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ATTORNEYS FOR CAPSTONE EQUITIES MANAGER, LLC

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re	§	
	§	CASE NO. 16-34393-hdh
ERICKSON INCORPORATED, *et al.*,	§	Chapter 11
	§	
Debtor.	§	

<u>OBJECTION OF CAPSTONE EQUITIES MANAGER, LLC TO ENTRY OF AN ORDER APPROVING DISCLOSURE STATEMENT IN SUPPORT OF THE JOINT PLAN OF REORGANIZATION OF ERICKSON INCORPORATED, ET AL., PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE</u>

Capstone Equities Manager, LLC ("<u>Capstone</u>") objects to the *Motion of the Debtors for Entry of an Order (I) Approving the Disclosure Statement; (II) Fixing a Record Date; (III) Approving Cure Procedures; (IV) Approving Solicitation Procedures; and (V) Approving Form of Ballot and Establishing Notice and Objection Procedures with Respect to Confirmation of the Chapter 11 Plan of the Debtors* (Doc. 335) (the "<u>DS Motion</u>") and states as follows:[1]

The DS Motion should not be granted, because the Disclosure Statement fails to provide adequate information to creditors and describes a plan that is patently un-confirmable. The DS Motion contains incorrect and confusing definitions, and lacks basic information needed by investors to make an informed judgment about the Plan. Among other things, the liquidation analysis attached to the Disclosure Statement indicates that the majority of the Debtors'

[1] Capitalized terms herein have the meaning ascribed to them in the DS Motion.

liquidation value is attributable to "owned aircraft" which it states have a liquidation value of $98 million. However, the liquidation analysis disclaims making any "representations or warranties regarding the accuracy of the estimates" and does not say what the estimate was based on or even who made it. As far any holder of a Claim is concerned, the estimates underlying the liquidation analysis, and therefore the analysis itself, are pulled out of thin air, providing absolutely no basis to understand the figures or even consider them when making a voting decision. While the Debtors doubtless will contend that the estimates are valid and credible, there is no basis for a creditor to evaluate the liquidation analysis and therefore to make a decision whether to cast a ballot for the plan. All holders of a claim have, on which to base their critical decision, is a disclaimer renouncing the Debtors' responsibility for the accuracy of the estimates and a bare number. This is obviously not enough for a "hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." 11 U.S.C. §1125(a).

Additionally, the DS Motion should not be granted because it contains an illegal "deathtrap" provision, which demotes members of Class 5 (Existing Second Lien Secured Claims) to Class 6 (General Unsecured Claims) if Class 5 does not vote to confirm the Plan. Unlike in a normal deathtrap provision, the proposed Plan does not just change the treatment of the non-accepting class; instead, it actually eliminates the class altogether and merges it into a lower class. The deathtrap is illegal and violates the absolute priority rule. Additionally, the existence of the deathtrap makes the Disclosure Statement inherently flawed because: (1) many claimholders cannot know what Class they will ultimately be in, which is the most basic information necessary to assess the merits of a plan, (2) General Unsecured Creditors already in Class 6 cannot assess their recovery under the Plan, because it depends on whether they will

ultimately be diluted by members of Class 5 falling into the deathtrap, and (3) the Disclosure Statement is highly misleading, because it states that holders of Claims in Class 5 will fall into Class 6, when in fact the result of rejection by Class 5 is that the Plan fails the absolute priority rule and cannot be confirmed.

Background

1. On December 22, 2016, the Debtors filed a first draft of their Disclosure Statement (Doc. No. 212), which gave the broad outlines of their proposed plan and its impact on creditors, but omitted many of the most important details. The draft Disclosure Statement contained placeholders for the "Liquidation Analysis," "Financial Projections," "Valuation Analysis," and "Distribution Analysis."

2. On January 19, 2017, the Debtors filed an amended Disclosure Statement providing those analyses and projections. The amended Disclosure Statement differed from the first version in several material respects. Most notably, Article VII.D.5 was revised to add a significant caveat to the treatment of holders of Allowed Claims in Class 5 (Existing Second Lien Secured Claims). As with the previous version, it stated that each Claimant would receive "its Pro Rata share of the Second Lien Equity Distribution," but then added the new qualification: "*provided*, that if Class 5 votes to reject the Plan, the entire amount of Allowed Existing Second Lien Claims shall be deemed to be Allowed Existing Second Lien Deficiency Claims and treated as Claims in Class 6." (Disclosure Statement Redline, Doc. 334-2 at 59.) The amended Disclosure Statement did not alter the treatment of Claims in Class 6, once again providing that those claimants will receive "its Pro Rata share of the Liquidation Trust." (*Id.*) As a result, the Plan now provides that if Class 5 votes to reject the Plan, holders of Claims in

Class 5 forfeit the Second Lien Equity Distribution and are reduced to sharing in a diluted share of the Litigation Trust.

3. This kind of feature, which drastically reduces the recovery of a class that votes against a plan, is commonly referred to as a "death trap provision." One financial restructuring glossary defines a "death trap" as "[a] provision in a plan whereby an impaired class receives a distribution, or an increased distribution, in exchange for the class's acceptance of the plan, but receives no distribution, or only the distribution to which the class is minimally entitled, if the class votes to reject the plan."[2] The provision added by Debtors is clearly a "death trap" under this definition. However, it differs from a typical death trap in that the Plan does not simply change the recovery of Class 5 if Class 5 fails to vote in favor of the Plan; rather, the Plan purports (in form) to eliminate that class entirely and merge it into Class 6.

4. On the same day that Debtors filed the amended Disclosure Statement, Debtors filed the DS Motion seeking the Court's approval of the Disclosure Statement and solicitation procedures (Doc. 335).

5. On January 20, 2016, the Debtors filed the *Notice of Expedited Hearing* (Doc. 340), notifying parties in interest that a hearing on the DS Motion was set for Thursday, February 2, 2017, giving parties less than two weeks to analyze the Disclosure Statement and file objections.

[2] Lexis Financial Restructuring & Bankruptcy Glossary, available at https://advance.lexis.com/open/document/lpadocument/?pdmfid=1000522&crid=dXJuOmNvbnRlbnRJdGVtOjVITUMtVkhSMS1GR0NHLVMyTkMtMDAwMDAtMDA&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5HMC-VHR1-FGCG-S2NC-00000-00&pdcomponentid=382153

Argument

A. The Disclosure Statement Fails To Contain Adequate Information Because the Liquidation Analysis Is Grossly Inadequate

6. Section 1125 of the Bankruptcy Code requires the proponent of a plan of reorganization to provide holders of impaired claims and interests with a disclosure statement that contains "adequate information" regarding the proposed plan. "Adequate information" is defined as:

> [I]nformation 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 a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information does not include such information about any other possible or proposed plan.

11 U.S.C. §1125(a).

7. In evaluating the adequacy of a disclosure statement, courts commonly refer to the "*Metrocraft* factors" articulated in *In re Metrocraft Pub. Services, Inc*., 39 B.R. 567, 568 (N.D. Ga. 1984). As stated in *Metrocraft*, "[r]elevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectibility of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks

posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates."

8. In order to provide adequate information, the liquidation analysis must have some indicia of reliability. *Metrocraft Pub. Services, Inc*., 39 B.R. at 570 ("Absent a valuation of the assets **with some factual basis**, and absent a concise statement addressing the prospects of a Chapter 7 liquidation, the disclosure statement does not provide adequate information as required by the Bankruptcy Code" (emphasis added); *In re Copy Crafters Quickprint, Inc*., 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). ("[T]he attached liquidation analysis at Exhibit B does nothing more than calculate twenty percent of the alleged 1985 value of the inventory and equipment and the accounts receivable. Absent a more recent valuation of the property by a qualified individual and an assessment of the collectibility of the accounts receivable, the Court is reluctant to approve a Disclosure Statement premised on an unsupported and self-serving valuation and a speculative sale."). The purpose of this requirement is obvious, because without any indicia of reliability, information in the liquidation analysis cannot be used for any purpose. Moreover, the purpose of the disclosure statement is to provide the information that investors need to make an "informed judgment" before voting. *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 758 F.3d 693, 699 (5th Cir. 2014).

9. Here, the liquidation analysis contains no indicia or reliability and provides no information to a holder to determine the actual prospects of recovery in a liquidation or whether the plan satisfies the "best interests of creditors" test of Bankruptcy Code Section 1129(a)(7). This is a problem with the disclosure statement—not a confirmation issue—because creditors are unable to arrive at an informed judgment about the merits of the Plan versus a liquidation.

10. The Debtors' purported liquidation analysis does not say (a) what the estimates are based on, (b) when the estimates were made, (c) who did the estimates or (d) what methodology was used. Indeed, the liquidation analysis is nothing more than bare numbers and a disclaimer of reliability, stating in all capitalized letters: "THE DEBTORS MAKE NO REPRESENTATION OR WARRANTIES REGARDING THE ACCURACY OF THE ESTIMATES AND ASSUMPTIONS CONTAINED HEREIN." (Disclosure Statement, Doc. 333, Ex. 5 p. 2.) Given the utter lack of any indicia of reliability, this disclaimer is very significant. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. at 568 (N.D. Ga. 1984) (listing the existence of a "(5) a disclaimer" as relevant factor). Holders of claims and interests reading the Disclosure Statement will see nothing more than bare unsupported figures and a disclaimer or reliability. This does not give the reader sufficient information to evaluate the prospects of recovery in a liquidation, an essential requirement of a disclosure statement, rendering the liquidation utterly useless. Under these circumstances, the Disclosure Statements fails the requirement that it must contain a liquidation analysis. *In re Diversified Investors Fund XVII*, 91 B.R. 559, 561 (Bankr. C.D. Cal. 1988) ("Case law holds that in order to provide adequate information, the disclosure statement must contain a liquidation analysis which compares the proposed plan of reorganization with a Chapter 7 liquidation.").

11. Courts have held that "in ascertaining the adequacy of information in a disclosure statement, the bankruptcy court must consider each creditor's access to outside sources of information." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. at 979. Ordinary investors are not capable of appraising the value of the Debtors' most significant assets—the fleet of aircraft to which the Debtor assigns a liquidation value of $98.1 million. This is not like a single asset real estate case in which any reader of the Disclosure Statement could simply pull up a web page to

reality check the Debtors' estimates. Readers of the Disclosure Statement will be largely hostage to the Debtors' own estimates. However, the Debtors' estimates are useless for the reasons explained above.

12. Additionally, the liquidation value of the Debtor's aircraft fleet is essential information. Liquidation is a real and live alternative to a restructuring in this case. The Debtors have estimated a "reorganization value" of between $180 to $230. (Disclosure Statement, Doc. 333, Ex. 7 p. 2.) The Debtors' own liquidation analysis places the "Proceeds Available to Creditors Before Wind Down Costs" at $178.9 million, the barest margin below Debtors' own estimated reorganization value. (*Id*. Ex. 5 p. 7.) The liquidation value of the Debtors' fleet is thus the single most important data point in a decision to accept or reject the Debtors' plan of reorganization. Yet the Debtors' Disclosure Statement provides absolutely no information that can be used to determine that amount. A hypothetical reasonable investor cannot make an informed comparison of the Plan versus liquidation based on the Disclosure Statement.

13. Unlike the typical, reasonable investor, Capstone has conducted a preliminary liquidation assessment and estimates the liquidation value of the aircraft fleet at $243 million (versus the Debtors' estimate of $98.1 million). Based on this valuation, liquidation would provide significantly more value to investors than reorganization. Capstone reserves the right to present its competing appraisal – and additional valuation evidence – at any hearing on confirmation. However, in advance of confirmation, the Bankruptcy Code requires that investors have adequate information to assess the credibility of the Debtors' liquidation estimates, or at least additional information about the source and credibility of the debtors' analysis. The Disclosure Statement is inadequate and Capstone respectfully requests that the DS Motion be denied.

B. The Disclosure Statement Contains Confusing Information And Incorrect Definitions, Because It Mis-Defines Administrative Claims

i. The Disclosure Statement Mis-Defines the Term "Administrative Claim."

14. In addition to lacking critical information necessary for investors to make an informed judgment, the Disclosure Statement contains patently false and confusing information that could lead some investors to misunderstand the classification of their Claims.

15. The Disclosure Statement defines "Administrative Claims" in the glossary to the Plan as follows:

> Administrative Claim means a Claim, Cause of Action, right, or other liability, or the portion thereof, that is entitled to priority under Bankruptcy Code sections 503(b), 507(a)(2), and 507(b), including (i) the actual and necessary costs and expenses incurred after the Petition Date of preserving the Estates and/or in connection with operating the Debtors' businesses (such as wages, salaries, or payments for goods and services); (ii) Professional Compensation Claims; and (iii) all fees and charges assessed against the Estates under 28 U.S.C. § 1930. The term Administrative Claim specifically excludes all Intercompany Claims.

16. Under the Interim DIP Order (Doc. 40), holders of Existing Second Lien Secured Claims were granted "superpriority administrative expense . . . under and to the extent set forth in sections 503 and 507(b) of the Bankruptcy Code against the Debtors' estates, which Existing Second Lien Superpriority Claims, if any, shall be payable from and have recourse to all assets and property of the Debtors." Therefore, holders of Existing Second Lien Secured Claims have "Administrative Claims" within the meaning of the Plan and Disclosure Statement. The fact that these administrative expense claims might be junior to certain other administrative claims as described in the Interim DIP Order is irrelevant. <u>What matters is that the holders of Existing Second Lien Secured Claims have Administrative Claims</u>.

17. In fact, holders of Existing Second Lien Secured Claims have <u>Allowed</u> Administrative Claims. "Allowed" Claims are defined in the Plan as including Claims "listed in Debtors' Schedules of Assets and Liabilities" and those "deemed allowed" under the Plan (Doc.

333 at 156.) The Debtor acknowledged the Existing Second Lien Secured Claims in its schedules and those claims are also deemed allowed under the Plan. Moreover, those claims were granted administrative priority status by an order of this Court that has not been appealed.

18. The Disclosure Statement contains numerous confusing and factually incorrect statements ignoring the fact that holders of Existing Second Lien Secured Claims have Allowed Administrative Claims, and potentially leading holders of those claims to misunderstand their treatment under the Plan. For example, the Disclosure Statement states:

- "Administrative Claims . . . are not classified." (Disclosure Statement, Doc. No. 333 at 34.)

This would lead a holder of Existing Second Lien Secured Claims to believe that all or part of its claim is not classified—whereas it appears that Existing Second Lien Secured Claims are classified in Class 5.

The Disclosure Statement also states:

- "Unless otherwise agreed to by the holder of an Allowed Administrative Claim and the Debtors or the Reorganized Debtors, as applicable, with the consent of the Required Investor Parties each holder of an Allowed Administrative Claim . . . will receive in full and final satisfaction of its Administrative Claim an amount of Cash equal to the amount of such Allowed Administrative Claim." (*Id*. at 35.)

This would lead the holder of an Existing Second Lien Secured Claim to believe that it is being paid in full in cash, since those Claims are also defined as Allowed Administrative Claims. However, other language in Plan contains the contrary suggestions that Existing Second Lien Secured Claims are placed in Class 5 and are not being paid in full. The Disclosure Statement must be corrected to fix these factual and misleading inconsistencies.

ii. The Disclosure Statement Fails To Explain How Classes 1-4 Are Impaired

19. The Disclosure Statement states that Classes 1-4 are impaired, even though holders of Claims in those Classes are paid in full in cash on the Effective Date. Presumably

these Classes are impaired because holders in those classes, like everyone else, is entering into the releases and exculpations. If so, parties in interest deserve to understand the basis on which Classes 1-4 are being treated as "impaired." A "hypothetical reasonable investor" cannot be credited with understanding the nuances of technical impairment. A hypothetical investor reasonably believes that the cramdown rules contain checks and safeguards against undervaluation, and in particular that the requirement of an impaired consenting class induces an economically impaired fulcrum class to closely scrutinize the Debtors' valuation. This assurance and safeguard does not exist when a class of senior claims is technically impaired, because a plan can be crammed down even if it massively undervalues the estate and treats junior claims unfairly. The Disclosure Statement should be transparent, so that holders of junior claims can evaluate the protections afforded (or not afforded) by the cramdown rules in this case.

C. The Plan's Deathtrap Is Illegal And Makes Adequate Disclosures Impossible

20. The amended version of the Debtors' plan bifurcates the claims of holders of Existing Second Lien Claims. Part of those claims is placed in Class 5, which will receive a pro rata distribution of shares in the Reorganized Debtor valued at between $4.8 to $23 million. (Disclosure Statement, Doc. No. 333 at Ex. 8 p. 3 [Recovery Analysis].) The balance of Existing Second Lien Claims is defined as the "Existing Second Lien Deficiency Claim" and placed into Class 6 with General Unsecured Creditors. Holders of Claims in Class 6 are entitled to a pro rata share of the Litigation Trust, which has an estimated value of $500,000 to $2 million. (*Id*. p. 4.) In short, the vast majority of the expected recovery for holders of Existing Second Lien Claims is attributable to the equity distribution on account of their claims in Class 5.

21. However, the Plan contains a "deathtrap" that conditions any recovery for holders of Class 5 Claims on the Class' affirmative vote to accept the Plan. In particular, the Plan and Disclosure Statement state that Class 5 recovery is conditioned as follows: "[P]rovided, that if

Class 5 votes to reject the Plan, the entire amount of Allowed Existing Second Lien Claims shall be deemed to be Allowed Existing Second Lien Deficiency Claims and treated as Claims in Class 6." (Disclosure Statement, Doc. 333 at 39.)

22. In a typical deathtrap provision, the recovery assigned to a given class of claims increases of decreases depending on whether it votes to accept the plan. The deathtrap provision in this case is unusual in that—at least in form—it provides for the complete annihilation of a class and its merger into the class below. If the deathtrap is triggered in this case, then—again, at least in form—Class 5 will cease to exist and will merge into Class 6. In reality, of course, the formal elimination of Class 5 is simply an attempt to eliminate a nonconsenting class and therefore to avoid the strictures of the absolute priority rule. In economic reality, the effect of the deathtrap is that if Class 5 rejects the Plan then its holders receive a significantly reduced recovery, while holders of claims in Class 6 still receive value under the Plan.

i. The Deathtrap is Illegal

23. Courts have held that "disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible." *In re Miller*, No. 96-81663, 2008 WL 191256, at *3 (Bankr. W.D. La. Jan. 22, 2008) (quoting *In re U.S. Brass Corp*., 194 B.R. 420 (Bankr.E.D. Tex. 1996)).

24. The deathtrap in this case is illegal and renders the plan unconfirmable on its face. The deathtrap in this case is illegal because it effects holders of claims other than those entitled to vote and decide whether the deathtrap is triggered. Specifically, if holders of Claims in Class 5 vote against confirmation thereby triggering the deathtrap, holders of Claims in Class 6 will be effected by having their class diluted with additional Claims. The original holders of Claims in Class 6 will receive a reduced recovery because of the decision of holders of Claims in Class 5.

25. This is precisely the feature disapproved of by the court in *In re MCorp Financial, Inc.*, 137 B.R. 219 (Bankr. S.D. Tex. 1992). In that case the "Debtors . . . included in their plan(s) a provision authorizing some possible payout to [three equity classes, 14, 15 and 16] upon a favorable vote" by only one of those classes—class 15. The debtors "colorfully labelled this the 'death trap provision.'" The court was disturbed by the fact that classes 16 and 17 had their recovery held hostage to the vote of deciding class 15: "Thus Classes 16 and 17 not only lost any possible distributions, but also the right to vote effectively, since they could not know until after Shearson had cast its vote (due on the same date as that of all other claimants) what their own status was." *Id*. at 236. The court held that the deathtrap in that case "result[ed] in the plan's not being fair and equitable. Further, this provision also results in unfair discrimination." *Id.* at 236. Like the plan in *MCorp*, the Plan in this case illegally conditions the recovery of the original holders of Claims in Class 6 on the vote of Class 5. The Plan unfairly and arbitrarily harms Class 6 based on what another class elects, which deprives holders of those claims of "the right to vote effectively," since they cannot "know until after [Class 5] has cast its vote" what their own status is.

26. Additionally, the deathtrap feature results in the improper classification of claims. Bankruptcy Code Section 1122 provides that "[e]xcept as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." The secured claims in Class 5 are not "substantially similar" to the general unsecured claims in Class 6. Therefore, those two classes of claims cannot be merged together, and the deathtrap is inconsistent with the classification scheme under the Code.

27. Additionally, the deathtrap violates the absolute priority rule. By initially classifying certain of the Existing Second Lien Claims in Class 5, the Debtors concede that those claims are secured and entitled to priority over General Unsecured Claims. However, if the deathtrap is triggered, all Existing Second Lien Claims—even the secured portion—will be treated *pari passu* with general unsecured claims in violation of the absolute priority rule and the Code's priority scheme. Because the Plan cannot be confirmed if the deathtrap is triggered, it is fatally flawed and the Disclosure Statement should be disapproved.

ii. The Deathtrap Renders Adequate Disclosure Impossible

28. In addition to creating insurmountable confirmation issues, the deathtrap renders the Disclosure Statement itself inadequate purely in relation to the adequacy of its disclosures.

29. First, it is axiomatic that the most basic function of a Disclosure Statement is to inform creditors of the classes into which their claims have been placed. Because of the deathtrap, many claimholders cannot know what Class they will ultimately be in until after voting occurs. The Disclosure Statement therefore fails to explain the classification of claims and interests.

30. Second, a plan and disclosure statement must "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(2). However, the Disclosure Statement in this case does not specify the treatment of creditors in Classes 5-6, neither of which will know the treatment of its class until after voting. Furthermore, the treatment of claims in Class 6 depends on the vote of creditors in Class 5, since if Class 5 votes to reject the Plan, Claims in Class 6 will have their share of the Litigation Trust diluted. As such, holders of Claims in Class 6 cannot determine how their claims will be treated by reading the Disclosure Statement.

31. Third, assuming that Class 5 votes to reject the Plan, the Plan will be un-confirmable because it violates the absolute priority rule. (Class 5 will receive a steeply reduced recovery, while Class 6 will recover something.) The Debtors' Disclosure Statement cynically tries to cover up this violation of the absolute priority rule by providing, in form rather than in substance, that Class 5 evaporates and merges into Class 6. This sleight of hand is designed to eliminate a junior class below the non-consenting Class 5. However, in economic reality, if the deathtrap is triggered, what occurs is that the impaired Class 5 does not consent to the Plan and a junior class (Class 6) receives property under the Plan, in violation of 11 U.S.C. § 1129(b)(2)(B). Accordingly, the Disclosure Statement is highly misleading and inadequate inasmuch as it states that the failure of Class 5 to consent to the Plan triggers reduced recovery under the Plan for holders of Claims in that class (in an effort to coerce holders in that Class to vote in favor of the Plan), when in reality the failure of Class 5 to consent to the Plan means the Plan in un-confirmable. Readers of the Disclosure Statement deserve to have a clear and truthful statement explaining the effects of their voting decisions. Instead, the Disclosure Statement seeks to coerce holders of the Existing Second Lien Claims to accept the Plan, with hollow threats that are unenforceable under the Code.

D. In the Alternative, the Court Should Continue the Disclosure Statement Hearing Because Insufficient Notice Was Given

32. The first draft of the Disclosure Statement filed on December 23, 2017 was a disclosure statement in name only. Nobody would dispute that it was far from providing "adequate information" within the meaning of Bankruptcy Code Section 1125. For one thing, it did not contain any liquidation analysis, which is necessary for a disclosure statement to present adequate information. It also contained placeholders for the "Liquidation Analysis," "Financial Projections," "Valuation Analysis," and "Distribution Analysis." Without these essential

components, the original draft could not be used to assess the value of the Debtors' business, the amount that a holder would expect to receive under the proposed Plan, or the amount a holder would receive in liquidation (according to the Debtor's projections).

33. The first draft of a meaningful disclosure statement was filed on January 19, 2017, giving parties in interest less than two weeks to analyze it in advance of the noticed hearing. This is less than half the amount of time required under the Bankruptcy Rules. Fed. R. Bankr. Proc. 2002(b) ("Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement . . .").

34. Additionally, as explained above, this is not a simple case. Significant value is at stake. The Plan and Disclosure Statement contain numerous factual inaccuracies that claim holders are forced to wade through. The Plan itself is also complex and contains toggle provisions forcing certain holders into a complex Prisoners' Dilemma. For all these reasons, it is absolutely critical that the Disclosure Statement in this case undergo thorough scrutiny. Therefore, Capstone Equities Manager, LLC respectfully requests that, if the Court chooses not to deny the DS Motion, in the alternative, the Court should continue the hearing on the Disclosure Statement to give parties in interest more time to analyze the Disclosure Statement and raise possible objections.

Conclusion

35. The Disclosure Statement provides insufficient information for a reasonable investor to compare the merits of liquidation versus confirmation. Adding insult to injury, it seeks to coerce holders of Existing Second Lien Claims into voting for the Plan anyways.

Capstone respectfully requests that the DS Motion be denied, or in the alternative, that the Disclosure Statement Hearing be continued to provide parties in interest with additional time to consider the adequacy of the Disclosure Statement.

DATE: February 1, 2017

Respectfully submitted,

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