). Ameritrans filed a limited objection to the Stay Motion on May 5, 2017. The Massachusetts Bankruptcy Court held a hearing on the Stay Motion on May 23, 2017 and a proposed order upon which stay relief is conditioned is to be filed by the Trustee on or before Tuesday, May 30, 2017.

B. Other State Court Proceedings

19. USHA, individually and derivatively on behalf of SOHA, filed a Verified Complaint in 2014 in the Supreme Court of the State of New York, New York County (the "**State Court**"), Index No. 651699/2014, against RGS, Futterman, SOHA, and 2280 FDB (the "**Defendants**") (the "**State Court Action**").

20. On November 28, 2016, USHA, derivatively on behalf of SOHA (asserting claims individually and derivatively on behalf of 2280 FDB), brought an action against Futterman, 2280 FDB, and Ladera in the State Court, [Index No. 656196/16] (the "**State Court Action II**", and together with the State Court Action, the "**State Court Actions**"). In the State Court Action II, USHA is seeking, among other things, a declaratory judgment and the unwinding of the transfer of parking rights through the Parking Declaration. USHA also filed a Notice of Pendency in connection with the State Court Action II relating to the transfer under the Parking Declaration (the "**Lis Pendens**").

21. On March 9, 2017, SOHA and 2280 FDB, two of the Respondents in the Arbitration Proceeding filed a motion with the State Court seeking an order to sever Ameritrans from the Arbitration Proceeding so that the Award and Findings of Fact and Conclusions of Law may be rendered in the Arbitration Proceeding with respect to the other Respondents (the "**Motion to Sever**").

22. On March 16, 2017, the Trustee filed a Suggestion of Bankruptcy in response to the Motion to Sever. The Motion to Sever was denied by the State Court on April 7, 2017.

C. Ameritrans and its Bankruptcy Case

23. On October 5, 2016, Ameritrans filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Massachusetts, Case No. 16-1384 (MSH). The Trustee was later appointed on October 6, 2016.

24. On March 27, 2017, the Trustee filed proofs of claim in the Debtors' bankruptcy cases (in the amount of $4,687,700.00) to protect Ameritrans' interest in or related to the SOHA Condominiums, the Arbitration Proceeding, the State Court Actions, and the Debtors' bankruptcy cases (the "**Ameritrans Proof of Claim**"). USHA also filed a proof of claim for itself and as agent in the amount of $10,000,000.00. Ventures 76 LLC filed a separate claim in the amount of $1,406,300.00 related to certain participation in Ameritrans' equity membership interest in SOHA.

25. On April 28, 2017, the Debtors filed an objection to the Ameritrans Proof of Claim, and the proofs of claims filed by USHA and Ventures 76 LLC. The claim objection hearing is scheduled with this Court for June 13, 2017.

TREATMENT OF UNSECURED CLAIM UNDER THE PLAN AND RELATED PROVISIONS

26. The Plan proposes the following treatment for unsecured claims, including the Movants' claims:

Class 4. Ladera Unsecured Claims

> Subject to the provisions of Article 7 of the Plan with respect to Disputed Claims, in full satisfaction, settlement, release and discharge of the Class 4 Ladera Unsecured Claims, the Holders of the Class 4 Ladera Unsecured Claims against Ladera shall receive, within 30 days of the Closing Date, their Pro Rata Share of Available Cash when as such distributions are made, after payment in full to all senior Creditors' Claims.

Class 7. L.P. Unsecured Claims

> Subject to the provisions of Article 7 of the Plan with respect to Disputed Claims, in full satisfaction, settlement, release and discharge of the Class 7 L.P. Unsecured Claims, the Holders of the Class 7 L.P. Unsecured Claims against Ladera shall receive, within 30 days of the Closing Date, Cash equal to their Pro Rata Share of the Available Cash when as such distributions are made after payment in full to all senior Creditors' Claims.

27. "Available Cash" is defined under the Plan as "the aggregate amount of cash held by the Disbursing Agent … less the sum of (i) cash to be distributed to holders of Allowed Administrative Claims or holders of Allowed Claims in Classes 1 (priority non-tax claims), 2 (RWN Ladera secured claim), 3 (other secured claims), and 6 (RWN L.P. secured claim), and (ii) the amount of Cash in the Disputed Claims Reserve at such time.

28. Pursuant to Article 6 of the Plan, in order to fund distributions under the Plan, the Debtors shall sell the "Property" (defined as "(i) the parcel of land located at 231/237 St. Nicholas Avenue a/k/a 300 West 122nd Street, New York, New York (being Lot 35, in Block 1948, as shown and set forth on the Tax Map of the City of New York, and (ii) the parcel of land located at 223/229 St. Nicholas Avenue a/k/a 305 West 121st Street, New York, New York (Tax

Map Block 1948, Lot 30)" (the " **Real Property**"). Such sale shall be free and clear of any and all liens, claims, encumbrances, and interests, including the Lis Pendens filed by USHA in the State Court Action II.

29. In addition, under the Plan, the Lis Pendens shall be deemed cancelled as of record upon entry of the Confirmation Order.

30. The Disclosure Statement also provides that the Debtors do not believe that they should escrow amounts on account of the claims related to Ameritrans and USHA. *See Page 19 of Disclosure Statement.*

31. Under Section 8.3 of the Plan, the Plan shall be deemed to resolve all disputes and constitute a settlement and release between the Debtors and creditors from any claim or liability, including any claims based on the conduct of the Debtors' businesses affairs prior to the commencement of the bankruptcy cases. Also, after the effective date of the Plan, pursuant to section 1123(b) of the Bankruptcy Code, the "released parties" (including the Debtors' officers, directors, members, general partner, managers or employees) are deemed released by the Debtors from any and all claims, obligations, and liabilities, including any derivative claims asserted or assertable on behalf of the Debtors.[4]

OBJECTION TO DISCLOSURE STATEMENT

32. Sections 1128 and 1129 of the Bankruptcy Code require a bankruptcy court to hold a confirmation hearing and to make an independent assessment of a plan's compliance with each and every statutory requirement for confirmation. In re Williams, 850 F.2d 250, 253 (5th Cir. 1988) ("In addition to the consideration of objections raised by creditors, the '[c]ourt has a

[4] Section 6.9 of the Plan provides for post-confirmation management pursuant to which the Debtors will continue in existence post-confirmation as the Post-Effective Date Debtors (at their election, the Debtors shall take such steps as are necessary to dissolve their existence in accordance with applicable non-bankruptcy law).

mandatory independent duty to determine whether the plan has met all the requirements necessary for confirmation.'").

33. A plan proponent "bears the burdens of both introduction of evidence and persuasion that each and every one of the sixteen (16) requirements for confirmation of a Chapter 11 plan as set forth in 11 U.S.C. §1129(a) has been satisfied" by a preponderance of the evidence. In re Zaruba, 384 B.R. 254, 257 (Bankr. D. Ala. 2008); In re Michelson, 141 B.R. 715 (Bankr. E.D. Cal.1992). The filing of an objection to confirmation does not shift away from the plan proponent the burden of proving that the plan satisfies all of the requirements of Section 1129(a). In re Rusty Jones, Inc., 110 B.R. 362, 373 (Bankr. N.D. Ill. 1990); In re Michelson, 141 B.R. at 719 (the court's approval of a disclosure statement as containing adequate information does not shift the proponent's burden of establishing that full disclosure was made).

A. The Disclosure Statement Does Not Contain Adequate Information

34. 11 U.S.C. § 1125(b) states that "[a]n acceptance or rejection of a plan may not be solicited after the commencement of a case . . . 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(a) defines "adequate information" as "information of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan. . . ." See, e.g., In re Ferretti, 128 B.R. 16 (Bankr. D.N.H. 1991).

35. The subjective determination of what is adequate information is made on a case by case basis and is largely within the discretion of the bankruptcy court. In re Ionosphere

Clubs, Inc., 179 B.R. 24, 29 (Bankr. S.D.N.Y. 1995); In re PC Liquidation Corp., 383 B.R. 856, 865 (E.D.N.Y. 2008) (the standard for disclosure is flexible and what constitutes adequate in any particular situation is determined on a case by case basis); In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) (same). Nevertheless, to satisfy Section 1125(a)'s standard, a disclosure statement must contain "at a minimum" adequate information concerning "all those factors presently known to the plan proponent that bear upon the success or failure of the proposals contained in the plan." In re Beltrami Enters., 191 B.R. 303, 304 (Bankr. D. Penn. 1995); In re Clam-All Corp., 233 B.R. 198, 2004 (Bankr. D. Mass. 1999) (the purpose of the adequate information requirement is to ensure that claim holders have sufficient information to make an informed decision regarding whether to vote for or against the proposed plan).

36. As set forth in Article 6 of the Plan (Implementation of the Plan), "[i]n order to fund distributions under the Plan, the Debtors shall sell the Property pursuant to the Bid Procedures Order to the Successful purchaser pursuant to Bankruptcy Code section 363 and 1123(a)(5)(d)…." *See Section 6.2* (Sale of Assets). "The Plan shall be funded by the sale of the Property pursuant to the Bid Procedures. These funds shall be utilized to satisfy payments consistent with the terms of this Plan." *See Section 6.3* (Plan Funding).

37. Despite the State Court Action II (in which Ladera is a named defendant) and the filed Lis Pendens affecting assets to be sold by the Debtors, specifically, the rights improperly transferred from 2280 FDB to Ladera pursuant to the Parking Declaration, the Disclosure Statement does not provide any information about the Parking Declaration, the pending State Court Actions and the Arbitration Proceeding. In fact, "Property" and "Assets" are defined under the Plan in a way not to even refer to the Parking Declaration.

38. Also, the Debtors are controlled by Futterman and represented by Futterman's counsel and counsel to the Futterman affiliates. The Disclosure Statement clearly fails to elaborate the multiplicity of these relationships which required substantial disclosure given that there is no committee in the case. The nature of the relationship with the Debtors' lender, the Debtors, and/or Futterman is also not elaborated given that it is more likely than not that there exists an agreement between at least Futterman and the lender. It is incomprehensible that the Debtors would file and trigger the "bad boys" guaranty to Futterman when there is inevitably little if any equity remaining in the "Assets" and certainly no equity if the Parking Declaration is not estate property. Accordingly, there should be disclosure of any Futterman guaranty.

39. There needs to be an explanation of the benefits to the lender from the Debtors seeking to sell the "Assets" free and clear of the Lis Pendens that the Lender cannot otherwise avail itself without this Court permitting a section 363(f) sale which it will determine at the sale hearing. Such proposed sale by the Debtors will apparently have benefits to the lender because of Futterman's rights and connection with respect to the Garage. Accordingly, any agreement or understanding involving Futterman's guaranty must be disclosed in order to determine the real objectives and underlying motivation, as well as whether Futterman or any entity affiliated with Futterman intends to advance a bid. This Court is further reminded that Debtors' counsel acknowledged in open court that the Lis Pendens is of no title concern, and that numerous title insurers are willing to insure around said lien. If this is in fact the case, the Debtors' objectives become all the more questionable.

40. Moreover, the Plan does not provide information about the value of the assets to be sold compared to the senior claims. The Disclosure Statement suggests a value of $53,000,000.00 for the Real Property. *See Page 36 of Disclosure Statement*. Pursuant to the

Disclosure Statement, the RWN Ladera Secured Claim is scheduled as a disputed claim in the amount of $42,500,000.00 but with a filed proof of claim in the amount of $48,040,822.06 (plus interest and fees). The Debtors should disclose to the Court and the Debtors' creditors the expected sale proceeds if the sale does not include the Parking Declaration rights and also the disputed nature of the secured creditor's claim.

41. The Disclosure Statement does not contain adequate information and cannot be approved under Section 1125 of the Bankruptcy Code.

B. The Plan is Unconfirmable and the Disclosure Statement Should Not be Approved

42. While, as a general rule, objections to the details of a proposed plan of reorganization are not considered at the disclosure statement stage, when the objectionable provisions of a proposed plan go to its very essence, and where they render the plan unconfirmable as a matter of law, such objections are appropriate. In re Filex, Inc., 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990); LAWRENCE P. KING, *7 COLLIER ON BANKRUPTCY* ¶ 11.25.03[5] (15th ed. Rev. 2004) ("[M]ost courts will not approve a disclosure statement if the underlying plan is clearly unconfirmable on its face."). See also, In re Mahoney Hawkes, LLP, 289 B.R. 285, 294 (Bankr. D. Mass. 2002)("[i]t is permissible ... for the court to pass upon confirmation issues where, as here, it is contended that the plan is so fatally and obviously flawed that confirmation is impossible.") (internal quotations omitted); In re Bjolmes Realty Trust, 134 B.R. 1000, 1002 (Bankr. D. Mass. 1990) (same).

43. Therefore, even if a disclosure statement contains adequate information, the Court should not approve a disclosure statement which concerns a plan that cannot be confirmed. In re Felicity Associates, Inc., 197 B.R. 12, 14 (Bankr. D.R.I. 1996) ("It has become standard Chapter 11 practice that 'when an objection raises substantive plan issues that are normally addressed at

confirmation, it is proper to consider and rule upon such issues prior to confirmation, where the proposed plan is arguably unconfirmable on its face'"); In re Eastern Main Electric Co-Op, Inc., 125 B.R. 329, 333 (Bankr. D. Me. 1991) (a disclosure statement should not be approved when it is apparent that the accompanying chapter 11 plan is not confirmable).

44. In this case, the Movants submit that the Plan is not capable of being confirmed by the Court and the Court should decline to approve the Disclosure Statement.

1) The Plan is Not Filed in Good Faith

45. In order to be confirmed, a plan must be proposed in good faith. In re Weber, 209 B.R. 793, 797 (Bankr. D. Mass. 1997) (even where all creditors vote to accept the plan, the good faith requirement contained in § 1129(a)(3) must still be satisfied). The Bankruptcy Code does not define "good faith" in the § 1129(a)(3) context. However, the term is generally interpreted to mean that there exists "a reasonable likelihood that the plan will achieve a result consistent with the purposes and objectives of the Bankruptcy Code." In re River Valley Fitness One L.P., 2003 Bankr Lexis 1252 (Bankr. D. N.H. 2001).

46. In the cases, the sale is nothing more than a bad faith effort to use the bankruptcy court to sell assets improperly transferred to the Debtors and to eliminate Futterman's guaranty to the Debtors' secured creditor.

47. Because of the dissolution of SOHA, the multiple breaches of fiduciary duty, conflicts of interest and series of ultra vires and unlawful conveyance of 2280 FDB's assets this court or the Massachusetts bankruptcy court must first determine whether the rights under the Parking Declaration constitute property of either estate. Obviously, RGS or 2280 FDB's manager,[5] both Futterman controlled entities, will not undertake any actions on behalf of the two

[5] SOHA Terrace Manager Corp. is the managing member of 2280 FDB and is also controlled by Futterman.

minority members, Ameritrans and USHA, to seek to void or set aside any alleged wrongful transfer of 2280 FDB's asset made by RGS and Futterman.[6]

2) Sale Free and Clear of the Lis Pendens

48. Funding of the Plan rely on sale of the Real Property free and clear of the Lis Pendens. Also, the Plan provides that entry of the Plan confirmation order will act as an order cancelling the Lis Pendens. However, a lis pendens is not the type of claim, lien or interest that is covered by section 363(f) of the Bankruptcy Code. In re Adamson, 312 B.R. 16 (Bankr. D. Mass 2004); In re Mundy Ranch, Inc., 484 B.R. 416 (Bankr. D.N.M. 2012).

49. The Court has yet to decide on this substantive disputes among the parties in connection with the sale hearing.

C. Inappropriate Proposed Vote Solicitation Procedures

50. Moreover, separate and apart from the above-mentioned confirmation impediments and disclosure deficiencies, the Disclosure Statement makes provision that in the event a "Ballot" is received that fails to specify either an acceptance or rejection of the Plan, it shall be deemed to have been cast as an "acceptance" of the Plan. *See Page 33 of Disclosure Statement*. The Movants submit that this treatment is incomplete or defective Ballots is inappropriate, especially given the releases and exculpatory provisions contained in the Plan. Instead, defective Ballots should either be disregarded or be deemed a rejection of the Plan. Acceptance of the Plan should only be by affirmative vote of creditors, and not assumed by default.

[6] At the time of the transfer under the Parking Declaration, 2280 FDB, Futterman and the Debtors were represented by the same law firm which now represents the Debtors in the underlying bankruptcy proceedings. Futterman, RGS and 2280 FDB have a conflict of interest, such that (1) 2280 FDB did not file a proof of claim in this bankruptcy; (2) Futterman will not authorize 2280 FDB to bring an action to void the Parking Declaration as a fraudulent conveyance.

RESERVATION OF RIGHTS

51. The Movants hereby expressly reserve all of their rights in connection with this matter, including, but not limited to, the right to object to the Plan on any basis not identified herein, and any other disclosure statements and/or plans of reorganization or amendments thereto filed by the Debtors.

WHEREFORE, the Movants respectively request that the Court (i) not approve the proposed Disclosure Statement for the reasons set forth herein; and (ii) grant such further relief as is just and proper.

Respectfully submitted,

JOHN O. DESMOND, CHAPTER 7 TRUSTEE OF AMERITRANS CAPITAL CORPORATION,

By his attorneys,

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