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Second Lien Noteholders of Avaya Inc.

Hearing Date: August 25, 2017 at 10:00 a.m. (ET)
Objection Deadline: August 16, 2017 at 4:00 p.m. (ET)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **AVAYA INC., *et al.*,** **Debtors.**[1]	Chapter 11 Case No. 17-10089 (SMB) (Jointly Administered)
AVAYA INC., *et al.*, **Movants,** **-against-** **AD HOC GROUP OF SECOND LIEN NOTEHOLDERS OF AVAYA INC.,** **Respondent.**	**Re: ECF Nos. 390 and 894**

[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.

OBJECTION OF AD HOC GROUP OF SECOND LIEN NOTEHOLDERS TO (A) DISCLOSURE STATEMENT FOR THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF AVAYA INC. AND ITS DEBTOR AFFILIATES AND (B) 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

To the Honorable Stuart M. Bernstein, United States Bankruptcy Judge:

The Ad Hoc Group of Second Lien Noteholders of Avaya Inc. (the "Ad Hoc Second Lien Group")[2] hereby submits this objection (the "Objection") to the (a) *Disclosure Statement for the First Amended Joint Chapter 11 Plan of Reorganization of Avaya Inc. and its Debtor Affiliates* [ECF No. 894] (the "Amended Disclosure Statement" of the "Debtors")[3] and (b) *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* [ECF No. 390] (the "Motion"). In support of the Objection, the Ad Hoc Second Lien Group respectfully avers as follows:

STATEMENT OF THE CASE

1. On August 7, 2017, the Debtors filed an Amended Plan and Disclosure Statement after negotiations with just two of their creditor constituencies: the Ad Hoc First Lien Group and the PBGC.[4] Given the exclusive nature of these settlement negotiations, is it a surprise that, in connection with the Amended Plan, the Debtors' current Chief Executive Officer and proposed

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[2] Capitalized terms used but not otherwise defined herein have the meanings given to them in the Amended Disclosure Statement or Motion (each as defined herein), as applicable.

[3] The Debtors filed their initial disclosure statement on April 13, 2017 [ECF No. 388].

[4] *See First Amended Joint Chapter 11 Plan of Reorganization of Avaya, Inc. and its Debtor Affiliates* [ECF No. 896] (the "Amended Plan").

new Chief Executive Officer will each receive many millions of dollars in up-front payments and subsequent payments and equity from the Debtors in exchange for supporting a plan that provides the first lien holders with a recovery of over 95%, and the PBGC with $300 million in cash and 7.5% of the new equity despite the fact that it shares equal priority with all other unsecured claimholders? Tellingly, the Debtors did not even attempt to include the Creditors' Committee, the Ad Hoc Crossover Group, or the Ad Hoc Second Lien Group in any of those discussions or "settlements," even though the very issues they purport to resolve have the most impact on the recoveries for unsecured claimholders and second lien noteholders.

2. These complex issues include, among others, (a) the valuation of the self-described Avaya "global enterprise," (b) the allocation between creditors of the value between so-called "Encumbered Assets" and "Unencumbered Assets," since a significant portion of the assets of the Avaya global enterprise may not secure the claims of the First and Second Lien Notes, (c) the allowance of purported intercompany claims, such as the Sierra Intercompany Note and the treatment of such, which has a potentially large impact on the recovery to all creditors, and (d) whether given the fully integrated and global nature of the Avaya Enterprise, which has 176 legal entities across the globe, with clients who are described as "transnational" and where less than 50% of its employees reside in the United States, substantive consolidation of Sierra with the other Debtors is warranted to effectuate the fair treatment of all creditors. Any proposed allocation of value will have case dispositive implications for unsecured claimholders and second lien noteholders, as the existence of multiple debtors and creditors with claims and potential liens against multiple domestic and foreign estates could lead to a subjective allocation that may tip the scales in favor of one set of creditors and estates at the expense of others. Indeed, this Court has acknowledged as much. *See* July 25, 2017 Hr'g. Tr. at 30:3-7 (THE

COURT: "In a very complicated case where you have a lot of non-debtor foreign affiliates, you have a wide disparity in what the various valuations are, and I suspect you're probably better off reaching a resolution of that than having me decide it.").

3. Why did the Debtors leave all stakeholders other than the Ad Hoc First Lien Group and PBGC out of the Amended Plan negotiations? While this Court believed and expressed its view at the July 25th hearing that the negotiation and filing of this Amended Plan and Disclosure Statement simply marked the first in a series of steps where the Debtors would "work their way down the capital structure," in fact, far from an intended first step, the filing represents the Debtors' and the Ad Hoc First Lien Group's end game: to try to expeditiously jam through a litigated Amended Plan and seek to stack the deck by obtaining the approval of a Plan Support Agreement that grants the Ad Hoc First Lien Group payment of all professional fees that will be incurred by its counsel and financial advisor in that litigation and obtain this Court's blessing of a settlement with the PBGC under Bankruptcy Rule 9019 that would lock-in its plan treatment on the basis of untested assertions of joint and several liability which should properly be approved only in the context of a confirmation order. In fact, contrary to the representations made by the Debtors' counsel to this Court, ***more than three weeks have now passed and the Debtors have not contacted or approached the Ad Hoc Second Lien Group or its counsel in connection with any settlement discussions***. *See* July 25, 2017 Hr'g. Tr. at 28:1-4 (THE COURT: "When are you going to talk to [the Ad Hoc Second Lien Group]? MR. HENES: "We're going to file our plan, let them look at our plan, and you know, we're going to – obviously, we're going to – it's a plan process.").

4. Even more troubling is the appearance that these backroom negotiations create: two "trades" that smack of self-dealing—first, a lucrative so-called "consulting agreement" for

Mr. Kennedy and a new employment agreement for Mr. Chirico, which, if approved by this Court, will pay Messrs. Kennedy and Chirico many millions of dollars in both up-front payments and subsequent payments at the same time that the Amended Plan enriches the members of the Ad Hoc First Lien Group with a 95% plus recovery, and second, a settlement with the PBGC in which it agrees to permit the termination of the Salaried Pension Plan in exchange for a $300 million cash recovery and 7.5% of the new equity even though it shares the same priority as all other unsecured claimholders.

5. If Mr. Kennedy is so valuable to the Debtors and the reorganized companies that a so-called "consulting agreement" paying him many millions of dollars is required (the full extent of the aggregate amounts he will be paid is not disclosed in the pleadings), then why is he being asked to leave his position as Chief Executive Officer and a member of the Board of Directors now at the very critical time that the Debtors are seeking to try to emerge from chapter 11 and turn their businesses around? These are the types of insider arrangements that not only are completely inappropriate in the context of an exclusive plan negotiation, but give the bankruptcy process a bad name, and the very reason why Congress enacted limitations on executive compensation. While Avaya continues to shed thousands of workers and seeks to severely compromise the claims of its second lien noteholders and unsecured claimholders, it rewards senior management with extravagant bonus packages, golden parachutes, and so-called "consulting agreements."

6. Contrary to the Debtors' stated desire for a prompt emergence from chapter 11, the Amended Plan and Amended Disclosure Statement will only lead to protracted and costly litigation, as the Debtors have elected to pursue a cram-down strategy dictated by the Ad Hoc First Lien Group, as opposed to the negotiated, arm's-length process with all of their creditors

that they represented to this Court. *See* July 25, 2017 Hr'g. Tr. at 14:19-25 (MR. HENES: "We believe it is a confirmable plan, a fair plan, and a plan that at the end of the day you're going to find is confirmable. With that being said, we're going to sit down with whatever parties want to sit down, as long as they're sitting down in good faith, to talk about the plan and see if we can make it something that's fully consensual."); 29:4-7 (MR. HENES: "But our view here is we're going to file our plan; everybody's going to look at it. . . we're going to talk, everybody's going to talk.").

7. The very process by which the Debtors negotiated the Amended Plan should raise serious concerns, and warrants the scrutiny both of this Court and the U.S. Trustee. ***First***, the Debtors negotiated "settlements" of intercompany and inter-debtor disputes between chapter 11 debtors Avaya Inc. and Sierra Communication International LLC with the same set of legal and financial professionals, and the same directors and officers, on each side of the supposed negotiations. How can a "settlement" occur when the Debtors and the same management and sets of advisors are on both sides of every issue? Even worse, by intentionally excluding unsecured claimholders and second lien noteholders from their settlement discussions, the Debtors lacked the neutrality required of a fiduciary in multi-debtor situations, and deprived the very people most affected by the outcome of those discussions a fair and full opportunity to advocate their respective positions before the Debtors publicly announced their determination of those issues. Indeed, conflicts of this kind can, under some circumstances, justify the appointment of a chapter 11 trustee or the disqualification of professionals with respect to inter-debtor disputes, *see In re Adelphia Commc'ns Corp.*, 336 B.R. 610, 671-73 (Bankr. S.D.N.Y. 2006) (requiring directors and officers of a debtor-holding company and debtor-operating company subsidiaries to recuse themselves with respect to inter-debtor disputes and

disqualifying counsel for the debtors from representing any of the debtors in connection with the same), as well as the denial of any agreements to support a plan negotiated under such circumstances, *In re Innkeepers USA Tr.*, 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010) ("In a bankruptcy case, it is 'Bankruptcy 101' that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate, and each of the estates in a multi-debtor case. As Judge Gerber held in *Adelphia*, in a case with multiple debtors, the debtors, as fiduciaries, have duties to refrain from favoring or appearing to favor one or another of their estates and its creditors over another."). Here, the Debtors are attempting to settle valuation, allocation, and intercompany claims in a manner that favors one debtor estate over another to the advantage of the first lien holders and the PBGC and solely to the disadvantage of the second lien noteholders and unsecured claimholders.

8. ***Second***, as noted earlier, as part of this plan negotiation process, the Debtors' senior management engaged in their own negotiation of new compensation packages while at the same time negotiating the terms of the Amended Plan with the members of the Ad Hoc First Lien Group, which would have to approve, and under the PSA, support those arrangements.[5] Specifically, Michael Kennedy, the Debtors' Chief Executive Officer, negotiated a so-called "consulting agreement" that will allow him to resign from the Debtors in advance of their potential emergence from chapter 11 as early as October 1, 2017—a critical juncture for the company as it finalizes its business plan for the upcoming fiscal year—and yet still receive a very lucrative golden parachute that includes $1.9 million in cash per year for the two-year

[5] Each of the "Advisory Agreement" and the "Executive Employment Agreement" entered into by the Debtors with Messrs. Kennedy and Chirico, respectively, are "Restructuring Documents" under the PSA, which are required to be supported by each "Holder Party" (section 4(a)(i) of the PSA) and which the "Company shall use reasonable best efforts to effectuate" (section (5)(a)(iii) of the PSA).

"Post-Emergence Advisory Period" and all change of control and retention bonuses, plus his annual base salary and Key Employee Incentive Plan and Annual Target Bonus payments after he has left the company for up to almost $2.5 million, including the reimbursement of legal fees incurred in connection with the negotiation of his compensation package and medical coverage. The aggregate amount payable to Mr. Kennedy has not been disclosed.

9. Additionally, in conjunction with Mr. Kennedy's apparent agreement to leave the Debtors and receive his golden parachute arrangement, James Chirico, the proposed new Chief Executive Officer, also stands to receive very large cash payments as a result of the plan negotiations, including a "sign-on" bonus of $2.5 million (query why a current senior officer like Mr. Chirico requires a "sign-on" bonus at all) on top of a base salary of $1.25 million and a target bonus equal to 200% of that annual salary. Mr. Chirico will also receive on emergence an equity grant award to be negotiated on or by August 31, 2017, presumably with the Ad Hoc First Lien Group. Like Mr. Kennedy, it appears that Mr. Chirico has used the opportunity of plan negotiations to enrich himself.

10. While this self-dealing and inappropriate conduct render the Amended Plan patently unconfirmable on its face, this Court should not countenance this egregious behavior by allowing the Debtors to move forward to solicit votes in connection with this flawed process and Amended Disclosure Statement. Moreover, given the failure by the Debtors to provide this Court and all stakeholders with much more information about why these various settlements and agreements are legally justifiable, the Amended Disclosure Statement also fails to provide creditors with adequate information that would enable them to vote on the Amended Plan. Among other material deficiencies, the Amended Disclosure Statement does not contain sufficient information relating to the value of "Unencumbered Assets," the allocation of value

between the Debtors and non-Debtors, the proposed treatment of intercompany receivables, an updated valuation or an independent assessment of the Debtors' financial projections, or the waterfall model that drives the Amended Plan's proposed creditor recoveries, let alone a build-up of assets and liabilities on an entity-by-entity basis. For these and the reasons set forth below, the Court should deny the approval of the Amended Disclosure Statement at this time and enter such other equitable relief as the Court sees fit so that this case and the deeply flawed process by which this Amended Plan was negotiated do not serve as precedent for others.

OBJECTION

11. Bankruptcy Code section 1129 sets forth the requirements the Debtors must satisfy before a court can confirm a chapter 11 plan. "Courts have recognized that 'if it appears there is a defect that makes a plan inherently or patently unconfirmable, the [c]ourt may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing." *In re American Capital Equipment, LLC*, 688 F.3d 145, 154 (3d Cir. 2012) (quoting *In re Larsen*, No. 09-02630, 2011 Bankr. LEXIS 1621 (Bankr. D. Idaho May 3, 2011)); *In re Quigley Co., Inc.*, 377 B.R. 110, 115–16 (Bankr. S.D.N.Y. 2007) ("If the plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile.") (citing *In re Beyond.com Corp.,* 289 B.R. 138, 140 (Bankr. N.D.Cal.2003) (collecting cases); *In re 266 Washington Assocs.,* 141 B.R. 275, 288 (Bankr. E.D.N.Y.), *aff'd,* 147 B.R. 827 (E.D.N.Y.1992); *In re Filex,* 116 B.R. 37, 41 (Bankr. S.D.N.Y.1990)); *In re Unichem Corp.*, 72 B.R. 95, 98 (Bankr. N.D. Ill. 1987) ("Although the issue of whether a plan meets the requirements of § 1129(a) is usually reserved for the hearing on confirmation, in certain circumstances it is appropriate for the court to consider the issue at the hearing on the disclosure

statement. One such circumstance is where it is readily apparent that the plan accompanying the disclosure statement could never legally be confirmed.") (citing *In re Pecht*, 53 B.R. 768 (Bankr. E.D. Va. 1985); *In re McCall*, 44 B.R. 242 (Bankr. E.D. Pa. 1984)). Addressing such defects at the disclosure statement stage of a chapter 11 case maximizes the interests of all creditors because it prevents the wasteful expenditure of estate resources on the solicitation of an unconfirmable plan.

12. In addition, Bankruptcy Code section 1125(b) requires a disclosure statement to a chapter 11 plan to contain "adequate information," which is defined as:

> "Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan . . ."

11 U.S.C. § 1125(a)(1).

13. Full and fair disclosure is the foundation of chapter 11, and the adequacy of information contained in the disclosure statement is of paramount importance. *See*, *e.g.*, *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994) ("[o]f prime importance in the reorganization process is the principle of disclosure"); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("[t]he importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court . . . we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of 'adequate information'"); *In re Galerie Des Monnaies, Ltd.*, 55 B.R. 253, 259 (Bankr. S.D.N.Y. 1985) ("preparing and filing of a disclosure statement is a most important step in the reorganization of a [c]hapter 11 debtor").

14. A disclosure statement must "contain simple and clear language delineating the

consequences of the proposed plan . . . and *the possible. . . alternatives* . . . ." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988) (emphasis added); *see also In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991) (disclosure statement must "clearly and succinctly inform the average . . . creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution"). In particular, a disclosure statement must provide enough information for parties in interest to understand the financial ramifications of the plan based on the case's particular facts and circumstances. *See*, *e.g.*, *In re McLean Indus., Inc.*, 87 B.R. 830, 834–35 (Bankr. S.D.N.Y. 1987); *In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 29 (S.D.N.Y. 1995).

15. A disclosure statement fails to meet the standards of section 1125 if the basis of the plan can be revealed only because parties in interest took extensive discovery or undertook their own expert analysis. *See In re Michelson*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) (citing *In re Braten Apparel Corp.*, 21 B.R. 239, 259-60 (Bankr. S.D.N.Y. 1982)). A plan proponent has an obligation in the first instance to set forth information sufficient to allow parties in interest to make informed decisions about the plan.

16. For the multiple reasons set forth herein, the Ad Hoc Second Lien Group submits the Amended Plan proposed in connection with the Amended Disclosure Statement is patently unconfirmable under Bankruptcy Code section 1129, and the Amended Disclosure Statement fails to meet the requirements of Bankruptcy Code section 1125 due to its numerous informational deficiencies.

The Amended Plan is Unconfirmable as a Matter of Law

17. **The Amended Plan Was Not Proposed in Good Faith**. Bankruptcy Code section 1129(a)(3) requires that a chapter 11 plan have "been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3); *see also In re Bd. of Directors of Telecom Argentina, S.A.*, 528 F.3d 162, 174 (2d Cir. 2008) ("Under § 1129(a)(3), a plan will be found in good faith if it 'was proposed with honesty and good intentions and with a basis for expecting that a reorganization can be effected.'") (quoting *In re Koelbl*, 751 F.2d 137, 139 (2d Cir.1984)). Here, however, the Amended Plan was not proposed in good faith. The Debtors' management negotiated new compensation packages at the very same time it sought the support of the members of the Ad Hoc First Lien Group—the designated new controlling equity owners who would ultimately have to agree to those compensation packages—on the terms of an amended plan that settles inter-debtor disputes in favor of the same first lien holders. Indeed, the self-interested "consulting agreement" for Mr. Kennedy and new employment agreement for Mr. Chirico, which both include up-front payments of millions of dollars, negotiated in the context of an exclusive plan negotiation with the Ad Hoc First Lien Group, make this *prima facie* evidence the Amended Plan was not proposed in good faith. In addition, the PBGC Settlement is premised on inter-debtor negotiations concerning, among other things, claims held against each other, as well as the validity of potential "controlled group" liability against Sierra, during the course of which no Debtor had independent advisors or directors and officers. Under such circumstances, the Debtors' conflicted advisors and directors and officers cannot advocate for any one Debtor because doing so would amount to a breach of their fiduciary duties to other creditors. *See*, *generally*, *In re Adelphia Commc'ns Corp.*, 336 B.R. 610, 669-70 (Bankr. S.D.N.Y. 2006), *aff'd* 342 B.R. 122 (S.D.N.Y. 2006) ("The duty of loyalty 'includes an

obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety, to treat all parties to the case fairly, and to maximize the value of the estate.'") (quoting *In re Hampton Hotel Inv'rs, L.P.*, 270 B.R. 346, 362 (Bankr. S.D.N.Y. 2001)).

18. Yet, that is exactly the situation that has occurred here, with self-dealing senior management and the same counsel representing both Avaya Inc. and Sierra Communication International LLC in the purported resolution of disputes and claims held against one another, which a board of directors comprised of the same individuals for each separate entity approved. *See* Amended Disclosure Statement at 25 ("The Global Plan Settlement includes a settlement of these issues and subordinates payments in respect of the foregoing Intercompany Claims to the payments required under the PBGC Settlement with the net effect being no recovery on the Sierra Intercompany Note. Distributions to be made under the Plan reflect settlement of the Debtors' intercompany arrangements, including the Sierra Intercompany Note, AHL Receivable and the AISL Receivable. These settlements considered, among other things, the risk of recharacterization with respect to such Claims.").

19. Given the Creditors' Committee, the Ad Hoc Crossover Group, and the Ad Hoc Second Lien Group were not even invited to participate in these negotiations, the Amended Plan that resulted from them suffers more than the appearance of impropriety here. The Debtors did not seek to obtain any independent review of these issues by unconflicted legal and financial advisors, and instead relied on the same set of professionals and directors and officers with conflicting duties of loyalty. These individuals merely "negotiated" among themselves and designed a "settlement" based upon legal assumptions of joint and several liability and structural seniority that support the Debtors' litigation strategy to cram-down the second lien noteholders. Indeed, as set forth in the *Objection of Ad Hoc Second Lien Group to Debtors' Motion for Entry*

of an Order (I) Authorizing the Debtors to Enter Into and Perform Under a Plan Support Agreement and (II) Granting Related Relief, filed contemporaneously herewith, it is likely the PBGC ***has no enforceable claims against Sierra and its foreign subsidiaries***. Accordingly, it is abundantly clear the Amended Plan was not filed in good faith, fails Bankruptcy Code section 1129(a)(3), and is patently unconfirmable.

20. **The Amended Plan Unfairly Discriminates between Similarly-Situated Creditors**. Bankruptcy Code section 1129(b) requires that a plan not "discriminate unfairly . . . with respect to each class of claims . . . that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b). Despite this requirement, the Amended Plan, through the PBGC Settlement, provides the PBGC over (a) $300 million in cash, (b) 7.5% of Reorganized HoldCo Equity, and (c) additional protections in favor of the Avaya Hourly Pension Plan following the Debtors' emergence from chapter 11.[6] As the Valuation Analysis sets forth, the total value of the Reorganized HoldCo Common Stock is approximately $2.8 billion at the midpoint,[7] and the PBGC stands to recover ***at least*** $510 million of its alleged $1,240 million claim, or 41.13%, assuming the additional protections have ***zero*** value. By comparison, the holders of Second Lien Notes, totaling more than $1.4 billion, are receiving a proposed recovery of 1.6% and other unsecured claims are estimated to receive a recovery of no more than approximately 8.2%.[8] Suffice it to say, by any yardstick, this constitutes unfair discrimination. *See Graphic Commc'ns*, 200 B.R. 143, 145 (Bankr. E.D. Mich. 1996) (finding a proposed 10% recovery to one class compared to a proposed 100% recovery to a different class of unsecured claimholders

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[6] *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter Into and Perform Under a Plan Support Agreement and (II) Granting Related Relief* at ¶ 4; Amended Plan at Article III(B)(5).

[7] Exhibit D to the Amended Disclosure Statement.

[8] Amended Plan at Article III(B)(4) and (6).

reflected "personal animosity" and was unfairly discriminatory); *In re Crosscreek Apartments*, 213 B.R. 521, 537-58 (Bankr. E.D. Tenn. 1997) (finding unfair discrimination where class of unsecured trade debt would be paid in full while another class comprising secured creditor's deficiency claim was receiving approximately 50%); *In re Cranberry Hill Assocs., L.P.*, 150 B.R. 289, 290-91 (Bankr. D. Mass. 1993) (same); *In re Tuscon Self-Storage, Inc.*, 166 B.R. 892, 898 (B.A.P. 9th Cir. 1994) (holding that 90% disparity between recoveries to classes of unsecured creditors was unfair discrimination); *In re Creekside Landing, Ltd.*, 140 B.R. 713, 716 (Bankr. M.D. Tenn. 1992) (proposed 20% payment unfair in light of 40% and 75% payouts to other classes). Accordingly, the Amended Plan's grossly disparate treatment of the PBGC relative to other similarly-situated creditors renders it unconfirmable as a matter of law, especially when, as here, the legal assumptions upon which the Debtors have justified their proposed superior treatment of pension claims have not been proven and/or litigated to conclusion.

The Disclosure Statement Lacks Adequate Information

21. **Unencumbered Assets**. Conspicuously absent from the Amended Disclosure Statement is any information concerning the nature, extent, and value of unencumbered assets in the Avaya Enterprise. The Debtors should further revise the Amended Disclosure Statement to provide this information on an entity-by-entity basis as required by Bankruptcy Code section 1129(a)(10). Moreover, this information should be supported by additional data in the "Valuation Analysis" provided by Centerview Partners LLC ("Centerview"), the Debtors' investment banker. Without this information, parties cannot determine whether creditors at certain Debtors are recovering more or less than that to which they are legally entitled.

22. **Allocation of Value**. The Amended Disclosure Statement does not contain adequate information regarding the allocation of value between and among the U.S. and foreign subsidiaries within the Avaya Enterprise. As evidenced by the Nortel bankruptcy cases,[9] there are various allocation methodologies by which the value of a global technology company may be determined and allocated. These methodologies to determine the appropriate allocation include the percentage of revenues, percentage of employees, percentage of profits, and other indicia of value. These are further impacted by transfer pricing and ownership of intellectual property. Creditors of Avaya need this information to determine whether any proposed plan fairly distributes assets and provides a fair recovery to each class.

23. **No Disclosure of Waterfall Model**. The Amended Disclosure Statement provides "[d]istributions under the [Amended] Plan are premised on a waterfall model that incorporates the settlement of various drivers underlying the allocations contemplated therein." Amended Disclosure Statement at 49. Among other things considered by the waterfall model are (a) the allocation of value among Debtor and non-Debtor entities, (b) the allowance and treatment of intercompany claims, and (c) the allocation of expenses in the chapter 11 cases. Despite these important considerations and the substantial impact they could have on creditor recoveries, the Debtors do not provide the waterfall model and its underlying assumptions and conclusions for review or scrutiny by creditors or this Court. Indeed, the Ad Hoc Second Lien Group through its counsel requested the waterfall model, but no delivery has been forthcoming. Simply put, it is self-evident the waterfall model is of the utmost importance in providing creditors with critical information to make an informed judgment on the Amended Plan. Without visibility on how the Debtors propose to distribute value and the basis for such waterfall

[9] *See* Case No. 09-10138 (KG) (Bankr. D. Del. May 12, 2015) [ECF No. 15544] (opinion on the allocation of sale proceeds across multiple domestic and foreign entities).

distribution, creditors cannot know whether the Amended Plan represents a fair resolution of these chapter 11 cases.

24. **Financial Projections**. The Debtors' financial advisor must update its valuation since over four months have passed since the filing of the initial disclosure statement in early April.[10] In addition, the valuation of the Debtors' financial advisor is largely dependent on the 'terminal value' that is assigned by them. Additional information is required on the assumptions underlying such terminal value.

25. In addition, the Debtors' financial advisor states they "assume that the Financial Projections had been reasonably prepared in good faith" and that their Enterprise Range "assumes the Avaya Enterprise will achieve its Financial Projections in all material respects." These statements make clear that Centerview has made no independent inquiry into the financial projections that form the basis for its valuation. This makes no sense, particularly for a company that has consistently overestimated its publicly-stated forward guidance. Part of the job of a debtor's financial advisor is to determine whether the key assumptions made by the Debtors' management team are reasonable in light of historical performance and future challenges. Particularly here, when the existing Chief Executive Officer is going to leave the company, thereby no longer being accountable for its financial projections, Centerview should be required by the Court to provide its expert view on the reasonableness of the key assumptions and the risks relating to such assumptions.

[10] The Centerview valuation states that "[t]he assumed Enterprise Value range, as of the Assumed Effective Date, reflects work performed by Centerview on the basis of information available to Centerview as of April 7, 2017."

CONCLUSION

26. The process by which the Amended Plan and Amended Disclosure Statement was agreed to by the Debtors, the Ad Hoc First Lien Group and the PBGC was deeply flawed. It is one derived from self-dealing and apparent conflicts, and should not be countenanced by this Court. It is not a chapter 11 plan that has been proposed in good faith and is unconfirmable. Since the Amended Plan was filed on August 7, 2017, the Debtors have not, contrary to the Court's expectation, reached out to negotiate or even been willing to provide the 'waterfall' analysis that is the basis for the various settlements contained in the Amended Plan. That is because their only interest is to litigate a cram-down plan that ultimately allows the two most senior executives of the Company to enrich themselves (with their aggregate payments nearing or exceeding the total amount being offered to unsecured claimholders) while giving the PBGC preferential treatment in a manner inconsistent with the Bankruptcy Code. As currently presented, the Amended Plan fails to satisfy necessary requirements of Bankruptcy Code section 1129, and the Amended Disclosure Statement contains many material deficiencies that would prevent "a hypothetical investor . . . [from making] an informed judgment about the plan." 11 U.S.C. § 1125(a)(1).

27. Simply put, the Debtors' estates must not expend resources on an Amended Plan that cannot be confirmed and has deprived creditors of critical information that will aid their decision on whether to vote to accept or reject the Amended Plan. As currently presented, the Amended Plan and Amended Disclosure Statement fail in these regards. Moreover, the self-dealing and conflicts that are so evident should be addressed now so that going forward a plan can be negotiated in good faith by the Debtors with all of their stakeholders.

WHEREFORE the Ad Hoc Second Lien Group respectfully requests the Court (a) deny approval of the Amended Disclosure Statement and the Motion at this time, (b) subject to the Court's calendar, set a new hearing date for the Amended Disclosure Statement and Motion on or around October 23, 2017 with a directive for good faith plan negotiations to take place over such 60-day period, and (c) grant such other relief as is just and proper.

Dated: August 16, 2017
New York, New York

Respectfully submitted,

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