UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re	Chapter 11
TRAINOR GLASS COMPANY, d/b/a Trainor Modular Walls, Trainor Solar, and Trainor Florida,	Case No. 12 B 09458 Hon. Carol A. Doyle
Debtor.	

OBJECTION OF BOND SAFEGUARD INSURANCE CO. AND LEXON INSURANCE CO. TO DISCLOSURE STATEMENT WITH RESPECT TO JOINT PLAN OF LIQUIDATION OF TRAINOR GLASS COMPANY

Bond Safeguard Insurance Co. ("BSIC") and Lexon Insurance Co. ("Lexon", collectively with BSIC, "Bond Safeguard"), by and through its undersigned counsel, object to the Disclosure Statement for the Joint Plan of Liquidation of Trainor Glass Company (the "Disclosure Statement") on the basis that the Disclosure Statement fails to comply with 11 U.S.C. §1125, and the corresponding Debtor's and Official Committee of Unsecured Creditors' Joint Plan of Liquidation (the "Plan") that it purports to describe cannot be confirmed so the Disclosure Statement must be rejected, and respectfully state as follows:

On March 9, 2012 (the "Petition Date"), Trainor Glass Co. ("Trainor" or "Debtor") filed a Voluntary Petition for Relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court"). The Debtor and the Official Committee of Unsecured Creditors' (the "Committee" collectively, the "Plan Proponents") filed the Disclosure

Statement and accompanying Plan. A hearing to consider the Disclosure Statement is scheduled for November 6, 2013 at 11:00 a.m., with any Objections to be filed by November 1, 2013.

As of the Petition Date, the Debtor was a party to a number of ongoing construction contracts (the "Contracts" or "Projects"). Many of the Contracts required the Debtor to provide a payment bond and a performance bond in connection with the Contracts as security for the Debtor's performance and payment of the laborers and materialmen providing labor and materials under the Contracts. Bond Safeguard is the surety on a variety of payment, performance and similar bonds (the "Bonds") issued on behalf of the Debtor.

In order to induce Bond Safeguard to issue the Bonds, the Debtor and various other parties (collectively, the "Indemnitors"), executed a General Agreement of Indemnity (the "Indemnity Agreement") wherein the Indemnitors agree to indemnify and hold Bond Safeguard harmless from every claim that Bond Safeguard may pay as a result of the Bonds. A copy of the Indemnity Agreement is attached hereto and made a part hereof as **Exhibit "1"**.

Due to the Debtor's defaults and failures to complete certain Projects, Bond Safeguard has paid claims made against various bonds totaling in excess of $14,000,000.00. Other claims against bonds executed on behalf of the Debtor are pending. As a result, in accordance with the terms of the Indemnity Agreement, the Indemnitors, including the Debtor, are now liable to Bond Safeguard for all losses incurred as a result of claims made against the Bonds (the "Indemnity Claims") along with the legal fees incurred in connection with the various claims. The Indemnity Claims asserted in these cases are intended as claims for indemnification as to the Debtor and each individual Indemnitor.

The Debtor claims in the Disclosure Statement that it "continued to operate its business and manage its properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the

Bankruptcy Code." *Disclosure Statement*, p. 14. This statement is made notwithstanding that just one paragraph prior, it was acknowledged that "the Debtor ceased business operations and terminated all employees", on February 21, 2012. *Disclosure Statement*, p. 13. This type of misleading representation must be corrected in the Disclosure Statement prior to it being approved.

OBJECTION TO THE DISCLOSURE STATEMENT

It is clear that the ultimate objective of the Plan that this Disclosure Statement describes is the complete liquidation of the Debtor's assets. However, the Disclosure Statement lacks necessary information that is required in order for it to be approved.

A. Lack of Adequate Information

Bond Safeguard opposes the approval of the Disclosure Statement for variety of reasons including that it contains inadequate information.

The Bankruptcy Code provides that adequate information is:

> 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, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing addition information.

11 U.S.C. § 1125(a)(1).

Information that should be contained in a disclosure statement includes: "[a] complete description of the available assets and their value; . . . [a] liquidation analysis setting forth the

estimated return that creditors would receive under Chapter 7; [t]he accounting and valuation methods used to produce the financial information in the disclosure statement; [i]nformation regarding the future management of the debtor, including the amount of compensation to be paid any insiders, directors, and/or officers of the debtor; . . . [and] [i]nformation relevant to the risks being taken by creditors and interest holders . . . ." *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988). The disclosure statement must also contain facts to support the assertions contained therein. *In re Egan*, 33 B.R. 672, 676 (Bankr. N.D. Ill. 1983).

At the outset, it should be noted that the Disclosure Statement fails to provide any financial projections or other supporting facts to demonstrate that the Plan is feasible or disclose the potential payout to the classes. It simply states that "[u]pon the Effective Date, all assets of the Debtor and its Estate, including all Encumbered Assets, shall be transferred to and vest in the Trainor Liquidating Trust and be deemed contributed thereto, subject to the terms of the Joint Plan and the Liquidating Trust Agreement." *Disclosure Statement*, p. 29.

There is no information in the Disclosure Statement that discusses the likely payment to any of the classes of creditors, or any financial information that would permit a creditor (particularly an unsecured creditor) to evaluate whether the Plan is the best alternative, as opposed to liquidation under Chapter 7. Notably, a "Liquidation Analysis" is attached to the Disclosure Statement as Exhibit "C" but it does not conduct a comparison of the potential administrative fees and costs that would be incurred by the Liquidation Trustee, professionals retained by the Liquidation Trustee, and the members of the proposed Oversight Committee. The Liquidation Analysis also does not contain a summary of the amount of funds that have been collected to-date or the estimated distribution to the various classes. Instead, the Liquidation Analysis simply states, without any support that "The Plan Proponents submit that any Chapter 7

Trustee Fee is likely if not assured to be higher than the fees to be charged by the Liquidating Trustee for his services." *Disclosure Statement*, Ex. C. However, it is a possibility that the fees and costs of the Liquidation Trustee, the Liquidation Trustee's professionals and the Oversight Committee will be substantially higher than a Chapter 7 Trustee's commissions, fees and costs. Additionally, given the posture of this case, the insertion of an independent Chapter 7 panel trustee (instead of the Liquidation Trustee[1]) may be appropriate.

B. *Overly Broad and Improper Releases*

The Plan and Disclosure Statement also contain overly-broad and improper releases for third-parties. In particular, the Plan provides:

> Subject to and limited by Section 11.8 hereof, as of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, including: (1) the settlement, release and compromise of debt and all other good and valuable consideration paid in connection with the Joint Plan, and (2) the services of Edwin J. Trainor and Thomas D. Trainor in facilitating the expedient implementation of the transactions contemplated in this Joint Plan, the Debtor, and any person or entity seeking to exercise the rights of the Debtor's estate (including the Committee or the Liquidating Trustee), including, without limitation, any successor to the Debtor or any estate representative appointed or selected pursuant to section 1123(B)(3) of the Bankruptcy Code, shall be deemed to forever release, waive, and discharge Edwin J. Trainor and Spouse Angela Trainor, Thomas D. Trainor and Spouse Irene Trainor, and their descendants, successors, and assigns from any and all claims, objections, suits, judgments, damages, demands, debts, remedies, rights, causes of action, rights of setoff and liabilities whatsoever (including any derivative claims asserted on behalf of the Debtor), in connection with or in any way relating to the Debtor, the conduct of the Debtor's business, the chapter 11 case, the Disclosure Statement or the Joint Plan (other than the rights of the Debtor, the Liquidating Trustee or a creditor holding an allowed claim to enforce the obligations under the Confirmation Order and the Joint Plan and the contracts, instruments, releases, and other agreements or documents delivered pursuant to the Joint Plan), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen,

[1] The Liquidation Trustee has been identified as Phillip Van Winkle, but no additional information has been provided that would permit a creditor to evaluate his disinterestedness.

> then existing or thereafter arising, in law, equity or otherwise, that are based in whole or in party [sic] on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date.

See Plan, Art. XI, §11.7 (the "Release Provision").

The Release Provision must be clarified to confirm that the Indemnity Claims Bond Safeguard holds against, *inter alia*, Edwin J. Trainor and Spouse Angela Trainor, Thomas D. Trainor and Spouse Irene Trainor (collectively, the "Released Individuals") are not released. The specific exclusion sought by Bond Safeguard as to its indemnity claims against the Released Individuals is particularly warranted given the specific exclusion of the Released Individuals in Section 11.8 of the Plan in favor the Bank.

Section 11.8 provides:

> Notwithstanding anything to the contrary herein, this Joint Plan shall not waive, release or impair the claims of First Midwest in its individual capacity against any member of the Trainor family including without limitation, Robert Trainor, Thomas D. Trainor, Edwin J. Trainor and William Trainor, or against any other guarantor or other party responsible for any debt owed by the Debtor to First Midwest.

See Plan, Art. XI, §11.8 (the "Exclusion Provision").

It is unclear exactly what is intended by the phrases used in Section 11.7 of the Plan "seeking to exercise the rights of the Debtor's estate" and "in connection with or in any way relating to the Debtor, the conduct of the Debtor's business, the chapter 11 case." To the extent the Exclusion Provision is necessary to preserve the Bank's claims against *inter alia* the Released Individuals, Bond Safeguard believes that it is necessary for a similar Exclusion Provision to be included in favor of Bond Safeguard in connection with its indemnity claims.

Further, it is submitted that granting of releases to the Released Individuals is improper. The case law concerning third-party releases within the Seventh Circuit is well established. The approval of consensual non-debtor releases was first approved in *In re Specialty Equip. Cos.,* 3

F.3d 1043 (7th Cir. 1993). Thereafter in the case of *Airadigm Communications, Inc. v FCC* (*In re Airadigm Communications, Inc.*), 519 F.3d 640 (7th Cir. 2008), the Seventh Circuit held that third party releases can be appropriate within certain circumstances. The *Airadigm* Court held that whether the release was "appropriate" was fact intensive and depended on the nature of the reorganization. *Airadigm*, 519 F.3d at 657. The Court went further and held that any release must be narrow and only apply to Claims "arising out of or in connection with," the reorganization, the Claim may not include willful misconduct, nor can the release provide for blanket immunity. *Id.*

In reaching its decision, the Seventh Circuit reviewed case law from many other Circuits and cautioned that "a non-debtor release should only be approved in rare cases… because it is 'a device that lends itself to abuse.'" *Id.* (citing *In re Ingersoll, Inc.*, 562 F.3d 856 (7th Cir. 2009); and *In re Metro Media Fiber Network, Inc*., 416 F.3d 136 (2d Cir. 2005)).

The Bankruptcy Judges sitting in the Districts within the State of Illinois have followed the *Airadigm* decision and have correctly held in case after case that after reviewing the specific facts and the nature of the Reorganization of the Debtor, the release must be narrow so that it only applies to claims arising out of, or in connection with, the reorganization of the Debtor, does not include any willful misconduct and does not provide any blanket immunity so as to affect matters beyond the jurisdiction of the Court or unrelated to the reorganization process itself. *See In re Berwick Black Cattle Co.,* 394 B.R. 448 (Bankr. C.D. Ill. 2008); *In re Draiman,* 450 B.R. 778 (Bankr. N.D. Ill. 2011); and *In re GAC Storage El Monte, LLC,* 489 B.R. 747 (Bankr. N.D. Ill. 2013).

In each of the above cited cases, the Court noted that the justification for granting third-party releases in the Plan of Liquidation is far less compelling than in a Plan of Reorganization.

Berwick, 394 B.R. at 461; *Draiman*, 450 B.R. at 777; *GAC Storage*, 489 B.R. at 768. The analysis that the Bankruptcy Court must conduct is set forth in detail by Judge Jacqueline P. Cox in her decision of March 19, 2013, in *GAC Storage*. The *GAC Storage* Court held:

> In *In re Gander Partners*, (*Gander Partners, LLC v. Harris Bank, N.A.*, (*In re Ganders Partners, LLC*), 432 B.R. 781 (Bankr. N.D. Ill. 2010), *aff'd*, 442 B.R. 883 (N.D. Ill. 2011), (*cite added*) this Court observed that "[a] section 105 injunction restraining creditors from proceeding against nondebtors is justified only if the creditor actions would interfere with, deplete or adversely affect property of a debtor's estate or which would frustrate the statutory scheme embodied in Chapter 11 or diminish a debtor's ability to formulate a plan of reorganization." 432 B.R. at 788. Courts recognize that the entry of an injunction may be appropriate under the following circumstances:
>
> > (1) there be the danger of imminent, irreparable harm to the estate of the debtor's ability to reorganize;
> > (2) there must be a reasonable likelihood of a successful reorganization;
> > (3) the Court must balance the relative harm as between the Debtor and the Creditor who would be restrained; (and)
> > (4) the Court must consider the public interest; this requires a balancing of the public interest in successful bankruptcy reorganizations with other competing societal interests.
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> *Id.* at 788 (citing *In re Monroe Well Service, Inc.*, 67 B.R. 746, 751-52 (Bankr. E.D. Pa. 1986))
>
> Here, although not required, the Court determines that there has been no showing of danger of imminent, irreparable harm to the Debtor's ability to reorganize. There is no reasonable likelihood of a successful reorganization, as the Debtor's financial projections are unreasonable. Balancing the harm as between the Bank and the Debtor, the Court finds that restraining the Bank is not justified because the Guarantors' time and energy are not directed toward the Debtor's reorganization. The public interest would not be served by issuing the Guarantors Injunction as the reorganization proposed herein is not likely to be successful.
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> *GAC Storage*, 489 B.R. at 769-770.

Here, the facts do not warrant the extreme relief of granting the Released Individuals a discharge of their indemnification liability to Bond Safeguard simply based on their positions as principals and related entities of the Debtor. The Release language as contained in the Debtor's

Disclosure Statement and Plan appear to be so broad as to encompass all Claims whether or not related to the Bankruptcy, for all times prepetition and whether or not subject to the jurisdiction of the Bankruptcy Court. These releases are also relating to a liquidating case. There will be no Debtor in existence after confirmation so there can be no danger of imminent, irreparable harm to the Estate or the Debtors' ability to reorganize. Nor can there be a reasonable likelihood of successful reorganization. Additionally, when the Court considers the public interest there is no true public interest that needs to be protected in successful Bankruptcy reorganizations versus the other societal interests of contracting parties being able to rely on their contractual obligations in modern commerce.

Since the Disclosure Statement purports to provide the broad sweeping releases which we believe to be wholly inappropriate and are outside the scope of the Seventh Circuit findings in *Airadigm,* and its progeny, they should not be approved. Additionally, the Disclosure Statement is inadequate in that it does not contain sufficient information so as to allow creditors to make an informed decision as to how to vote.

CONCLUSION

It is clear that the Disclosure Statement cannot be approved in its current form as it does not contain sufficient information upon which a creditor can make an informed decision, contains improper releases, and does not contain financial projections to support the contention that Chapter 7 liquidation is not more advantageous. For the foregoing reasons, Bond Safeguard contends that the Disclosure Statement cannot be approved.

WHEREFORE, for the foregoing reasons, Bond Safeguard Insurance Company and Lexon Insurance Company respectfully request entry of an Order (i) denying approval of the Disclosure Statement; and (ii) for such other and further relief as this Court deems just and proper.

Dated: November 1, 2013

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