Hearing Date and Time: May 25, 2017 at 10:00 a.m. ET
Objection Deadline: May 18, 2017 at 4:00 p.m. ET

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
AVAYA INC., *et al.*[1]	)	Case No. 17-10089 (SMB)
Debtors.	)	Jointly Administered

OBJECTION OF THE AD HOC FIRST LIEN GROUP TO DEBTORS' MOTION SEEKING ENTRY OF AN ORDER (I) EXTENDING THE DEBTORS' EXCLUSIVE PERIODS TO FILE A CHAPTER 11 PLAN AND SOLICIT ACCEPTANCES THEREOF PURSUANT TO SECTION 1121 OF THE BANKRUPTCY CODE AND (II) GRANTING RELATED RELIEF

The Ad Hoc First Lien Group,[2] comprising holders of over 50% of the Debtors' first lien debt, by and through its undersigned counsel, hereby files this objection (the "Objection") to the *Debtors' Motion Seeking Entry of an Order (I) Extending the Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof Pursuant to Section 1121 of the Bankruptcy*

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Avaya Inc. (3430); Avaya CALA Inc. (9365); Avaya EMEA Ltd. (9361); Avaya Federal Solutions, Inc. (4392); Avaya Holdings Corp. (9726); Avaya Holdings LLC (6959); Avaya Holdings Two, LLC (3240); Avaya Integrated Cabinet Solutions Inc. (9449); Avaya Management Services Inc. (9358); Avaya Services Inc. (9687); Avaya World Services Inc. (9364); Octel Communications LLC (5700); Sierra Asia Pacific Inc. (9362); Sierra Communication International LLC (9828); Technology Corporation of America, Inc. (9022); Ubiquity Software Corporation (6232); VPNet Technologies, Inc. (1193); and Zang, Inc. (7229). The location of Debtor Avaya Inc.'s corporate headquarters and the Debtors' service address is: 4655 Great America Parkway, Santa Clara, CA 95054.

[2] As set forth in the *Fourth Amended Verified Statement Pursuant to Bankruptcy Rule 2019* [Docket No. 454].

Code and (II) Granting Related Relief [Docket No. 374] (the "Exclusivity Motion"). In support of this Objection, the Ad Hoc First Lien Group respectfully represents as follows:

OBJECTION

1. By the Exclusivity Motion, the Debtors seek a 120-day extension of their exclusive plan filing and solicitation periods (collectively, the "Exclusive Periods") to September 16, 2017 and November 15, 2017, respectively. The Ad Hoc First Lien Group objects to the Exclusivity Motion for the simple reason that the Debtors have not earned a four month extension of the Exclusive Periods given their complete failure to engage in substantive plan negotiations with any of their primary stakeholders before filing a proposed plan of reorganization on April 13[3] or since. While it is just their first request to extend their Exclusive Periods, based on the Debtors' conduct to date, the Ad Hoc First Lien Group respectfully submits that the length of the requested extension is more likely to inhibit, rather than promote, development of a *confirmable* chapter 11 plan in these cases and a much shorter extension of 30 days is all that is warranted at this time.

2. Of the nine principal factors a court evaluates when considering a debtor's request to extend its exclusive periods,[4] most are geared toward a debtor having the time to formulate a

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[3] On April 13, 2017, the Debtors filed the *Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates* [Docket No. 388] (the "Disclosure Statement") and the *Joint Chapter 11 Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates* [Docket No. 389] (the "Current Plan") and scheduled a hearing on approval of the Disclosure Statement (the "Disclosure Statement Hearing") for May 25, 2017. *Notice of Disclosure Statement Hearing* [Docket No. 392]. Terms not defined herein shall have the meanings ascribed to such terms in the Current Plan or the Disclosure Statement, as applicable.

[4] Courts generally consider the following factors (the "Exclusivity Factors") when determining whether to extend or terminate exclusivity: (1) the size and complexity of the case; (2) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information to allow a creditor to determine whether to accept such plan; (3) the existence of good faith progress towards reorganization; (4) the fact that the debtor is paying its bills as they become due; (5) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (6) whether the debtor has made progress in negotiations with its creditors; (7) the amount of time which has elapsed in the case; (8) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and (9) whether an unresolved contingency exists. *See In re GMG Capital Partners III, L.P.*, 503 B.R. 596, 600-601 (Bankr. S.D.N.Y. 2014)*; In re Borders Grp., Inc.,* 460

confirmable chapter 11 plan that is supported by creditors.[5] In order to achieve this objective, a debtor must engage in good faith negotiations with its stakeholders. Here, however, the Debtors refused to engage in *any* substantive negotiations with their primary creditor constituencies before filing the Current Plan, notwithstanding repeated requests by the Ad Hoc First Lien Group. Indeed, the first time the Ad Hoc First Lien Group and, upon information and belief, the Ad Hoc Crossover Group and Creditors' Committee, saw the Current Plan was when it was filed on the docket at approximately 8:40 p.m. (ET) on April 13.

3. This conduct is especially alarming in these cases because the Current Plan requires, and *any viable plan* will require, first lien creditors to take a substantial portion of their recovery in the form of equity in the Reorganized Debtors, thus making their consent to such treatment a necessary condition for confirmation of any plan. The Debtors have acknowledged this fact with the Current Plan proposing that the holders of first lien debt, who are the Debtors' largest creditor constituency and owed in excess of $4.6 billion, receive $1.418 billion in cash or new secured debt of the Reorganized Debtors and 95% of the equity in Reorganized HoldCo in satisfaction of their claims.[6] Yet, as noted by the Debtors in the Disclosure Statement, a chapter 11 plan cannot be confirmed over the objection of a secured creditor unless such plan is "fair and

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B.R. 818, 822 (Bankr. S.D.N.Y. 2011); *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) (citing *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997)).

[5] In determining whether to extend a debtor's exclusive periods, courts generally engage in a careful balancing of the nine Exclusivity Factors. A request to extend exclusivity is "a serious matter" and "[s]uch a motion should 'be granted neither routinely nor cavalierly.'" *In re Matter of All Seasons Indus., Inc.*, 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990) (quoting *In re McLean Indus., Inc*., 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987)). Even in large, complex cases, specific reasons must be shown to justify granting a particular extension. *See In re Pub. Serv. Co. of N.H.*, 88 B.R. 521, 537 (Bankr. D.N.H. 1988) ("If size and complexity alone were sufficient cause, that interpretation of the statutory standard would in effect eat up the rule."). Of the Exclusivity Factors, showing progress in negotiations with creditors and failing to make good faith progress towards reorganization, are often afforded greater weight. *See Adelphia*, 352 B.R. at 588.

[6] The Debtors posit in the Disclosure Statement that such treatment will provide first lien creditors with a full recovery on their claims. The Ad Hoc First Lien Group disputes this assertion and, at the appropriate time, will establish, among other things that render the Current Plan unconfirmable, that the valuation upon which the Current Plan is premised is flawed and materially overstates the value of the Debtors' enterprise.

equitable" as required by Bankruptcy Code section 1129(b), and the law is well settled that satisfaction of a secured creditor's claim in the form of equity of the reorganized debtor requires acceptance of the plan by the class composed of such claims and cannot be "crammed down" on such class.[7]

4. Prior to filing the Current Plan, the Debtors were well aware that a majority of first lien creditors would not agree to their proposed treatment under the Current Plan, which renders the Current Plan patently unconfirmable. Rather than using their initial Exclusive Periods to build consensus around a confirmable chapter 11 plan, however, the Debtors defiantly filed the doomed Current Plan, which lacks support from any major creditor constituency and caters almost exclusively to the interests of (i) Pension Benefit Guaranty Corporation ("PBGC")[8] and (ii) the Debtors' equity sponsors and current officers and directors—to whom the Debtors propose to gift $330 million in equity[9] (based on the Debtors' questionable plan valuation) and

[7] *See* Transcript of Hearing at 22:15-16, *In re Hawker Beechcraft, Inc.*, Case No. 12-11873 (SMB) (Bankr. S.D.N.Y. Jan. 31, 2013) (noting that secured creditors could not be required to take equity on account of their secured claims when approving a settlement that required termination of certain of the debtors' pension plans as a precondition to secured creditors receiving their recovery in the form of equity), an excerpt of such transcript attached hereto as Exhibit A; *see also In re Pac. Lumber Co.*, 584 F.3d 229, 246 (5th Cir. 2009) (stating that unsecured notes and equity securities cannot constitute indubitable equivalents of secured claims); *In re Ponce de Leon, 1403, Inc.*, 523 B.R. 349 (Bankr. D.P.R. 2014) (citing legislative history); *In re San Felipe @ Voss, Ltd.*, 115 B.R. 526, 529 (S.D. Tex. 1990) (holding that securities of third party may constitute indubitable equivalent but noting Bankruptcy Code's prohibition against cramdown of secured creditor through equity securities of debtor).

[8] The Debtors, in their motion to approve the Disclosure Statement, appear to concede that the Plan favors PBGC. *See Debtors' Motion Seeking Entry of an Order Approving: (I) the Adequacy of Information in the Disclosure Statement; (II) Solicitation and Notice Procedures; (III) Forms of Ballots and Notices in Connection Therewith; and (IV) Certain Dates with Respect Thereto* [Docket No. 390], ¶ 7 ("The restructuring transactions contemplated by the Plan . . . will preserve the integrity of the Debtors' two single employer qualified pension plans . . . ."). Tellingly, the Debtors made the foregoing disclosure but failed to note anywhere in the Disclosure Statement that they had been advised by the Ad Hoc First Lien Group and, upon information and belief, the Ad Hoc Crossover Group, that their constituents would not agree to a chapter 11 plan that did not contain acceptable concessions with respect to the Debtors' pension plans.

[9] *See* Current Plan, Article IV.P. at 26 ("On the Effective Date, equity grants equal to [10.0]% of the Reorganized HoldCo Common Stock (on a fully diluted basis) shall be reserved for continuing directors, officers and employees of the Reorganized Debtors on terms acceptable to the Debtors and set forth in the Plan Supplement.").

grant sweeping releases[10] that are inconsistent with applicable law.

5. The filing of a plan before seeking to establish consensus is particularly troubling in these cases where the Debtors repeatedly have stated that they need to emerge from chapter 11 as soon as possible, with Debtors' counsel highlighting at the first day hearing in these cases that:

> [I]t is absolutely critical that we get the company restructured and out of bankruptcy as quickly and efficiently as possible. *Simply put*, Judge, this is not a company and not a business that will do well in a protracted litigated bankruptcy.[11]

Yet, the Debtors' conduct to date likely will lead to the protracted, expensive litigation that the Debtors have said they will have difficulty withstanding and undoubtedly will delay the Debtors' emergence from chapter 11. *Simply put*, the Debtors' actions have been inconsistent with their stated objectives and chapter 11's basic tenets of building consensus and maximizing value, and do not support a 120-day extension of the Debtors' Exclusive Periods.[12]

6. With the Current Plan having been on file for more than 30 days, the Ad Hoc First Lien Group has yet to receive an answer to the question of why the Debtors chose to file a plan that cannot be confirmed without the acceptance of first lien creditors with full knowledge that neither the Ad Hoc First Lien Group (whose members hold in excess of 50% of the Debtors' first lien debt) nor the Ad Hoc Crossover Group (whose members hold in excess of 30% of the Debtors' first lien debt and 80% of the Debtors' second lien debt) supports the terms of the Current Plan. The only answer can be that the Debtors are seeking to pressure first lien creditors

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[10] *See* Current Plan, Articles VIII.C. (Debtor Release) and VIII.D. (Third Party Release).

[11] *See* Transcript of 1/20 Hearing at 11:3-9 (emphasis added); *see also* Transcript of 4/14 Hearing at 12:22-24 ("There's still a bunch of issues, but we're going to work -- you know, this company does need to get out so we're going to move as quickly as possible."); Transcript of 1/20 Hearing at 11:23-12:3 ("There is broad stakeholder consensus, Your Honor, that coming out of this first day hearing and certainly after the appointment of an official committee of unsecured creditors, to work very, very quickly and develop a plan of reorganization that gets this company out of these courtrooms.").

[12] *Adelphia*, 352 B.R. at 586 (noting that "consensus building" is the goal of chapter 11).

to vote in favor of a plan that only the Debtors' board of directors has deemed satisfactory (for the benefit of PBGC, out-of-the-money creditors, equity sponsors and directors and officers) or risk potential value degradation to first lien recoveries associated with prolonged chapter 11 cases or a conversion to chapter 7. If this is the Debtors' tactic, it will not be successful.

7. The Ad Hoc First Lien Group has made it clear from the inception of these cases that its members are willing to make sacrifices to ensure the Debtors' successful emergence from chapter 11. However, first lien creditors cannot be, and will not be, the only constituency to bear the pain of the Debtors' reorganization. Shared sacrifices will be necessary.

8. Facing the expiration of their initial Exclusive Periods, the Debtors have yet to accept the need for shared sacrifice or take on the traditional debtor role of honest broker. In filing a plan that contemplates that the Reorganized Debtors will honor and maintain the U.S. Qualified Pension Plans, notwithstanding the Debtors' knowledge that first lien creditors will not agree to subordinate their secured claims to the payment of unsecured debt, the Debtors have fostered a dynamic that encourages PBGC to refuse to engage in constructive settlement discussions with creditors. Based on the Debtors' actions, PBGC now has unrealistic expectations about the treatment of the Debtors' pension plans notwithstanding the Debtors' inability to confirm a plan without the consent of first lien creditors. Indeed, based on the Debtors' conduct to date, the Debtors do not appear properly focused on reorganizing the Debtors' businesses, maximizing value for creditors and saving tens of thousands of jobs.

9. Rather than wait for the Debtors to spearhead plan negotiations, on May 1, 2017, the steering committee of the Ad Hoc First Lien Group submitted a restructuring proposal (the "Steering Committee Proposal") to the Debtors. The Steering Committee Proposal conveyed the Ad Hoc First Lien Group's willingness to negotiate the terms of a consensual reorganization and

reflects appropriate sacrifices from *all* stakeholders. Compromise in similar circumstances is not uncommon. For example, the debtors in *In re Hawker Beechcraft, Inc*. ("Hawker") pursued a settlement among their secured creditors and PBGC where the secured creditors refused to take equity on account of their secured claims absent pension-related relief. In Hawker, PBGC agreed to terminate certain of the debtors' qualified pension plans and secured creditors consented to receive equity on account of their claims. In approving the settlement reached in Hawker, this Court recognized that shared sacrifice is a precondition to confirmation of a reorganization plan that requires secured creditors to convert their secured claims into equity. *See* Transcript of Hearing at 22:15-16, *In re Hawker Beechcraft, Inc.,* Case No. 12-11873 (SMB) (Bankr. S.D.N.Y. Jan. 31, 2013) ("the secured creditors will not accept a plan that does not provide for the termination of these [pension] plans. Their refusal is understandable."). Rather than consider the proposal with interest, the Debtors have yet to provide a substantive response to the Steering Committee Proposal.

10. Having failed to heed the views of their key stakeholders that substantive plan negotiations should take place prior to the filing of any plan and failing to respond to the Steering Committee Proposal, the Debtors appear (i) to have chosen to ignore their fiduciary duties and (ii) intent on pursuing the unconfirmable Current Plan with a proposed confirmation schedule that will result in contentious litigation and the incurrence of significant administrative expenses. Given the utter lack of creditor support for the Current Plan, continued prosecution of the Current Plan amounts to nothing more than a waste of estate and judicial resources and should be abandoned.

11. Moreover, in filing and continuing to prosecute the Current Plan without the support of the Ad Hoc First Lien Group, whose members' aggregate holdings render them the

"Required Lenders" under the prepetition Cash Flow Credit Facility, the Debtors also have turned a blind eye to the likely default that will arise under the terms of the DIP Facility, resulting in a Cash Collateral Event of Default[13] on June 18, 2017. As the Court is aware, the DIP Financing Order contains certain case milestones that were geared toward ensuring that the Debtors do not languish in chapter 11. Indeed, counsel for the Ad Hoc First Lien Group emphasized the importance of the case milestones at the first day hearing:

> Your Honor, I want to underscore something that Mr. Dahl had mentioned to you about the case milestones. That aspect of the DIP financing and what's in the order is critically important to the first lien constituency. It puts the cases on a fast track for a reason. As referenced in Mr. Koza's declaration, the company provides services that are mission-critical for its customers. This company cannot languish in Chapter 11. The hard work of Chapter 11 is ahead of us. So the company, for the last nine months that we've been involved, has been focused on sales effort. As you saw in the declaration, that has not borne fruit. As a result, we need to focus on a plan of reorganization or other alternatives, and that has to happen with deliberate speed. I rise to just emphasize to Your Honor that that case milestone aspect of it is critically important to our constituency, and we expect and understood that the company will turn its attention to the hard work of Chapter 11, and getting this company out of bankruptcy as quickly as possible.[14]

Unfortunately, to date, the Debtors have focused their efforts on trying to pressure the first lien creditors to submit to their demands. As a result, the Debtors are nearing a Cash Collateral Event of Default by failing to file "a chapter 11 plan that is acceptable to the Required Lenders . . ., on the one hand, and the Debtors on the other hand . . . with this Court within 150 days of the Petition Date," or June 18, 2017.[15]

12. Despite the Debtors' inability to establish that the Exclusivity Factors warrant an extension of the Exclusive Periods and the Debtors' failure to use their initial Exclusive Periods

[13] As defined in the DIP Financing Order, ¶ 16.

[14] *See* Transcript of 1/20 Hearing at 26:16-25-27:1-12.

[15] *See* DIP Financing Order, ¶ 16(b).

constructively to build consensus in the manner contemplated by chapter 11, the Ad Hoc First Lien Group is not advocating for termination of the Exclusive Periods at this time. Rather, the Ad Hoc First Lien Group submits that a 30-day extension of the Exclusive Periods, together with an adjournment of the Disclosure Statement Hearing, is appropriate to allow the Debtors sufficient time to reform their ways and commence good faith negotiations with their primary stakeholders toward a confirmable chapter 11 plan, after which time the Court and the parties can reevaluate whether an extension is warranted.

13. These chapter 11 cases are at a crossroads and the Debtors' actions over the coming weeks likely will be determinative of whether these estates move toward reorganization or succumb to litigation. The Ad Hoc First Lien Group is eager to commence negotiations on the terms of a consensual plan, but reemphasizes that reaching consensus will require shared sacrifices among all constituencies, not just the first lien creditors. But, if near-term progress towards reorganization does not occur, the Ad Hoc First Lien Group will pursue available remedies to maximize first lien creditor recoveries including, among others, seeking the appointment of a chapter 11 trustee or termination of exclusivity. These are not options that the Ad Hoc First Lien Group desires to pursue and whether they will be necessary is in the Debtors' hands. The path forward is obvious and the time is now for the Debtors to foster constructive negotiations and pursue a viable chapter 11 plan. Anything less would be inconsistent with their fiduciary duties and the Ad Hoc First Lien Group will hold all parties accountable, including the Debtors, their board of directors and their equity sponsors, if progress is not made.

RESERVATION OF RIGHTS

14. The Ad Hoc First Lien Group respectfully reserves all of its rights and remedies, including, without limitation, to seek a termination of the Exclusive Periods at a subsequent date.

CONCLUSION

WHEREFORE, the Ad Hoc First Lien Group respectfully requests that the Court (a) limit an extension of the Exclusive Periods to no more than thirty (30) days, (b) adjourn the Disclosure Statement Hearing for at least thirty (30) days, and (c) grant such other relief as is just, proper and equitable.

Dated: New York, New York
May 16, 2017

By: /s/ Ira S. Dizengoff

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EXHIBIT A

1

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-11873-smb

5 -x

6 In the Matter of:

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8 HAWKER BEECHCRAFT, INC., ET AL.,

9

10 Debtors.

11

12 -x

13

14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 January 31, 2013

19 10:43 AM

20

21 B E F O R E:

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25

1 Anyone else?
2 MR. KWASTENIET: Your Honor, as a house --
3 THE COURT: Just a moment.
4 The debtors are parties to several defined benefit
5 plans --
6 Sit down.
7 -- including the salaried plan and the base plan with
8 nonunion workers and the hourly plan pursuant to its collective
9 bargaining agreement with the International Association of
10 Machinists and Aerospace Workers, hereinafter "the union".
11 Each of the plans is substantially underfunded. Under a global
12 settlement with the PBGC and the union, the debtors will
13 terminate the salaried and base plans pursuant to the distress
14 termination provisions of ERISA and freeze the hourly plan as
15 of December 31, 2012. On a going forward basis, all employees
16 will be entitled to participate in a defined contribution plan.
17 The settlement with the PBGC also provides that the
18 PBGC will be appointed statutory trustee under the salaried and
19 base plans, waive the termination premium payment, and receive
20 an allowed aggregate claim in the amount of 419,500,000
21 dollars. In addition, the debtors will pay eleven million
22 dollars to the PBGC on the effective date in consideration of
23 the PBGC's release of liens against the control group,
24 including the debtors' nondebtor foreign subsidiaries.
25 The agreement with the union provides, in relevant

1 part, that the hourly plan will be frozen as of December 31,
2 2012, and the debtors will honor all benefits earned under the
3 hourly plan on or before December 31, 2012.
4 Effective January 1, 2013, the debtors will provide
5 benefits for eligible union employees through a new defined
6 contribution plan as set forth in an amendment to the
7 collective bargaining agreement.
8 Finally, the debtors will pay up to 450,000 dollars
9 for professional fees and expenses incurred by the union in
10 connection with the debtors' restructuring and the amendment of
11 the collective bargaining agreement.
12 Objections were submitted by the HBC ad hoc retiree
13 committee, hereinafter "the ad hoc committee", and several plan
14 participants, although it was not clear which plan they
15 participated in.
16 These objections generally fell into three categories.
17 First, the participants needed official representation, and
18 accordingly, the Court should appoint an official committee to
19 represent them.
20 Second, it was unfair for the debtors to terminate the
21 two nonunion plans but not terminate the union's hourly plan.
22 Third, the debtors failed to satisfy the requirements
23 for distress termination under ERISA.
24 Prior to the hearing on the motion, the debtors
25 reached an agreement that resolved the objection of the ad hoc

1 committee. According to the debtors, the proposed rejection
2 will affect approximately two percent, or seventy of the higher
3 salaried participants under the salaried plan, and none under
4 the base plan. For everyone else, the PBGC payments will equal
5 the payments the plan participants would have received if the
6 plans had not been terminated.
7 As to the two percent, the debtors have agreed to fund
8 250,000 dollars per year for ten years and to allocate those
9 proceeds to those participants who are receiving benefits
10 during this period from the PBGC that is less than they would
11 have received under the salaried plan. In addition, the
12 debtors will pay 80,000 dollars to counsel for the ad hoc
13 committee to cover its fees and expenses.
14 For the reasons that follow, the motion as
15 supplemented by the debtors' agreement with the ad hoc
16 committee is approved. As this is a settlement, I recount the
17 rules that govern the Court's determination. On a motion to
18 approve a settlement, the bankruptcy court does not decide
19 underlying questions of law or fact; Cosoff v. Rodman, In re:
20 W. T. Grant Company, 699 F.2d 599, 608 (2d Cir. 1983).
21 Instead, the court must make an informed and independent
22 judgment that the settlement does not fall below the lowest
23 point in the range of reasonableness; Id.
24 The decision is based on several factors including the
25 risks and rewards of continued litigation, the possibility of

1 delay, increased costs and difficulty in collection, even if
2 the trustee prevails, the interest of the creditors and whether
3 they support the settlement, the competency of counsel that
4 support the settlement, and the extent to which settlement
5 reflects an arm's-length bargain. See In re: Iridium Operating
6 LLC, 478 F.3d 452, 462 (2d Cir. 2007).
7 Before addressing the question of the settlements, I
8 turn to the issues of representation and fairness raised by the
9 objectors. Section 1102 of the Bankruptcy Code provides that
10 the court may order the appointment of additional committees of
11 creditors if necessary to assure adequate representation of
12 such creditors. It is true that the plan participants did not
13 have a seat at the negotiating table. Nevertheless, the PBGC
14 represented their interests in connection with whether the
15 debtors had satisfied the requirements for a distress
16 termination because the PBGC will pick up the responsibility
17 for those plans and had the motivation to oppose a distress
18 termination.
19 In addition, the ad hoc committee represented the
20 interests of the salaried participants in negotiating the
21 supplemental payments discussed earlier. The appointment of an
22 official committee would not provide any additional benefit and
23 would increase the administrative expenses that the debtors
24 must pay.
25 Accordingly, I conclude that the interests of the plan

1 participants had been adequately represented and declined to
2 appoint an official committee.
3 The objections directed at the fairness of terminating
4 two plans but not the union plan are understandable. However,
5 the law does not require a debtor to deal with all of its plans
6 in the same manner or require a court to consider the disparate
7 treatment between the participants in the different plans. See
8 In re: Kaiser Aluminum Corporation, 456 F.3d 328, 341, note 9
9 (3d Cir 2006). A debtor can seek to terminate some plans and
10 not others, as long as it exercises appropriate business
11 judgment.
12 Further, the union plan and the other plans did not
13 stand on the same footing. In order to terminate the salaried
14 and base plans, the debtors must satisfy the distress
15 termination requirements under ERISA. Because the hourly plan
16 is required under the collective bargaining agreement, the
17 debtor must satisfy the ERISA requirements and must also show
18 that they are entitled to modify the collective bargaining
19 agreement under Section 1113 of the Bankruptcy Code. The fact
20 is that Congress made it more difficult to terminate a union
21 pension plan. For this as well as the debtors' interest in
22 promoting a good working relationship with its union, the union
23 has greater leverage in negotiations. The hourly plan is not
24 similarly situated with the other two plans. And the debtors
25 have exercised reasonable business judgment in declining (sic)

1 to terminate the salaried and base plans but freeze the hourly
2 plan.
3 This brings us to the question of the settlement. The
4 debtors are currently substantially overleveraged compared to
5 their competitors. Their secured debt totaled approximately
6 1.76 billion, and their total debt aggregated for 2.46 billion
7 as of the petition date. Their assets appear to be worth less
8 than their secured debt, and in a Chapter 7 liquidation, only
9 secured debt would recover something. The majority of the
10 creditors, including the secured creditors, have consented to a
11 plan that will convert the debt to equity and thereby
12 deleverage the debtors so that they can successfully compete
13 with others in their industry.
14 Because the plans are underfunded, the debtors would
15 be required to pay approximately 516.5 million dollars, or
16 approximately 74 million dollars annually from 2013 through
17 2019. By terminating the salaried and base plans, freezing the
18 hourly plan, and substituting defined contribution plans, the
19 debtors estimate that they will save 244 million dollars.
20 Although I did not have to decide this question to
21 determine the reasonableness of the global settlement, the
22 evidence submitted on the motions shows, and the PBGC
23 acknowledges that the debtors satisfy the statutory
24 requirements for a distress termination of the salaried and
25 base plans. In essence, the debtors would have to meet the so-

1 called reorganization test by showing that unless the plans are
2 terminated, they will not be able to pay their debt pursuant to
3 the plan of reorganization and continue in business outside of
4 Chapter 11.
5 The debtors have unsuccessfully attempted to market
6 themselves to third parties who are willing to assume the
7 liability for the salaried and base plans.
8 Furthermore, the secured lenders will not accept a
9 plan that does not provide for the termination of these plans.
10 Their refusal is understandable. Under the plan to which they
11 have agreed, they will convert the secured claims to equity and
12 thereby structurally subordinate themselves to the payment of
13 unsecured debt, including the significant liabilities arising
14 from the underfunding of the salaried and base plans. Without
15 the acceptance by the secured class, the debtors will not be
16 able to confirm any plan and will be forced to liquidate. In
17 the latter event, all plans will terminate.
18 In short, the unfortunate truth is that the
19 termination of the salaried and base plans appear to be an
20 inevitable result of these Chapter 11 cases. In addition, the
21 PBGC has agreed to waive the statutory termination premium of
22 1,250 dollars per plan participant per year for three years or
23 the aggregate sum of 36 million in exchange for a one-time 11
24 million dollar payment. Accordingly, the settlement with the
25 PBGC is fair and reasonable.

1 The settlement with the union, which is also part of
2 the global settlement, is also fair and reasonable. The union
3 has agreed to forego litigation under Section 1113 of the
4 Bankruptcy Code and has consented to a modification of the
5 hourly plan that freezes it as of the end of 2012 and
6 substitutes a defined contribution plan on a going forward
7 basis. The prospective substitution of a defined contribution
8 plan for the defined benefit plan which is also underfunded
9 will result in savings to the debtor.
10 Accordingly, I conclude that the debtors have
11 exercised appropriate business judgment in entering into the
12 global settlement, and the evidence shows that it falls well
13 within the range of reasonableness when one considers the risks
14 and rewards of litigating a distress termination with the PBGC
15 and the union, and the attendant costs and delays.
16 The global settlement is the product of an arm's-
17 length bargain by sophisticated attorneys and other
18 professionals, and is supported by the various constituencies
19 including the PBGC and the ad hoc committee.
20 While two percent of the participants in the salaried
21 plan will suffer a reduction in benefits, the reduction has
22 been mitigated through the supplemental agreement reached
23 between the debtors and the ad hoc committee.
24 The global settlement is an important component, and
25 indeed a condition of the debtors' emergence from Chapter 11

1 which will permit the debtors to continue to operate and
2 continue to employ thousands of union and nonunion people.
3 You can submit an order.
4 MR. KWASTENIET: Thank you, Your Honor.
5 Just one housekeeping matter on the union settlement.
6 We did, for the record, submit some various affidavits. The
7 affiants are here and available to testify, but we would
8 appreciate having the Steve Miller, Mike Kramer, and the
9 Hendricks affidavits admitted into evidence.
10 THE COURT: Any objection?
11 Hearing no objection, I'll accept them.
12 (Affidavits of Steve Miller, Mike Kramer, and Mark Hendricks
13 were hereby received into evidence as Debtors' Exhibit as of
14 this date.)
15 THE COURT: Does anybody want to cross-examine the
16 witnesses?
17 The record should reflect there's no response.
18 Yes, sir?
19 MR. FEDER: Your Honor, if I may, just for one second,
20 with respect to the opinion that you just read into the record,
21 I'd like to just seek a clarification on one point. For the
22 record, Benjamin Feder, Kelley Drye & Warren on behalf of PBGC.
23 With respect to the point on 1102, whether the
24 retirees were entitled to a separate committee, you made the
25 statement regarding the -- that their interests were