IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re SIGNATURE STYLES, LLC, *et al.*, Debtors.	Chapter 11 Case No. 11-11733 (KG) (Jointly Administered) **Hearing Date: December 2, 2011 at noon** **Objections Due: December 2, 2011 at 9 a.m.**

UNITED STATES TRUSTEE'S (I) OBJECTION TO EMERGENCY MOTION OF THE DEBTORS AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR THE ENTRY OF AN ORDER (A) PRELIMINARILY APPROVING DISCLOSURE STATEMENT, (B) APPROVING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT PLAN OF LIQUIDATION, (C) APPROVING THE FORM OF BALLOT AND SOLICITATION MATERIALS, (D) ESTABLISHING VOTING RECORD DATE, (E) FIXING THE DATE, TIME AND PLACE FOR THE COMBINED DISCLOSURE STATEMENT AND CONFIRMATION HEARING AND THE DEADLINE FOR FILING OBJECTIONS THERETO AND (F) APPROVING RELATED NOTICE PROCEDURES AND (II) PRELIMINARY OBJECTION TO THE DISCLOSURE STATEMENT, TO CONFIRMATION OF THE PLAN, AND TO THE SOLICITATION PROCEDURES UTILIZED BY THE PLAN PROPONENTS

Roberta A. DeAngelis, the United States Trustee for Region 3 ("U.S. Trustee"), by and through her undersigned attorneys, hereby (I) objects to the Emergency Motion Of The Debtors And Official Committee Of Unsecured Creditors For The Entry Of An Order (A) Preliminarily Approving Disclosure Statement, (B) Approving Procedures For Solicitation And Tabulation Of Votes To Accept Or Reject Plan Of Liquidation, (C) Approving The Form Of Ballot And Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing The Date, Time And Place For The Combined Disclosure Statement And Confirmation Hearing And The Deadline For Filing Objections Thereto And (F) Approving Related Notice Procedures (the "Motion"), and (II) sets forth preliminary objections (the "Preliminary Objections") to the disclosure statement (the "Disclosure Statement") and to confirmation of the plan (the "Plan")

filed by the Debtors and the official committee of unsecured creditors (the "Committee," and collectively with the Debtors, the "Plan Proponents"), [Dkt. Nos. 453 and 454]. In support, the U.S. Trustee states as follows:

PRELIMINARY STATEMENT

1. On November 18, 2011, the Plan Proponents filed the Plan and Disclosure Statement, together with ballots and notices, in the above-referenced case. The following day, without seeking, let alone obtaining, Court approval of the Disclosure Statement or form of ballots, notices or solicitation procedures, the Plan Proponents had the Debtors' claims agent mail out solicitation packages, including the unapproved Disclosure Statement, ballots and notices, to the Debtors' creditors.

2. By soliciting votes without an approved disclosure statement, the Plan Proponents directly violated the plain language of § 1125(b) of the Bankruptcy Code (the "Code"), which requires that any solicitation of votes on a plan be accompanied by a disclosure statement that has been approved by the Court, after notice and a hearing, *prior* to any solicitation. The Plan Proponents attempt to remedy their violation of § 1125(b) by filing the Motion more than a week after sending out solicitation packages, seeking what is in essence retroactive preliminary approval of the Disclosure Statement. The Plan Proponents ignore that, under § 1125(b) of the Code, approval of a disclosure statement must be obtained before – not after – solicitation has begun.

3. The Plan Proponents claim that they followed their procedure in order to help the consumer creditors of the Debtors, namely those creditors holding gift cards or merchandise credits. The Plan Proponents assert that they wanted to alert the consumer creditors that, after being denied by the Debtors and their lender the right to use their gift cards

and merchandise credits for half a year, they now have the opportunity to use those cards and credits for a limited period of time (or they may elect to receive a distribution from the estate instead). The Plan Proponents further assert that they could not wait to get approval of the Disclosure Statement before beginning solicitation, as the Code requires them to do, because the holiday season is approaching, and the consumer creditors may want to use their gift cards or credits in the next few weeks.

4. The excuses the Plan Proponents offer cannot justify violation of the Code. In any event, the excuses ring hollow. The Plan Proponents had the ability to alert the consumer creditors to the fact that they could now use their cards and credits without, simultaneously, soliciting votes on the Plan.[1] In addition, if there really was time urgency, the Plan Proponents could have filed the Plan and Disclosure Statement long ago, as the sale of substantially all of the Debtors' assets closed on September 13, 2011 (*see* Motion, ¶ 9). At the very least, the Plan Proponents could have filed all solicitation documents a week or two earlier, and simultaneously filed a motion along the lines of the current one, seeking preliminary approval of the Disclosure Statement, ballots, notices and solicitation procedures, on shortened notice if necessary, in advance of undertaking any solicitation. Such procedure was followed in another case in this Court, *BT Tires*, Case No. 09-11173 (Bankr., D. Del.) (CSS), Dkt. Nos. 438, 439, 440. Counsel for both the Debtor and the Committee in the present case are well aware of the *BT Tires* procedure because both firms (including certain of the individual attorneys involved in the present case) were counsel to parties in interest in *BT Tires*. However, in the present case the Plan Proponents chose not to follow the procedure

[1] The Plan Proponents' claim that they acted in furtherance of the interests of the consumer creditors is also belied by the Plan's treatment of those consumer creditors, which, with respect to the priority gift card holders, further violates their rights under the Code, as detailed below.

used in *BT Tires*, and instead decided to solicit votes with no Court approval, and no opportunity for the U.S. Trustee or any other party in interest to object in advance of the solicitation and have that objection heard by the Court, as is their right under the Code.

5. The Plan Proponents assert in the Motion (¶ 4) that they "used their best efforts to keep the Office of the United States Trustee informed of the proposed process." The only information provided by the Plan Proponents to the Office of the United States Trustee ("OUST"), however, were the general statements made at Court hearings in September, 2011, and at the hearing on November 17, 2011, one day before the Plan Proponents filed the Plan and Disclosure Statement, and two days before the solicitation packages were mailed. At that Court hearing, counsel for the U.S. Trustee indicated that she had yet to see the Plan or Disclosure Statement, and reserved all rights to object to whatever procedures the Plan Proponents intended to use. Debtors' counsel agreed that all rights were reserved. In addition, Debtors' counsel asserted that the Plan Proponents would work with counsel for the U.S. Trustee to get any issues resolved. The following day, November 18, counsel for the U.S. Trustee communicated with Debtors' counsel by telephone and voice mail, indicating that the Plan Proponents should follow the procedures used in *BT Tires*, that the OUST had issues with certain provisions of the Plan and Disclosure Statement and needed additional time to fully review the papers, and that no solicitation packages should be sent out. Despite having had these communications with the OUST, the next day the Plan Proponents caused the Debtors' claims agent to send out solicitation packages to all voting classes.

6. In addition to all of the above, the Disclosure Statement should not be approved because it includes inaccurate – and therefore inadequate – information. The Disclosure Statement incorrectly describes the gift card class, which is a priority class, as

unimpaired, and therefore not entitled to vote, when such class is in fact impaired. Such impairment includes providing zero distribution to any gift card holder with a claim under $50 (which likely covers a significant percentage of gift card holders), requiring each gift card holder to fill out an additional form and return their gift card before being able to receive any distribution, and failing to provide distribution on the effective date of the plan, as required by 11 U.S.C. § 1129(a)(9)(B)(ii). In addition to failing to comply with § 1129(a)(9)(B)(ii) of the Code, the Plan also fails to comply with other requirements of §1129(a), including §1129(a)(1),(2),(3),(7), and (8). Therefore, the Disclosure Statement should not be approved for the additional reason that it proposes a Plan that is not confirmable as a matter of law.

7. The remedy for the Plan Proponents' violation of § 1125(b) of the Code is not retroactive approval of an inadequate Disclosure Statement that proposes an unconfirmable Plan, but rather designating as invalid all votes obtained through the improper solicitation. *See* 11 U.S.C. § 1126(e).

8. The U.S. Trustee objects to certain other aspects of the Motion, as detailed below.

9. In light of the above, the U.S. Trustee respectfully requests this Court to deny the Motion, deny approval of the Disclosure Statement and the solicitation procedures, and deny confirmation of the Plan.

JURISDICTION

10. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine the this objection.

11. Pursuant to 28 U.S.C. § 586(a)(3), the U. S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U. S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

12. Under 11 U.S.C. § 307, the U. S. Trustee has standing to be heard on the issues raised by this Motion.

BACKGROUND

13. On June 6, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

14. On June 17, 2011, the U.S. Trustee appointed an official committee of unsecured creditors.

15. Up until the sale of its assets in this bankruptcy case, the Debtor Signature Styles, LLC was a catalog and internet retailer of women's apparel, operating under the brand names of Spiegel, Newport News and Shape Fx. The other Debtor, Signature Styles Gift Card,

LLC, serviced gift card transactions for Signature Styles, LLC. A large amount of the Debtors' unsecured debt is held by consumer creditors, by way of gift cards and merchandise credits.

16. On the Petition Date, the Debtors filed a motion which sought, among other things, approval of the sale of substantially all of the Debtors' assets through a bidding and auction process (the "Sale Motion"). The stalking horse was an affiliate of the Debtors' secured lenders, which are funds related to Patriarch Partners Agency Services LLC ("Patriarch").

17. On September 7, 2011, the Court granted the Sale Motion, allowing the sale to the Patriarch affiliate. According to the Plan Proponents, the sale closed on September 13, 2011. *See* Motion, ¶ 9.

18. At the sale hearing on September 7, 2011, the Plan Proponents indicated that they anticipated being able to file a plan and disclosure statement by the end of September. Yet it was not until two months later, on November 18, 2011, that they filed the Plan and Disclosure Statement. Counsel for the U.S. Trustee first learned that the Debtors would be filing the Plan and Disclosure Statement just one day earlier, at a Court hearing on November 17, 2011, which primarily concerned a motion by Committee counsel relating to its fees. At that time, counsel for the U.S. Trustee reserved on the record all rights regarding whatever procedure the Plan Proponents intended to use to approve the Disclosure Statement and to confirm the Plan.

19. According to the affidavit of service [Dkt. No. 467] on November 19, 2011, the day after filing the Plan and Disclosure Statement, the Debtor's claims agent sent out the solicitation packages, and notice of the hearing on confirmation of the Plan and approval of

the Disclosure Statement by first class mail. A review of the service list shows that the vast majority of parties solicited served were individuals -- presumably consumers holding merchandise credits and gift cards. *See* Dkt No. 467, Ex. B and C.

20. The Disclosure Statement that was included in the solicitation packages states on the top of the first page that, "The Plan Proponents in these cases *are permitted* to distribute and have distributed this disclosure statement before its *final approval* by the bankruptcy court." Dkt. No. 454 (emphasis added). This statement is not true – there was no order permitting the Plan Proponents to distribute the Disclosure Statement before being approved by the Court, and the Code does not permit such procedure. Nor had the Plan Proponents obtained any preliminary approval of the Disclosure Statement at the time solicitation was made, as was suggested by the statement at the top of the Disclosure Statement.

21. The Plan classifies holders of gift cards into Class II.B, describing them as unimpaired, and indicating that their claims will be paid in full, although not on the effective date of the Plan. *See* Plan, § 1.2 (B). Moreover, in order to receive such treatment, a holder of a gift card must (1) have filed a timely proof of claim, (2) fill out a form, which will not be sent to them until after the effective date of the Plan, that requires each gift card claimant to elect between receiving a cash payment or using their gift card to purchase merchandise (although the latter option is available only through February 24, 2012), and (3) mail back their gift card with the election form. *See id*.; Disclosure Statement, § 3.2, under Class II.B.[2]

[2] The Debtors scheduled all gift card claims as "contingent," and estimated those claims to exceed $11 million. *See* amended Schedule F to schedules of Signature Style Gift Cards, LLC, Dkt. No. 445. The Disclosure Statement indicates that there is only approximately $60,000 to $70,000 in allowed gift card claims. *See* Disclosure Statement, § 3.2. These are presumably the gift card holders that filed a proof of claim by the bar date. Thus,

22. The Plan classifies creditors that hold merchandise credits as Class III.B, and the Disclosure Statement states that such claimants shall receive an estimated recovery of 8 – 10% on their claims. *See* Plan § 1.3 (B); Disclosure Statement, § 3.2, under Class III.B. There is a proviso similar to that for the gift card class, requiring the holders of merchandise credits to complete an election form (which is included in their ballot) in order to receive any distribution. Unlike the gift card holders, the holders of merchandise credits are not required to turn in their merchandise credit cards or provide other physical evidence of the credit.

23. Although not set forth in the chart found at § 3.2 of the Disclosure Statement, a separate section of the Disclosure Statement, titled "De Minimis Distributions" provides that, "[t]he Debtors will not distribute Cash to the Holder of an Allowed Claim if the amount of Cash to be distributed on account of such Claim is less than fifty dollars ($50) in the aggregate." Disclosure Statement, § 3.8.2; Plan § 2.5. Such provision effectively means that many, if not most, of the gift card class and the merchandise credit class, all of whom are consumers, shall receive zero on their claims.[3]

24. The gift card creditors were not served with copies of the Plan or Disclosure Statement, because they are purported unimpaired under the Plan. Instead, on November 19, 2011, they were sent a Notice to Unimpaired Creditors of Hearing on Adequacy of Disclosure Statement and Confirmation of Joint Plan of Liquidation Filed by the Debtors and the Official Committee of Unsecured Creditors. *See* Aff't of Service, Ex. 467, and Dkt

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only approximately six-tenths of one percent of the consumers holding gift cards are included in the gift card class and eligible to receive any distribution.

[3] The only holders of merchandise credit who are eligible to receive any cash distribution are those with claim at or more than $500. That is because the maximum recovery for the holders of merchandise credits is estimated at 10%. *See* Disclosure Statement, §3.2. Ten percent of $500 is $50. Thus, the claimant must have a claim of at least $500 to receive any recovery at all, as the Plan provides that no distributions of under $50 will be made.

No. 456. That notice informed the gift card holders that they were purported unimpaired and were not eligible to vote on the Plan. It also informed them that the gift card holder would receive a distribution under the Plan only if (a) they time filed a proof of claim, (b) their gift card exceeds $50, and (c) they submit an election form that will be sent after the Effective Date. The notice further stated that if the gift card holder did not return such election form within 30 days of the Effective Date, the gift card claim shall be deemed disallowed and the sole source of recovery shall be against the Purchaser, to purchase merchandise through February 24, 2012, after which time the card would be worthless. *See* Dkt. No. 456.

25. All notices sent by the Plan Proponents indicate that a hearing on the confirmation of the Plan and adequacy of the Disclosure Statement would take place on December 21, 2011, with an objection deadline of December 15, 2011.

ARGUMENT

A. Objection to Motion

26. Section 1125(b) of the Bankruptcy Code provides:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title 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(b) (emphasis added).

27. The plain language of § 1125(b) makes clear that acceptance or rejection of a plan after the commencement of the case cannot take place without transmitting a disclosure statement to every person or entity whose vote the plan proponent is soliciting,

which disclosure statement was approved by the Court, after notice and a hearing, *prior* to solicitation. *Id.*[4]

28. As the Court of Appeals for the Third Circuit explained in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), "[o]nce the bankruptcy proceeding is underway, the debtor may not solicit approval of a plan of reorganization from a claim-holder 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.'" *Id.* at 362 (emphasis added), *quoting* 11 U.S.C. § 1125(b). The Third Circuit described these disclosure requirements as "*crucial* to the effective functioning of the federal bankruptcy system." *Id.* (emphasis added).

29. In *First American Bank of New York v. Century Glove, Inc*., 81 B.R. 274 (D. Del 1988), *aff'd in part*, 860 F.2d 94 (3d Cir. 1988), the Plan Proponents moved to invalidate a creditor's vote rejecting the plan because another creditor had sent him a proposed competing plan, although no vote on such competing plan was solicited. The District Court declined to invalidate the vote, holding that "§ 1125(b) does not mandate prior court approval of all solicitation materials *so long as the disclosure statement has been approved as required*." *Id.* at 280 (emphasis added).

30. In affirming the District Court in part, the Third Circuit Court of Appeals in *Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94, 97 (3d Cir. 1988)

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[4] Where, as here, "'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) *quoting Hartford Underwriters Insurance Co. v. Union Planters Bank N.A.*, 530 U.S. 1, 6 (2000).

explained that "[s]ection 1125(b) bars certain solicitation activities, regardless of the intent of the actor. Whether that provision is violated is not a matter left to the discretion of the bankruptcy court, but is a matter of fact and law." [5]

31. Applying the facts and law to the present situation, it is clear that the Plan Proponents violated § 1125(b) of the Code. The facts are established by the affidavit of service filed at Dkt. 467, which shows that the Plan Proponents sent out the Plan for solicitation on November 19, 2011, with the Disclosure Statement, ballots and notices. The docket establishes that, at the time of solicitation, there was no Court approval of the Disclosure Statement. The applicable law is set forth in § 1125(b) of the Code, which expressly prohibits solicitation of votes on a plan "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(b) (emphasis added). As the Plan Proponents solicited votes without a disclosure statement that was approved, after notice and a hearing, prior to the solicitation, they violated § 1125(b) of the Code.

32. Violation of § 1125(b) of the Code cannot be remedied by approval of the Disclosure Statement at the confirmation hearing, because one of the express points of § 1125(b) is for the approval to take place *prior to* the solicitation.

33. There are only two narrow exceptions to the requirements of § 1125(b) of the Code. Section 1125(f) of the Code, which applies solely to small business cases, allows a

[5] The Third Circuit's decision in *Century Glove* affirmed that portion of the District Court's decision that held that a creditor who sent the competing plan to another creditor did not violate 11 U.S.C. §1125(b). The Third Circuit did not decide whether the circumstances merited designation of the votes of any creditors, as there was not a final order on such matter. *See Century Glove*, 860 F.2d at 99, 103.

combined hearing on a plan and disclosure statement. Even under § 1125(f), however, "conditional" approval of the disclosure statement by the Court is required prior to solicitation. *See* 11 U.S. C. § 1125(f)(3). The other exception is a pre-packaged bankruptcy, in which the solicitation takes place prior to the filing of the petition. Section 1125(b) is inapplicable by its terms to pre-packaged cases, because it addresses solicitation "*after* the commencement of the case." *See* 11 U.S. C. § 1125(b)(emphasis added). As the present case is not a small business case or a pre-packaged case, solicitation without a prior approved disclosure statement is prohibited by § 1125(b).

34. The only authority the Plan Proponents cite for their failure to comply with § 1125(b) can be found in a footnote 5 of the Motion, which references § 105(a) of the Code. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). That section of the Code does not provide a basis for the relief the Plan Proponents seek. The equitable principles of § 105(a) of the Bankruptcy Code cannot be used to circumvent clear Congressional intent. *See, e.g., United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.*), 33 F.3d 294, 300 (3d Cir. 1994); *United States Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994). The Supreme Court has opined that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

35. As stated by the Third Circuit in *In re Combustion Engineering, Inc.*, 391 F.3d 190, 237 (3rd Cir. 2004), "[t]he general grant of equitable power contained in § 105(a) cannot trump specific provisions of the Bankruptcy Code, and must be exercised within the

parameters of the Code itself." Thus, the general equitable principals of § 105(a) of the Code cannot be used to trump the specific requirements of § 1125(b) of the Code, as the Plan Proponents ask the Court to do here.

36. As there is no authority to allow the Plan Proponents to retroactively seek approval of a Disclosure Statement after solicitation has been made, the Motion should be denied. In addition, any votes obtained by way of such solicitation should be designated as invalid under § 1126(e) of the Code, which provides:

> On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, *or was not solicited or procured in good faith or in accordance with the provisions of this title*.

11 U.S.C. § 1126(e) (emphasis added); *see also Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94. 97 (3d Cir. 1988)(recognizing § 1126(e) of the Code as "a remedy for § 1125(b) violations"); *In re Combustion Engineering, Inc.*, 391 F.3d 190, 247 n. 67 (3d Cir. 2004)("a court may designate (i.e. disqualify from voting) the ballot of any entity whose acceptance or rejection of the plan was not in good faith, or was not solicited or procured in good faith")(internal citations omitted).

B. Preliminary Objection to Disclosure Statement[6]

37. "[T]he general purpose of the disclosure statement is to provide 'adequate information' to enable 'impaired' classes of creditors and interest holders to make an informed judgment about the proposed plan and determine whether to vote in favor of or against that

[6] The U.S. Trustee's objections to the approval of the Disclosure Statement and confirmation of the Plan are preliminary objections, and are being filed prior to the objection deadline sought by the Plan Proponents for approval of the Disclosure Statement and confirmation of the Plan. The U.S. Trustee reserves the right to make further objections to both the Plan and Disclosure Statement.

plan." *In re Phoenix Petroleum, Inc.*, 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001). Section 1125(a) of the Bankruptcy Code defines "adequate information" as information of a kind and in sufficient detail to enable a hypothetical, reasonable investor to make an informed judgment about the plan.

38. The U.S. Trustee objects to the adequacy of the Disclosure Statement because it includes inaccurate information. The Disclosure Statement incorrectly describes the gift card class as unimpaired, and therefore not entitled to vote, when such class is in fact impaired for the reasons set forth in section C below.

39. The U.S. Trustee also objects to the adequacy of the Disclosure Statement because it proposes a plan that is unconfirmable as a matter of law, for the reasons set forth in section C below. Courts have routinely held that a disclosure statement accompanying an unconfirmable plan should not be approved because solicitation of votes on an unconfirmable plan would be a futile and wasteful effort. *See In re American Capital Equipment, Inc.*, 405 B.R. 415, 423 (Bankr. W.D. Pa. 2009) (rejecting disclosure statement that described a facially unconfirmable plan) (*aff'd sub nom. Skinner Engine Co. v. Allianz Global Risk U.S. Insurance Co.*, 2010 U.S. Dist. LEXIS 45667 (W.D. Pa. 2010)); *In re GSC, Inc.*, 453 B.R. 132, 157 n.27 (Bankr. S.D.N.Y. 2011) ("An unconfirmable plan is grounds for rejection of the disclosure statement; a disclosure statement that describes a plan patently unconfirmable on its face should not be approved." (*citing In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007))).

C. Preliminary Objection to Confirmation of the Plan

40. For a plan to be confirmed, § 1129(a)(9)(B) of the Code provides that, with respect to claims specified under § 507(a)(7)(which includes unsecured claims of individuals arising from the deposit of money in connection with the purchase of goods that were not delivered), a plan must provide as follows:

> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claims.

11 U.S.C. § 1129(a)(9)(B)(emphasis added).

41. The gift card holders are priority creditors under § 507(a)(7) of the Code. This is recognized by the Plan Proponents, as the Plan classifies gift card holders who filed a proof of claim as priority creditors that are unimpaired, and therefore not able to vote. *See* Plan, § 1.2 (B)("Allowed gift card claims are classified under the Plan as Priority Claims.") Because the gift card creditors are unable to vote, the Plan has to comply with § 1129(a)(9)(B)(ii) of the Code, which requires that the gift card claimants be paid "cash on the effective date of the plan equal to the allowed amount of such claims." (emphasis added) The Plan fails to comply with § 1129(a)(9)(B)(ii) of the Code in the following ways:

(a) Many of the gift card holders are likely to have claims of less than $50, and the Plan provides that the Debtors shall not make any distributions less than $50. Therefore many of the gift card holders will receive zero distribution on their claim under the Plan.

(b) In order to receive any distribution, the Plan Proponents are requiring gift card holders, who have already filed proofs of claim, to jump through two additional hoops: (i) they have to fill out yet another form, to elect between receiving a cash payment or using their gift card to purchase merchandise (which they can do only through February 24, 2012); and (ii) they have to return the actual gift card with the election form.

(c) No gift card holder will be paid any distribution until some time *after* the

Effective Date, as their election form will not even be sent out until the Effective Date.

42. The various impairments to the priority class of gift card holders set forth above renders the plan unconfirmable because (a) not all of these priority claimants are being paid in full, and many of them may actually receive zero, (b) no gift card holders will be paid prior to the effective date, and (c) the gift card holders' rights have been otherwise impaired by additional steps they must take to receive their distribution, yet they have been denied the opportunity to vote on the plan.

43. Even if the gift card holders were given a right to vote on the Plan, and the class accepted the Plan, the Plan would still have to comply with § 1129(a)(9)(B)(i) of the Code, which requires that each claimant be paid the full allowed amount of their claim, although deferred cash payments are allowed. The Plan cannot comply with this section of the Code because any gift card claimants with an approved claim of less than $50 will receive zero on their claim.

44. The Plan also is not confirmable because it fails to comply with the requirements of § 1129(a)(1), (7), and (8) of the Code, due to the treatment of the gift card holders, which are an impaired class of priority creditors that have not been given the right to vote on the Plan, and which, according to the liquidation analysis included in the Disclosure Statement, would receive a 100% distribution in a chapter 7 liquidation.

45. The Plan also is not confirmable under § 1129(a)(2) or (3) because the Plan Proponents solicited votes on the Plan in violation of the express requirements of § 1125(b). Therefore the Plan Proponents have not complied with the applicable provisions of Title 11, as required by § 1129(a)(2), and have not proposed the Plan in good faith and not by any means forbidden by law, as required by § 1129(a)(3).

Objections to Solicitation Procedures, Notices, and Objection Deadlines

46. The U.S. Trustee also objects to the solicitation procedures, as well as the to the notice sent, and the election form to be sent, to the gift card holders.

47. First, as detailed above, the U.S. Trustee objects to that aspect of the solicitation procedures that seek to ratify the actions of the Plan Proponents in soliciting votes on the Plan without first obtaining approval of a disclosure statement, after notice and a hearing, as required by § 1125(b).

48. Second, the U.S. Trustee objects to the Plan Proponents failing to file a motion to approve voting procedures, including the form of ballots, and the time and manner of voting, as required by Rule 3017-1 of the Local Rules of this Court, *prior* to soliciting votes and sending out the ballots and notices to creditors and other parties in interest.

49. Third, the U.S. Trustee objects to the deadline the Plan Proponents seek for filing and serving objections to confirmation of the Plan and approval of the Disclosure Statement. The Plan Proponents are seeking to cut the notice period provided by Bankruptcy Rule 2002(b) by at least two days. Bankruptcy Rule 2002(b) provides that at least 28 days' notice must be given to parties in interest as to the objection deadline for both approval of a disclosure statement and the confirmation of a plan.[7] The objection deadline is December 15, 2011, and service was made by mail on November 19, 2011. Such service provided a total of 26 days' notice, which is two days short of the notice mandated by the Bankruptcy Rules.

50. Fourth, the U.S. Trustee objects to the Unimpaired Notice that was sent to the gift card holders stating that they are unimpaired, because they are in fact impaired.

[7] Arguably the notice is five days short because it was made by mail. *See* Bankruptcy Rule 9006(f)(when service is made by mail, three days must be added to the notice period).

51. Fifth, the U.S. Trustee objects to the procedure of requiring the gift card holders to submit another form (the form electing whether to receive a cash distribution or to use their gift card to purchase merchandise), and to turn in their gift card, to receive a cash distribution under the Plan. The U.S. Trustee also objects to requiring the holders of merchandise creditors to submit an election form (which is included in their ballot) to be eligible to receive a cash distribution under the Plan.

52. If the Court allows the election forms to be required in order for a holder of a gift card to receive a distribution, then the election form should be sent to gift card holders immediately, and not after the effective date, so that they can be paid in full on the effective date, as required by 11 U.S.C. § 1129(a)(9)(B)(ii). In addition, if the election form is to be allowed, the U.S. Trustee has objections to certain wording and information included on the proposed election form.

53. Sixth, the U.S. Trustee objects to the deadline for making Rule 3018(a) motions with respect to any claim as to which the Debtors have objected, or will object prior to the confirmation hearing. The time table proposed by the Plan Proponents (*see* Motion, ¶ 21), allows the Debtors to object to claims through December 1, 2011, and seeks a deadline to file 3018(a) motions only 6 days later, on December 7, 2011. Such shortened notice does not provide claimants with due process.

Reservation of Rights

54. The U.S. Trustee reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Motion, and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

55. The U.S. Trustee reserves all rights to assert further objections to the Disclosure Statement and to confirmation of the Plan.

56. The U.S. Trustee also reserves all rights to object to any fee application of counsel for either of the Plan Proponents relating to legal work performed in connection with the Plan or the Disclosure Statement, as the Plan is not confirmable as a matter of law, the Disclosure Statement contains inaccurate information, and the Plan Proponents solicited votes for such Plan in violation of § 1125(b) of the Bankruptcy Code.

WHEREFORE, the United States Trustee respectfully requests this Court to deny the Motion, deny approval of the Disclosure Statement, the solicitation procedures, the notice of unimpaired status sent to the gift card holder, and the election form to be sent to the gift card holders, to deny confirmation of the Plan, and award such other and further relief as this Court deems appropriate under the circumstances.

Dated: December 1, 2011
Wilmington, Delaware

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

By: */s/ Juliet Sarkessian*
Juliet Sarkessian, Esquire
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (Fax)