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**ACF FinCo I LP, a Delaware limited partnership**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| IN RE: | § | CASE NO. 16-34169-HDH |
| | § | |
| ValuePart, Incorporated | § | Chapter 11 |
| | § | |
| Debtor | § | |

# OBJECTION TO DISCLOSURE STATEMENT

ACF FinCo I LP, a Delaware limited partnership ("***ACF***"), a secured creditor and party-in-interest in the above-captioned bankruptcy case, hereby files its Objection (the "***Objection***") to the Disclosure Statement Pursuant to 11 U.S.C. § 1125 in Support of Debtor's Chapter 11 Plan of Reorganization [Docket No. 475] (the "***Disclosure Statement***") filed by ValuePart, Incorporated (the "***Debtor***"). In support here, ACF respectfully represents as follows:

## I. INTRODUCTION

1. The Disclosure Statement should not be approved because it does not contain adequate information for voting on the Plan as required by Section 1125 of the Bankruptcy Code. As explained in further detail below, the Disclosure Statement lacks essential information regarding: the alleged Exit Financing[1] and new equity investment upon which the proposed plan relies; the Debtor's proposed treatment of ACF's claim; and support for the Debtor's financial projections. The Disclosure Statement contains other key errors and omissions that prevent Court approval.

2. In addition, the Disclosure Statement should not be approved because it supports an unconfirmable plan. In addition to other unsatisfied confirmation requirements (including, but not limited to, the failure of the plan proponent to comply with the Bankruptcy Code and the failure to satisfy the fair and equitable "cramdown" test as to ACF's proposed plan treatment), the Debtor cannot prove that the proposed plan is feasible. Throughout this case, the Debtor has wavered on the brink of liquidation, able to maintain the appearance of positive cash flow. But upon inspection of the Debtor's monthly operating reports, the Debtor's post-confirmation performance - even with the benefit of speculative Exit Financing and a new equity investment - will be insufficient to support its distributions to creditors, ongoing operating expenses, and administrative claims. For this separate reason, the Court should deny the Debtor's request for approval of the Disclosure Statement.

## II. BACKGROUND

### A. Prepetition Facts.

3. ACF made a prepetition loan (the "***Loan***") to the Debtor as evidenced by, among

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Disclosure Statement.

other things, that certain Loan and Security Agreement dated August 4, 2016 between ACF and the Debtor (the "***Loan and Security Agreement***"), which contained the terms and conditions applicable to a Revolving Credit Note (the "***Note***") for the amount financed.

4. The Debtor's Loan payment and performance obligations are secured senior perfected liens in virtually all of the business assets of the Debtor - including, without limitation, all inventory, accounts, equipment, general intangibles, cash, and the proceeds thereof (collectively, and as fully defined in the Loan and Security Agreement, the "***Collateral***").

5. The Loan and Security Agreement, the Note, and all other documents related to the Loan are referred to herein collectively as the "***Loan and Security Documents***."

6. The Debtor's financial condition deteriorated rapidly, and less than three months after ACF made the Loan, on October 27, 2016 (the "***Petition Date***"), the Debtor filed a petition for Chapter 11 bankruptcy protection, thereby commencing this bankruptcy case.

7. As of the Petition Date, ACF asserts a secured claim for the outstanding balance due and owing under the Loan in an amount that is no less than $16,113,392.50, plus additional amounts for certain fees and charges (including attorneys' fees) as provided under the Loan and Security Documents, as set forth in its proof of claim filed in the Claims Register as Claim No. 18-1 (the "***ACF Claim***").

8. In addition, ACF asserts the right to recover accrued and accruing postpetition interest (including default interest), attorneys' fees, charges, and expenses to the full extent allowed by law[2], less the postpetition amounts paid to ACF as more fully described below.

9. Since the Petition Date, and after considering postpetition payments made to

[2] The Debtor has maintained throughout this case that ACF is oversecured. For purposes of this objection only and without making any admissions or waiving any rights, ACF assumes its collateral value exceeds its claim, rendering ACF an oversecured creditor.

ACF, the ACF Claim balance has grown to approximately $16.86 million as of June 30, 2017.

**B. The Debtor's Failures Postpetition.**

**1. Declining Financial Performance.**

10. The Debtor's monthly operating reports reflect a reduction in accounts receivable aged under 90 days (i.e., accounts receivable more likely to be collected), an increase in accounts receivable aged over 90 days (i.e., accounts receivable less likely to be collected), and a decline in inventory (including prepaid inventory) during the course of this case as follows:

| | **October 29, 2016** | **May 27, 2017** | **Variance** |
|---|---|---|---|
| Accounts Receivable under 90 days | $7,954,767 | $7,526,440 | ($428,327) |
| Accounts Receivable over 90 days | $818,535 | $1,431,646 | $613,111 |
| Inventory (including prepaid) | $21,831,544 | $20,425,614 | ($1,405,930) |

*See* Docket No. 524, May 2017 Monthly Operating Report ("May 2017 MOR"), at 2, 5.

11. The Debtor calculated its inventory for May 27, 2017, using an inventory reserve amount that is $1,617,878 less than the inventory reserve applied to the October 29, 2016, inventory calculation. Assuming the identical inventory reserve, the inventory value in seven months from October 29, 2016 - May 27, 2017 has declined more than $3 million. *See id.*, at 11.

12. The Debtor also is owed approximately $8.8 million in accounts and notes receivable due from insiders and/or affiliates. *See id.*, at 13.

13. As of May 27, 2017, the Debtor's postpetition liabilities exceeded the Debtor's cash balance by approximately $200,000. *See id.*, at 2.

14. On an accrual basis, the Debtor's postpetition operating income through the end of April 2017[3] is *negative* $585,819, and the Debtor has suffered a postpetition net *loss* of

[3] The May 2017 MOR incorporates a non-cash adjustment to the inventory reserve which skews the operating and non-operating figures for the month. Excluding this non-cash adjustment, the Debtor's postpetition operating income through the end of May 2017 is nearly *negative* $650,000.

$4,291,906. *See* Docket No. 468, April 2017 Monthly Operating Report ("April 2017 MOR"), at 3.

15. The Debtor admits that for fiscal years 2015 and 2016, the Debtor reported a net combined loss of more than $8.5 million. *See* Disclosure Statement, at 27.

**2. Debtor's Violations of Court Orders and Bankruptcy Code Provisions.**

16. The Debtor has violated this Court's cash collateral orders by failing to timely pay its adequate protection obligations to ACF at various times throughout the case, and failing to comply with ACF's reasonable requests for information. ACF reserves all rights related to such violations.

17. The Debtor violated Bankruptcy Code sections 327, 328 and/or 330 by employing and paying an estate professional without Court approval. Effective November 21, 2016, the Debtor retained Gordon Brothers, a valuation consultant, to conduct multiple appraisals of the Debtor's inventory. The Debtor paid Gordon Brothers $10,000 in or about November 2016, and the Debtor's lawyers subsequently paid Gordon Brothers an additional $10,000. *See* Docket No. 274 ("GB Application"), at 11. The Debtor sought *nunc pro tunc* approval of its employment of Gordon Brothers on February 21, 2017 disclosing the foregoing facts. *See id.*

18. Notwithstanding the information disclosed in the GB Application, the Debtor failed to disclose *any* payments to Gordon Brothers in its monthly operating reports until the April 2017 MOR, when the Debtor disclosed an additional $17,047 paid to Gordon Brothers in April 2017. *See* April 2017 MOR, at 7.[4]

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[4] ACF acknowledges that prior monthly operating reports reflected a payment for "Inventory Valuation" as of 12/24/16. *See, e.g.,* Docket No. 400, March 2017 Monthly Operating Report, at 9. Beginning in the April 2017 MOR, the Debtor listed Gordon Brothers among its "professionals," having received $17,047 in April 2017 and $27,047 total paid to date. ACF reserves all of its rights regarding these issues, to the extent not resolved by Court order.

19. The Debtor's payments to Gordon Brothers, on at least two occasions postpetition, were made from ACF's cash collateral without ACF's consent and without Court approval.

**3. <u>Plan Filing Delays.</u>**

20. At the first hearing conducted in this case, Debtor's counsel urged the Debtor's intent and ability to exit bankruptcy quickly through the filing of a plan and disclosure statement within the statutory exclusivity period.

21. Contrary to the Debtor's early assertions, the Debtor sought exclusivity extensions on two separate occasions: The Court extended the Debtor's plan filing exclusivity period to May 1, 2017, then again to May 5, 2017, and a third and final time to May 25, 2017; and the plan solicitation exclusivity period to July 1, 2017, then again to July 5, 2017, and a third and final time to 75 days after May 25, 2017. *See* Docket Nos. 296, 423, 452.

22. The exclusivity extensions were premised primarily on the Debtor's stated intention to obtain exit financing from a third-party lender and alleged progress related thereto. At a hearing in February 2017, the Debtor's investment banker testified that he had completed his exit lender solicitation process and had received only four expressions of interest from potential exit lenders. To date, the Debtor has not demonstrated that <u>any</u> exit lender has committed to funding the Debtor's reorganization effort.

23. On May 24, 2017, just before the termination of the extended exclusivity period, the Debtor filed the Disclosure Statement, which describes the Debtor's Chapter 11 Plan of Reorganization filed the same date [Docket No. 472] (the "***Plan***").

## <u>III. THE PLAN AND DISCLOSURE STATEMENT</u>

24. The Disclosure Statement references the Exit Financing, but provides no details

other than the revolving loan amount is "expected" to be "at least $16.1 million" and "secured by a first-priority lien in and on substantially all of the Reorganized Debtor's assets." Disclosure Statement, at 37. According to the Plan, the Exit Financing Documents will be made available only 15 days before the hearing on confirmation. *See* Plan, at 14. According to the Plan, the "Exit Financing Proceeds" will be exactly $16,100,000.00, less than the amount of the ACF Claim. *See* Plan, at 11.

25. The Disclosure Statement explains that a newly-formed entity, Green Oak, will contribute $7 million, consisting of $4 million of equity and $3 million of unsecured, partially-subordinated debt. *See* Disclosure Statement, at 37; Plan, at 12. However, the Disclosure Statement offers very few other details regarding Green Oak, its proposed members Skokie and Jemco, or the alleged investment.

26. The Debtor has filed Exhibits A (FAQs), B (Liquidation Analysis) and C (Projections) of the Disclosure Statement, but has not disclosed Exhibit D (Sources & Uses) or Exhibit E (Causes of Action).

27. The Disclosure Statement describes alternative treatments for paying ACF's claim. If ACF votes in favor of the Plan, ACF will receive an Effective Date cash payment of $12.6 million (or such other amount as the parties agree). If ACF votes against the Plan, the Debtor will place $16.1 million (less than the ACF Claim) into an escrow account, which will earn 6.5% payment-in-kind ("PIK") interest per annum; ACF's liens will allegedly shift from its current collateral to an escrow account; and ACF will be paid out of the escrow account by the later of 30 days after the ACF Claim is allowed, or September 4, 2019 — nearly three years after the Petition Date and two years after the anticipated Effective Date. *See* Disclosure Statement, at 34.

28. The Disclosure Statement describes a "Creditor Note" that is payable to the Creditor Trust 4.5 years after the Plan's effective date, but contains few other details. *See, e.g., id.*, at 15, 39.

29. The Disclosure Statement is silent on a "Litigation Put," a term that is defined in the Plan as the Creditor Trust's right to demand that the Reorganized Debtor buy the Litigation Recovery Share from the Creditor Trust. *See* Plan, at 13.

## IV. OBJECTIONS AND AUTHORITIES

30. Pursuant to Section 1125 of the Bankruptcy Code, a debtor's disclosure statement must be approved by a court as containing adequate information prior to solicitation. 11 U.S.C. § 1125(b). Adequate information means:

> 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, but adequate information need not include such information about any other possible or proposed plan.

11 U.S.C. § 1125(a)(1).

31. Section 1125 does not require a specific list of items to be disclosed, but courts have described numerous disclosures that should typically be contained in a disclosure statement, such as the debtor's financial information and projections, asset values, treatment of creditors' claims and related distributions, timing of payments, logistics and means for implementing the plan, related costs, and the roles of insiders. *See, e.g., In re Cardinal Congregate I, LP*, 121 B.R. 760, 765 (Bankr. S.D. Ohio 1990) (listing 19 various factors).

32. The Disclosure Statement cannot be approved because it lacks adequate information.

33. Additionally, a court should disapprove a disclosure statement where "it describes

a plan of reorganization which is so fatally flawed that confirmation is impossible." *In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996); *see also In re 266 Washington Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992). Although objections to a plan are usually reserved for a confirmation hearing, a bankruptcy court may address plan confirmation issues in connection with approval of a disclosure statement "where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable." *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154 (3d Cir. 2012). The primary reason to evaluate confirmability is to "avoid engaging in a wasteful and fruitless exercise of sending the disclosure statement to creditors and soliciting votes on the proposed Plan when the plan is unconfirmable on its face. Such an exercise in futility only serves to further delay a debtor's attempts to reorganize." *In re Atlanta West VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988).

34. Because the Plan cannot be confirmed, the Court should not approve the Disclosure Statement.

**A. Disclosure Statement Lacks Adequate Information.**

**1. The Disclosure Statement Lacks Adequate Information Regarding Postpetition Funding.**

35. The Disclosure Statement references Exhibit D, a chart purportedly reflecting sources and uses of postpetition funds. However, the Debtor has failed to disclose Exhibit D, or any other analysis allowing a hypothetical creditor to make an informed decision regarding the viability of the Plan. Exhibit D must be disclosed and evaluated by parties in interest prior to solicitation.

36. In addition, the Disclosure Statement explains that the major sources of Plan and post-confirmation operational funding comes from Exit Financing of "at least $16.1 million" and

an equity infusion from Green Oak of $7 million. However, the specific funding terms are not disclosed, which also prevents a hypothetical creditor from making an informed decision regarding the viability of the Plan. Details of these funding sources should be adequately disclosed prior to and in connection with Plan solicitation.

37. The Exit Financing Documents are part of the Plan Supplement Documents, which the Debtor expects to disclose 15 days before the Confirmation Hearing. Details regarding the Exit Financing are critical to proper evaluation of the Plan, and any solicitation process would be ineffective without specific details. The Court should deny approval of the Disclosure Statement until and unless the Debtor discloses the terms, requirements, and conditions of the Exit Financing in sufficient detail for hypothetical investors to credibly evaluate the likelihood and impact of such financing. Creditors who will be voting on the Plan should be entitled to review and analyze the full term sheets of any anticipated exit lender(s) with all conditions to close, including items typical to asset-based lending transactions such as:

a) Minimum availability at close;

b) Any financial performance triggers (revenue, EBITDA, maximum leverage, etc) to close;

c) Minimum equity injection requirements;

d) Permitted indebtedness provisions consistent with the proposed debt as set forth in the Plan;

e) Any outstanding diligence items;

f) Any personal guaranty requirements (and, if required, statement acknowledging proposed guarantors' willingness to provide);

g) All reserves and borrowing base advance rates, including but not limited to

advance rates for accounts receivable and for inventory;

h) Availability blocks or any other reductions of the borrowing base;

i) Requirements to pay accounts payable at close, or the dollar amount of extended accounts payable that would be reserved from the borrowing base for meeting opening availability requirements;

j) The projected borrowing base and availability for the 5-year Plan term; and

k) All loan covenants.

38. The Disclosure Statement should also include an acknowledgement and approval by the proposed exit lender for the escrowing of loaned funds relating to the treatment of ACF's claim, and a release or subordination to ACF of any lien on those funds, to verify that the proposed exit lender understands that in cannot access most, if not all, of its loan proceeds immediately upon funding.

39. Similarly, it is unclear whether the Debtor ever plans to disclose details regarding its proposed new equity owner or the proposed equity investment and loan. As to the equity owner, the Plan explains that Green Oak will be owned 50% by Skokie and 50% by Jemco. The Disclosure Statement does not, however, make any clear disclosure regarding these member entities, including any affiliation of these member entities with the Debtor or affiliates/insiders of the Debtor; where the member entities are located and who controls the member entities; and what capability the members have to fund the proposed $7 million equity/loan. The Debtor must disclose all of this detail plus provide a full term sheet that includes all conditions to close, covenants, restrictions, and requirements associated with the transaction.

**2. The Disclosure Statement Lacks Adequate Information Regarding Treatment of ACF's Claim.**

40. The Debtor proposes to pay $16.1 million (i.e., all of the proposed Exit

Financing) into escrow if ACF votes against the Plan. However, in the event ACF prevails on its claim objection defense, ACF is owed more than $16.1 million. As of June 30, 2017, and after subtracting the adequate protection payments made by the Debtor postpetition, ACF's claim will be approximately $16.86 million; this amount will increase on a monthly basis due to interest accrual and other fees/expenses to which ACF may be entitled. *See* 11 U.S.C. § 506(b). The Disclosure Statement fails to describe any source of funding the shortfall of ACF's allowed claim amount or to estimate the ACF Claim in the event ACF succeeds.

41. The Disclosure Statement also fails to adequately describe interest accruals. Under the Plan, if ACF votes to reject, the Debtor will pay PIK interest at the rate of 6.5% per annum. PIK interest is not paid as it accrues; rather, it compounds (i.e., is added to the principal balance) as it accrues. The Disclosure Statement does not explain that the proposed PIK interest compounds; the compounding interval (daily, monthly, annually, etc.); or the source of payment of compounded, accrued interest in excess of the $16.1 million placed into escrow. The Disclosure Statement also does not provide any analysis to justify the proposed 6.5% annual interest rate.

42. The Plan proposes to strip ACF of its existing lien interests and, instead, to attach ACF's existing lien interest in the escrowed funds. However, the Disclosure Statement fails to provide any mechanism for perfecting such lien interest, leaving ACF exposed and at tremendous risk in the event ACF must resort to recovery through the escrowed funds. There is no disclosure where the escrow will be held, whether it will be considered an asset of the estate, and whether the alleged exit lender will also assert a lien on the funds in the escrow account (thereby stripping ACF of the lien rights purportedly shifted from its current collateral package to the proposed escrow account).

43. In the event ACF does not vote in favor of the Plan and the parties litigate Ares' Claim allowance, the Court could order a portion of ACF's claim treated as unsecured. Neither the Disclosure Statement nor the Plan accounts for such an outcome, which becomes highly problematic if the ruling occurs after the class of general unsecured creditors receives its Plan distributions.

44. If ACF votes to accept the Plan, then the Debtor proposes to pay $12.6 million on account of ACF's Claim, with no justification for such amount. The Disclosure Statement should explain why the Debtor believes this is an appropriate allowed claim amount, both because the Debtor borrowed more than this sum and because the allegations in the pending adversary proceeding seek to reduce the claim below this amount and to subordinate any ultimately allowed claim.

### 3. The Debtor's Projections Lack Support and Detail.

45. The Debtor's Projections fail to provide adequate information regarding, among other things:

- A breakdown for the Debtor's projected $2.3 million in administrative expenses.
- Clear disclosure for how the Debtor treats prepaid inventory, which is reported in the Debtor's monthly operating reports but not in the Liquidation Analysis or the Projections.
- The source of incremental interest payments for claims other than ACF's claim.
- The funding source, timing, and amount of expenses relating to ongoing litigation of Ares' claim objection.
- Whether contractual expenses, such as the Debtor's John Deere marketing contract payments, are included in the Projections.

- The current status of the John Deere contract, including any/all postpetition modifications (and whether such modifications are documented in a fully executed agreement) and prospects for term extensions.
- Why the Debtor's projected sales show a significant increase from current levels.
- As discussed above, the proposed terms, conditions, and requirements of the Exit Financing and Green Oak funding.

46. In addition, the Debtor provides no projections for recovery or investigation of its significant accounts receivable, which it listed in the Schedules as over $14 million, as well as the outstanding claims and obligations between the Debtor and its non-debtor affiliates. The Debtor's operating reports reflect $8.8 million in amounts owed to the estate by insiders and/or affiliates.

47. The Disclosure Statement does not disclose an intent to "write off" recovery of such significant amounts, but the Projections do not account for recovery.

48. The Disclosure Statement also fails to explain efforts, if any, the Debtor has made for repayment of such debts, and to identify as litigation claims the causes of action it holds against these affiliates for failure to repay the Debtor.

49. The Debtor should clearly disclose such claims, and the prospects and strategy for recovery, as potential assets available for the benefit of creditors.

50. The Debtor has made mistakes in many of its financial reports (see, e.g., amended operating reports); and the Projections continue that trend of unreliability. Notwithstanding the limited disclosure provided, the Projections treat property and equipment purchases (otherwise known as capital expenditures or "CapEx") as a source of cash, not as a use of cash; this is reflected in Exhibit C to the Disclosure Statement, page 7, listing "Purchase of property and

equipment" under "Cash Flows from Investing Activities" as increases in the Debtor's cash position. To the extent the purchase of property and equipment constitutes a use of cash, upon correction the ending cash balance in 2021 would go from $345,000 to *negative* $1.4 million - a massive swing in the Debtor's cash position that renders the Plan not feasible. The Disclosure Statement should therefore (i) explain why the Debtor adds cash value to the Debtor's cashflow analysis for CapEx; or (ii) be accompanied by a revised Projection that recognizes CapEx will significantly. Otherwise, like other financial documents prepared by the Debtor throughout this case, the Projections are unreliable and stand to significantly mislead Plan voters (or a hypothetical investor).

**4. Additional Disclosure Lacking.**

51. The Debtor has mentioned, but has not disclosed, Exhibit E (Causes of Action), depriving hypothetical investors with adequate information from which to evaluate the Plan. The Debtor has also failed to disclose the impact of settling any such claims with the Committee.

52. Section VI.B. of the Disclosure Statement, entitled "Capital Structure," recites certain balance sheet figures of the Debtor as of the Petition Date. However, these figures are not consistent with the scheduled amount reflected in the most recent monthly operating report. *Compare* May 2017 MOR, Docket No. 468, at 2 *with* Disclosure Statement, at 20.

53. The Debtor asserts as true allegations regarding prepetition events that are not established by any evidence and that are the subject of a pending adversary proceeding. Specifically, the Debtor alleges that ACF refused to waive a default that arose based on a post-closing appraisal "performed at the Senior Lender's direction," suggesting that the appraisal was not conducted by an independent third party. The Debtor further alleges that ACF refused to "allow the Debtor to pay expenses necessary to run its business." *See* Disclosure Statement, at

22. ACF objects to the characterization of its prepetition conduct without clear disclosure indicating that these are only the Debtor's allegations. ACF further reserves all rights in connection with these and any other allegations, including the right to admit or deny in connection with the pending adversary proceeding.

54. The Disclosure Statement does not clearly and plainly disclose the Debtor's affiliates or the significant amounts of money owed to or from those affiliates, other than the transactions within one year prior to the bankruptcy filing. *See* Disclosure Statement, at 21-22. Failure to adequately describe the affiliations of the debtor is grounds for disapproval. *In re Cardinal Congregate I*, 121 B.R. 760, 767 (Bankr. S.D. Ohio 1990). The monthly operating reports filed in this case reflect approximately $8.8 million of insider/affiliate obligations owed to the Debtor; this information should be clearly and plainly disclosed.

55. The Disclosure Statement does not adequately describe the source of funding the Creditor Note, events of default under the Creditor Note, or remedies in the event of default under the Creditor Note. A proposed form of Creditor Note should be included as an exhibit to the Disclosure Statement and included with Plan solicitation.

56. Furthermore, the Creditor Note payment terms (initial payment of $375,000; 45 installment payments beginning after 180 days of Plan effectiveness) seem arbitrary and must be further explained.

57. The Disclosure Statement does not reference a "Litigation Put" - a term defined but also not explained in the Plan. The Debtor must clearly explain the Litigation Put, how it is exercised, and all calculations used to determine its value.

**B. <u>The Plan Cannot Be Confirmed.</u>**

58. The Bankruptcy Code sets forth the requirements for confirmation in Section

1129; if the Plan cannot meet the confirmation requirements, then approving the Disclosure Statement is futile and should not occur. ACF reserves all of its rights to object to confirmation of the Plan on any grounds, whether or not stated herein.

59. In order for a plan to be confirmable, it must be feasible. "A rehabilitation plan is successful when a debtor's plan is 'not likely to be followed by ... liquidation, or the need for further financial reorganization.'" *In re Save Our Springs (S.O.S.) Alliance, Inc.*, 632 F.3d 168, 172 (5th Cir. 2011) (quoting 11 U.S.C. § 1129(a)(11)). "Courts have employed the following factors in determining whether a plan is feasible: the debtor's capital structure, the earning power of the business, economic conditions, the ability of debtor's management, the probability of continuation of management, and any other related matter." *In re Geijsel*, 480 B.R. 238, 257 (Bankr. N.D. Tex. 2012) (Jones, J.) (citation omitted). "Courts, understandably, look favorably on debtors with available capital. Though courts do not need to assume the worst, they should be wary of a plan in which 'virtually all of the income' goes to paying off the plan without a 'sufficient buffer' to weather economic storms." *Id.*, quoting *In re Adamson Co., Inc.*, 42 B.R. 169, 176 (Bankr. E.D. Va. 1984).

60. A plan cannot be confirmed if its proponent has not complied with the Bankruptcy Code. 11 U.S.C. § 1129(a)(3).

61. A plan cannot be confirmed unless all impaired classes of claims have voted in favor of the plan, or at least one class of impaired claims has voted in favor and the plan meets the "cramdown" test set forth in Section 1129(b). In order to satisfy "cramdown," a plan must not discriminate unfairly and must be fair and equitable with respect to the non-consenting impaired classes. 11 U.S.C. § 1129(b). For a plan to be fair and equitable to secured creditors, such creditors must, at a minimum, "receive under the plan property of a value equal to the

allowed amount of their claims." *In re Spanish Lake Assocs.*, 92 B.R. 875, 877 (Bankr. E.D. Mo. 1987). A plan cannot be fair and equitable unless the holders of claims in a class of secured creditors "retain the liens securing such claims . . . ." 11 U.S.C. § 1129(b)(2)(A)(i)(I). "[W]here a debtor seeks to confirm a plan over a secured lender's objection, "it is incumbent upon the Debtor to demonstrate its ability to meet the standards of cram-down under Section 1129(b) of the Code." *See id.* at 879.

62. The proposed Plan cannot be confirmed because it is not feasible, the Debtor has failed to comply with the Bankruptcy Code, and the proposed treatment of ACF's claim is not fair and equitable. As a result, the Plan cannot be confirmed without ACF's consent, and the Disclosure Statement should not be approved.

**1. <u>The Plan Is Not Feasible.</u>**

63. The Debtor has failed to submit the proposed sources and uses allegedly set forth in the undisclosed Exhibit D. Without that information, the Debtor cannot establish that the Plan is feasible.

64. Even absent Exhibit D, the Debtor has made clear that the Plan's feasibility requires the Exit Financing and the contribution from Green Oak. The failure of either of these funding sources dooms confirmation of the Plan.

65. Even assuming, *arguendo*, that the Debtor's Exit Financing comes through in the full "expected" amount of $16.1 million, the Exit Financing will be insufficient to reserve against ACF's full potential claim amount, and unavailable for operations or other claim payments if ACF votes against the Plan leaving the Debtor with only the funding from Green Oak and operating revenues.

66. However, the Debtor will not survive on operating revenues coupled with $7 million in cash from Green Oak, as evidenced by the Debtor's past performance.

67. In 2014 and 2015 combined, the Debtor *lost* $8.5 million.

68. According to the Debtor's monthly operating reports, the Debtor has been generating net operating losses postpetition. The Debtor's unpaid postpetition expense obligations exceed available cash by $200,000. The Debtor has operated at a net loss of over $4 million in seven months postpetition, with monthly net operating losses of more than $500,000. The collectible accounts receivable and the inventory value continues to decline postpetition. Even assuming full $7 million in funding from Green Oak, the Debtor projects only a nominal cash balance of $74,000 by the end of 2018.

**2. The Debtor Has Failed To Comply with Applicable Provisions of the Bankruptcy Code and This Court's Orders.**

69. The Debtor failed to comply with Bankruptcy Code sections 327, 328 and/or 330 by employing and paying Gordon Brothers postpetition, without Court authorization.

70. The Debtor failed to comply with Bankruptcy Code section 365 by failing to obey the Court's cash collateral orders, including failing to promptly provide information when reasonably requested by ACF, failing to timely pay ACF, and using cash collateral without ACF's or the Court's authorization to pay Gordon Brothers.

**3. The Plan Is Not Fair and Equitable as to ACF.**

71. The Plan does not provide ACF with the value, as of the effective date of the Plan, of at least the value of its secured claim. To the extent ACF's claim is allowed in full, the Plan only provides for payment of the escrowed $16.1 million plus PIK interest at the rate of 6.5%. As discussed above, there is no stated intention or ability to pay ACF its full claim amount of approximately $16.86 million as of June 30, 2017 (and rising); and the 6.5% PIK interest rate does not fairly compensate ACF for the additional risks associated with claim treatment.

72. Additionally, the Plan proposes to transfer ACF's existing liens in the Debtor's assets to the Exit Financing funds held in escrow. Section 1129(b) does not allow the Debtor to shift liens, but rather requires that "the holders of such claims retain the liens securing such claims, *whether the property subject to such liens is retained by the debtor or transferred to another entity.*" 11 U.S.C. § 1129(b)(2)(A)(i)(I) (emphasis added). This objective unfairness violates the "cramdown" requirements and prevents Plan confirmation.

73. Even if the lien transfer were acceptable, the Plan does not provide for perfection of such liens - which is subjectively unfair and precludes Plan confirmation. Plus, the escrowed funds are less than the potential allowed secured claim amount, thus reducing the shifted liens to property of a reduced value, converting a portion of ACF's potential fully secured claim to an undersecured claim, and (when the mere accrual of PIK interest is considered) providing for a negative amortization of the ACF's claim. *See In re Northwest Timberline Enterprises, Inc.*, 348 B.R. 412, 435 (Bankr. N.D. Tex. 2006) (holding that negative amortization feature of loan violated Section 1129(b)(2)(A)(i)(I)).

74. The Disclosure Statement proposes to fully repay the Creditor Note over 4.5 years; however, the ACF claim is to be paid the later of September 2019 or the determination of ACF's claim. Litigation - including appeals - could last far longer than 4.5 years, yet the Creditor Note is being paid ahead of the senior secured creditor, which is not fair and equitable treatment of the ACF Claim.

## V. CONCLUSION

75. The Disclosure Statement fails to meet the adequate information requirements of Section 1125, and supports an unconfirmable Plan. Therefore, the Court should deny approval of the Disclosure Statement.

WHEREFORE, ACF respectfully requests that this Court (i) deny the request for approval of the Disclosure Statement, and (ii) grant such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 26th day of June, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, a true and correct copy of the foregoing was served via the Court's CM/ECF facilities to all parties consenting to service through same,

including counsel for the Debtor, the Committee, and the United States Trustee, and via United States First Class Mail to all parties on the attached service list.

*/s/ Keith M. Aurzada*
Keith M. Aurzada