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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: **THRU, INC.,** **Debtor.**	**Case No. 17-31034** **Chapter 11**

DROPBOX, INC.'S OBJECTION TO THRU, INC.'S DISCLOSURE STATEMENT

TO THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

NOW COMES Dropbox, Inc. ("Dropbox"), and files this *Objection to Thru, Inc.'s Disclosure Statement*, in support of which Dropbox would respectfully show as follows:

I. BACKGROUND

1. Dropbox is a service founded in 2008 in San Francisco, California, that today offers online file management and collaboration services to over 500 million users. In March of this year, Dropbox obtained a $2.3 million judgment against Thru, Inc. ("Thru" or the "Debtor") in trademark litigation pending in the United States District Court for the Northern District of California (the "District Court"). Dropbox's judgment derived from (a) Thru's attempt to extort money from Dropbox based on Thru's substantively meritless claim that it held trademark rights

to the "DROPBOX" mark; (b) Thru's strategic delay in asserting its supposed claims; and (c) Thru's egregious litigation misconduct.

2. The District Court found as a matter of law that Thru had no trademark rights to assert against Dropbox. Rather, Dropbox held senior rights to its name as the result of an assignment from a third party.[1] Thru knew about the assignment and Dropbox's senior rights years before asserting claims against Dropbox. But it nevertheless claimed senior rights and then could not even muster a triable issue of fact on the question despite extensive discovery.

3. Thru had known of Dropbox and its supposed infringement of Thru's trademark rights since June 2009 but deliberately chose to do nothing for years.[2] The record was replete with evidence that Thru's CEO and directors viewed Thru's claims against Dropbox as a "lottery ticket," a long-shot chance at an unearned windfall. To maximize its imagined payoff, Thru strategically delayed in asserting its supposed rights for years as Dropbox grew to worldwide prominence. As Thru's executives put it, their "best leverage . . . [was] to sit tight and wait to the

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[1] *Supplementary Order re Plaintiff's Motion for Summary Judgment* p.12*, Dropbox, Inc. v. Thru, Inc.*, No. 3:15-cv-01741-EMC, Dkt. No. 146 (N.D. Cal. Dec. 7, 2016) (the "Supplementary Order"). A copy of the Supplementary Order is attached hereto as Exhibit B.

[2] *Order Granting Plaintiff's Motion for Summary Judgment* p. 8, *Dropbox, Inc. v. Thru, Inc.*, No. 3:15-cv-01741-EMC, Dkt. No. 135 (N.D. Cal. Nov. 15, 2016) (the "MSJ Order"). A copy of the MSJ Order is attached hereto as Exhibit A.

The District Court's findings and conclusions are binding in this bankruptcy case, notwithstanding any appeal. The Fifth Circuit has held that:

> A federal court applies federal common law in deciding the collateral estoppel effect of a prior federal judgment. Under federal law, three elements must be shown for collateral estoppel to apply:
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> (1) The issue at stake must be identical to that involved in the prior action;
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> (2) the issue in the prior action must have been actually litigated; and
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> (3) the determination of the issue in the prior action must have been necessary and essential to the prior judgment.

Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 243-44 (5th Cir. 1983). Though Thru has appealed the District Court's judgment, "[a] case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal." *Fidelity Standard Life Ins. Co. v. First Nat. Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975).

[Dropbox] IPO announcement and be prepared to file suit that day . . . ."[3] Based on the undisputed record, the District Court found Thru guilty of laches as a matter of law: "Thru's delay in asserting its putative rights to the mark was part of a deliberate scheme to increase the value of its claims by leveraging an anticipated initial public offering from Dropbox."[4] As District Court explained, "if ever there was a paradigmatic case of laches" this was it.[5]

4. The District Court also held that Thru "engaged in bad faith conduct both prior to and during" the trademark litigation.[6] Among other things, the District Court held that Thru and its CEO, Lee Harrison, had filed a frivolous motion and repeatedly given false testimony in written discovery responses and deposition testimony. As the District Court put it, Thru and its Chief Executive had engaged in a "pattern of inaccurate responses and representations" throughout the litigation.[7] On March 8, 2017, the District Court awarded $2,297,432.00 for attorneys' fees and costs to Dropbox based on Thru's bad faith conduct both in asserting trademark claims against Dropbox and in its conduct of the litigation.[8]

5. The District Court's substantial judgment came as no surprise to Thru. In fact, just weeks before the hearing on Dropbox's request for fees, Thru engaged in machinations aimed at shielding its assets from Dropbox. Thru "borrowed" $615,000 from three insiders [CEO Lee Harrison, and Board Members Eliza Jayne McCoy and Roderic Holliday-Smith] and purported to

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3 MSJ Order at 8 (quoting internal Thru documents); *see also id.* at 8-9 (summarizing evidence of Thru's purposeful delay and Thru's inability to explain this evidence).

4 *Order Granting Plaintiff's Motion for Attorneys' Fees* p. 3, *Dropbox, Inc. v. Thru, Inc.*, No. 3:15-cv-01741-EMC, Dkt. No. 173 (N.D. Cal. March 8, 2017) (the "Judgment"). A copy of the Judgment is attached hereto as Exhibit C.

5 MSJ Order at 9.

6 Judgment at 6.

7 Judgment at 6.

8 Judgment at 6.

grant those insiders a lien on all of Thru's assets, which up to that point were wholly unencumbered.[9] Over the next several weeks, the same insiders loaned Thru an additional $250,000, allegedly under the same secured terms. Much of the $865,000 alleged secured loan proceeds were used to repay unsecured debt and salary owed to those very same insiders. $200,000 was paid to Thru's parent company, in which those same insiders are members. Additionally, Thru's CEO Harrison is one of these inside "lenders." In his case, he "loaned" $50,000 to Thru and then received at least $80,000 in "salary."

6. By rule, Dropbox's judgment against Thru was to become enforceable on March 22, 2017. *See* Fed. R. Civ. P. 62(a). Thru did not post a supersedeas/appeal bond for the amount of the judgment, nor did it ask the District Court to require a lower bond amount based on financial hardship. Instead, the day the judgment became executable, Thru filed the instant bankruptcy case.

7. According to Thru's schedules, it owes $3,674,978.30 in debt. Of that, $865,000.00 (24 percent) is the amount owed to insiders that was incurred within one month before the Petition Date, and $2,297,432.09 (63 percent) is owed to Dropbox. Thus, only 13 percent of Thru's debt is owed to someone other than insiders or Dropbox. Much of that is amounts owed to Thru's attorneys for the meritless litigation it pursued against Dropbox.

8. Thru is not currently a profitable company and has not been profitable for some time (to the extent that it ever was). According to the 2016 deposition testimony of Thru's CEO Lee Harrison, Thru was not profitable in 2013, 2014, or 2015. And at the 341 meeting, Mr. Harrison admitted that Thru continues to lose an average of $83,000.00 per month. Nevertheless, in addition to paying healthy salaries and independent contractor payments to Mr. Harrison and

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[9] Dropbox disputes that the liens purportedly granted to the insiders were properly perfected and reserves all rights with respect to this issue.

his wife, Thru also pays for its executives' country club memberships and, in certain instances, luxury cars.

9. On April 6, 2017, Thru filed is *Disclosure Statement in Support of Chapter 11 Plan of Reorganization* (Dkt. No. 42, the "Disclosure Statement") and its *Chapter 11 Plan of Reorganization* (Dkt. No. 43, the "Plan"). The deadline to object to the disclosure statement is May 8, 2017.

II. THE PLAN IS UNCONFIRMABLE ON ITS FACE

10. The Court should deny approval of the Disclosure Statement because the Plan is patently unconfirmable. Where a plan is "so fatally flawed that confirmation is impossible," a bankruptcy court should deny approval of a disclosure statement. *In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996); *see also In re Beyond.com Corp.*, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) ("patently unconfirmable"); *In re Curtis Center Limited Partnership*, 195 B.R. 631, 638 (Bankr. E.D. Pa. 1996) (same); *In re Market Square Inn, Inc.*, 163 B.R. 64, 68 (Bankr. W.D. Pa. 1994) ("not capable of confirmation").

11. There are at least three reasons why Thru will not be able to confirm its Plan. First, the Plan is not feasible because there is no reason to believe that, after years of continuing losses, Thru will suddenly be able to generate enough profit to pay Dropbox's substantial claim.[10] In fact, Dropbox's claim may be worth more than Thru has earned in profit in its 15-year history. Second, the Plan was not proposed in good faith because, *inter alia*, it impermissibly gerrymanders classification of creditors in order to create an impaired consenting class. Third, the Plan is not

[10] Despite the fact that the hearing on the disclosure statement is set for May 12, Thru has yet to fill in the myriad missing blanks in its filed plan and disclosure statement to disclose the proposed repayment term, nor has it filed projections to evidence the feasibility of its plan.

fair and equitable because it does not provide Dropbox or other unsecured creditors the present value of their claims.

A. THE PLAN IS NOT FEASIBLE BECAUSE THRU DOES NOT HAVE THE FINANCIAL WHEREWITHAL TO MAKE THE PLAN PAYMENTS.

12. The Plan is not feasible because Thru does not have the financial capability to pay its unsecured creditors in full. The Court cannot confirm Thru's plan if "[c]onfirmation of the plan is [] likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor …." 11 U.S.C. § 1129(a)(11). This is commonly known as the feasibility requirement; that is, a plan must be feasible in order to be confirmed. Thru's plan is not feasible. It proposes to pay, whether directly or into escrow, unsecured claims totaling approximately $2.8 million over an unknown time period, despite the fact that Thru has been losing approximately $83,000.00 per month and has not turned a profit in at least three years.

13. Even spread out over ten years, that amounts to $23,333.33 per month before interest. At the prime rate, which is currently 4 percent, the monthly payment over ten years would be $28,350.00. At an 8 percent rate, the monthly payment would be $33,972.00. While Mr. Harrison testified at the 341 meeting that he and his colleagues "feel very good about our business going forward,"[11] this self-serving speculation cannot be credited, especially in light of the company's operating history.[12] And it is certainly not sufficient to meet Thru's burden to prove its Plan is confirmable.

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[11] Tr. 40:18-19. A copy of the 341 transcript is attached hereto as Exhibit D.

[12] Mr. Harrison's subjective beliefs regarding Thru's financial matters are hardly trustworthy. For example, he previously reported to Thru's board of directors that another company called Box would offer Thru several million dollars for Thru's supposed rights to the Dropbox name. Questioned under oath as to how he came up with that figure, Harrison testified that it was "[j]ust a guess" and that he "[j]ust pulled it out of the air." An excerpt of the deposition transcript is attached hereto as Exhibit E.

14. "The Supreme Court has said that '[h]owever honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impracticable schemes for resuscitation.'" *In re Brown*, 951 F.2d 564, 572 (3d Cir. 1991) (quoting *Tennessee Publishing Co. v. American Nat'l Bank,* 299 U.S. 18, 22 (1936)). Other than Mr. Harrison's and his colleagues' imaginary scheme for resuscitation, there is no reason to believe that Thru will be able to repay $2.8 million in unsecured claims over the next ten or even twenty years. To pay such amounts back over ten years, assuming 8 percent interest,[13] Thru's *profits* would have to increase by more than $1.4 million per year, or approximately 50 percent of Thru's historical annual revenue. Thru's plan is simply not feasible. It amounts to a "hope" plan, and Thru will not be able to obtain confirmation—at least not without the proceeds from Thru's claims against its directors and officers, discussed below.

B. THE PLAN WAS NOT PROPOSED IN GOOD FAITH.

15. A plan must be proposed in good faith, and it must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1), (3). Thru did not propose its Plan in good faith for a number of reasons. First, it impermissibly classifies Dropbox's claim separately from other unsecured claims. Second, it improperly seeks to obtain an advantage in ongoing litigation. Finally, it unjustifiably protects Thru's insiders by abandoning valuable claims against those insiders and maintaining unnecessary benefits and compensation for Thru's management.

i. The Plan Impermissibly Gerrymanders the Classes.

16. The most glaring absence of good faith in Thru's proposed Plan is its impermissible classification of Dropbox's claim separately from other unsecured claims. The Fifth Circuit has stated in no uncertain terms that "thou shalt not classify similar claims differently in order to

[13] The Court found 8 percent to be the appropriate rate in *In re Cornwall Personal Ins. Agency, Inc.*, 308 B.R. 771, 774 (Bankr. N.D. Tex. 2003).

gerrymander an affirmative vote on a reorganization plan." *Matter of Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991). And if a debtor's proffered reasons for classifying similar claims separately are no more than a façade to mask the debtor's true intent to gerrymander, then the plan cannot be confirmed. *See id.* "[S]ubstantially similar claims, those which share common priority and rights against the debtor's estate, should be placed in the same class." *Id.* at 1278.

17. Consensual plan confirmation requires that every impaired class of creditors votes to accept the plan. *See* 11 U.S.C. § 1129(a)(8). A class of claims has accepted a plan if at least two-thirds in amount and more than one-half in number of non-insiders have voted to accept. 11 U.S.C. § 1126(c). If a class votes not to accept the plan, the Court may still confirm it over that class's nonconsenting vote if (a) at least one impaired class has voted in favor of the plan (this class is commonly referred to as the impaired consenting class); (b) the plan is fair and equitable; and (c) the plan does not discriminate unfairly. 11 U.S.C. § 1129(a)(10), (b)(1). It is fairly common in contested chapter 11 cases for a debtor to classify similar claims separately in order to create an impaired consenting class. This is what the Fifth Circuit referred to as gerrymandering in the *Greystone* case.

18. In *Greystone*, the debtor classified its secured lender's significant deficiency claim separately from trade vendors' relatively insignificant claims. The debtor argued that the legal difference between a statutorily created deficiency claim and a trade claim was sufficient to justify separate classification. *Id.* at 1279. The debtor also argued that the "realities of business" justified separate classification. *Id.* at 1280. But the Fifth Circuit rejected both these arguments. As is the case with Thru's plan, the separate classification in *Greystone* was an obvious attempt to "manipulate 'acceptance' by artful classification." *See id.* at 1277 ("Classification of claims thus affects the integrity of the voting process, for, if claim could be arbitrarily placed in separate

classes, it would almost always be possible for the debtor to manipulate 'acceptance' by artful classification.").

19. There is no legitimate reason for Thru to classify Dropbox's claim separately from other unsecured creditors, which is evident because there is no other impaired class of claims. The plan states that the DIP claims and prepetition lender claims are impaired, but the plan also provides that those claims are deemed allowed in their entirety and will be paid in full on the effective date.[14] So they are not impaired.[15] The plan also includes a class of "other secured claims," but there do not appear to be any creditors in that class. The only truly impaired classes are general unsecured claims and Dropbox's claim, which are identical in terms of priority and rights against the debtor's estate. They should therefore be in the same class.

ii. The Plan is Part of Thru's Impermissible Scheme to Gain an Advantage in Ongoing Litigation.

20. Thru's lack of good faith is also manifested by the timing of this case. It was filed the day Dropbox's judgment against it became enforceable, as a means of allowing it to appeal the lopsided decision against it without the posting the requisite supersedeas/appeal bond. In other words, Thru filed this case and its Plan for the improper purpose of obtaining an advantage in ongoing litigation.

21. "To be proposed in good faith, a plan must fairly achieve a result consistent with the Code." *Matter of Block Shim Dev. Co.-Irving*, 939 F.2d 289, 292 (5th Cir. 1991). The quintessential example of an improper purpose for filing chapter 11 is when a debtor files in order to obtain a tactical advantage in ongoing litigation. *See In re Mirant Corp.*, No. 03-46590, 2005

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[14] The proposed treatment of the insiders' unperfected pre-petition claim and DIP claim is yet another problem with the plan, and Dropbox will address this issue in more detail in a formal plan objection.

[15] *See* 11 U.S.C. § 1124(1) ("a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest").

WL 2148362, *8 (Bankr. N.D. Tex. Jan 26, 2005) ("In analyzing the purpose of a debtor's chapter 11 petition in the context of a motion to dismiss for bad faith filing, the courts regularly consider whether the bankruptcy was intended to obtain tactical advantage in litigation or negotiations."). Here, the timing of this case and the fact that the Debtor has no realistic prospect of reorganization overwhelmingly indicate that this case was filed solely to obtain a tactical advantage in the ongoing litigation between Thru and Dropbox.

iii. The Plan Unjustifiably Protects Thru's Insiders by Abandoning Valuable Claims Against those Insiders and Maintaining Unnecessary Benefits and Compensation for Thru's Management.

22. The Plan unjustifiably protects Thru's insiders to the detriment of Dropbox and the other creditors. The Plan and Disclosure Statement do not propose that Thru minimize ongoing expenses, such as paying for its executives' country club memberships and luxury cars. They also do not provide that Thru's executives will take a pay cut to make Thru's plan a bit more feasible. Nor do they propose, for example, to appoint an independent fiduciary to investigate and potentially prosecute valuable causes of action against insiders.[16] Thru also does not schedule or otherwise disclose fraudulent transfer or breach of fiduciary duty claims against Mr. Harrison and Thru's other officers and directors as well as potential legal malpractice claims against Thru's counsel in the Dropbox litigation (discussed further below). Instead, the Plan essentially proposes for Thru's executives to stay aboard Thru's gravy train at the expense of Dropbox and other unsecured creditors. That again demonstrates a lack of good faith.

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[16] The filing of a chapter 11 petition imposes upon a debtor-in-possession a fiduciary duty to all of its creditors to administer its assets and business of the estate in the best interests of those creditors. *In re Bellevue Place Assoc.*, 171 B.R. 615, 623-24 (Bankr. N.D. Ill. 1994). Conflicting personal interests of officers and directors that interfere with the exercise of the fiduciary duties to all creditors constitute cause to appoint a chapter 11 trustee. *Id.* at 624.

C. THE PLAN DOES NOT PROVIDE UNSECURED CREDITORS WITH THE PRESENT VALUE OF THEIR CLAIMS.

23. The Plan is not fair and equitable because it proposes to pay unsecured creditors insufficient interest—*i.e.*, the Plan does not propose to pay unsecured creditors the present value of their claims. Regardless of whether Dropbox's claim is classified separately, its claim will dominate its class, and its class will therefore vote to reject Thru's plan.[17] That means the plan must be fair and equitable to be confirmed.[18] A plan is fair and equitable with respect to unsecured claims if:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

11 U.S.C. § 1129(b)(2)(B). The plan proposes for equity to retain its equity interests, so the plan therefore must provide Dropbox and other unsecured creditors with the present value of their claims. *See In re Northwest Timberline Enters., Inc.*, 348 B.R. 412, 423 (Bankr. N.D. Tex. 2006).

24. While a plan "may pay an unsecured creditor with deferred payments over the life of the plan … the present value requirement necessitates the payment of interest …." *In re Cornwall Personal Ins. Agency, Inc.*, 308 B.R. 771, 774 (Bankr. N.D. Tex. 2003). And the appropriate interest rate must compensate the creditor for actual risk, which is the rate the debtor would have to pay in order to borrow the same amount of money in the commercial loan market.

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[17] *See* 11 U.S.C. § 1126 (governing voting and acceptance of a plan).

[18] *See* 11 U.S.C. § 1129

Id. at 775 (citing *Mississippi State Tax Comm'n v. Lambert (In re Lambert)*, 194 F.3d 679 (5th Cir. 1999)). Factors to consider include the term of the loan, the security provided, and the risk of default. *Id.* To reach the appropriate rate, one normally begins with a risk-free rate and then adds an appropriate upward adjustment to compensate for risk. *Id.* at 776.

25. Here, Thru proposes to pay unsecured creditors interest at the federal judgment rate, which is currently 1.06 percent. But courts usually consider the prime rate as the current risk-free rate. The Wall Street Journal prime rate is currently 4 percent. With respect to Dropbox specifically, Thru is proposing to escrow its monthly payments until the trademark litigation, including all appeals, is concluded. That could take many years. When the balance of a claim increases over the life of a plan due to interest, it is a negative amortization plan, *see Northwest Timberline*, 348 B.R. at 420, which adds another level of risk. Thru is not offering Dropbox any security for the payout (and indeed has thus far avoided posting security by way of a supersedeas bond by filing this bankruptcy case), and Thru has not explained how it will generate enough revenue to pay Dropbox's claim after years of continuing losses. All of the factors point toward a significant risk premium in line with what a bankrupt entity would have to pay to borrow $2.3 million dollars in the marketplace on an unsecured basis, with no down payment, with accruing and unpaid interest, and with payment deferred several years.

26. Dropbox respectfully submits that such a loan is not available anywhere. If it is, then the interest rate would likely push the limits of usury. In any event, it is Thru's burden to prove that the plan is fair and equitable, *Cornwall*, 308 B.R. at 774, and Thru has not met and cannot meet that burden. Proposing such an insignificant, negatively-amortizing interest rate in the face of overwhelming authority that the rate is not even close to adequate further demonstrates Thru's bad faith in this bankruptcy case and bad faith in proposing the Plan. It is one of many

facts that establish how Thru filed this bankruptcy case solely with the intent to obtain a litigation advantage and without any real intent or legitimate hope to reorganize.

III. THE DISCLOSURE STATEMENT DOES NOT CONTAIN ADEQUATE INFORMATION

27. The Court should not approve the Disclosure Statement because it contains inadequate information for creditors to make an informed decision on how to vote. A disclosure statement may not be approved unless it contains adequate information. *See In re Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988). The Bankruptcy Code defines that standard as "information of a kind, and in sufficient detail, … that would enable … a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a). Relevant factors for evaluating the adequacy of a disclosure statement include: (a) events which led to the filing of bankruptcy; (b) a description of available assets and their value; (c) anticipated future of the company; (d) sources of information; (e) a disclaimer; (f) the present condition of the debtor; (g) scheduled claims; (h) estimated returns to creditors under a chapter 7 liquidation; (i) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (j) the future management of the debtor; (k) the plan or a summary thereof; (l) estimated administrative expenses; (m) the collectability of accounts receivable; (n) financial information, data, valuations, or projections relevant to creditors' decisions to accept or reject the plan; (o) information relevant to the risks posed to creditors under the plan; (p) actual or projected realizable value from recovery of preferential or voidable transfers; (q) litigation likely to arise outside bankruptcy; (r) tax considerations; and (s) the relationship of the debtor with affiliates. *See*, *e.g.*, *In re U.S. Brass Corp.*, 194 B.R. 420, 427 (Bankr. E.D. Tex. 1996).

A. THE DISCLOSURE STATEMENT CONTAINS INCOMPLETE AND MISLEADING INFORMATION ABOUT THE DROPBOX LITIGATION AND THE EVENTS LEADING TO BANKRUPTCY.

28. The Disclosure Statement contains incomplete information about the trademark litigation and the events leading to bankruptcy. The three brief paragraphs that describe these events are misleading and inadequate.[19] They paint a rosy picture of Thru as an innocent victim, and wholly fail to acknowledge that the federal district court judge granted Dropbox $2.3 million in fees and costs due to Thru's bad acts, both before and during the litigation. It was Thru's own actions, not Dropbox's, that ultimately led to entry of a significant judgment against Thru and Thru's resulting bankruptcy filing. Likewise, Thru's description of the litigation fails to adequately convey the substantial likelihood that Thru will not succeed on appeal and will only incur further attorneys' fees (both for itself and perhaps to Dropbox as well) to the detriment of Thru's creditors.

29. Dropbox suggests that the following language should be added to this section of the Disclosure Statement:

> Creditors should be aware, however, that Dropbox is confident that the Debtor will not succeed on appeal, and Dropbox intends to take all necessary actions to defend against the Debtor's alleged claim to the Dropbox trademark. Dropbox believes that the most likely outcome of the litigation is that the Court of Appeals will affirm both the trademark rulings and the Fee Award, and the Debtor will incur substantial attorneys' fees in the process. This will leave the Debtor with significantly more debt and no more assets from which to pay its creditors.
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> Dropbox believes the facts speak for themselves in the litigation, and no one but the Debtor itself is to blame for the Fee Award. The United States District Court for the Northern District of California held that the Debtor first became aware of the fact that Dropbox was using the name Dropbox in June of 2009 but did nothing to enforce its alleged rights for many years. Instead, the Debtor's "delay was

[19] *See* Disclosure Statement pp. 7-8.

> a deliberate attempt to maximize the value of its claims by leveraging an anticipated initial public offering from Dropbox." The Debtor's CEO Lee Harrison wrote in a 2013 email that "[t]he best leverage we have is to sit tight and wait to the IPO announcement and be prepared to file suit that day and make as much noise as we can about it."
>
> The Court observed that Harrison's email and other documents "demonstrate that Thru purposefully delayed bringing suit in an attempt to increase its leverage over Dropbox and this the value of its claims." The Court therefore had no problem holding that "[t]he evidence is overwhelming that Thru's delay in filing suit was unreasonable and prejudiced Dropbox …." Later the Court found that the case was exceptional based on the Debtor's bad faith, both before and during the litigation, and awarded Dropbox the Fee Award. This bad faith included false statements by Harrison during a deposition and in sworn interrogatory responses.

B. THE DISCLOSURE STATEMENT DOES NOT ADEQUATELY DISCLOSE AND PRESERVE CAUSES OF ACTION.

30. The Plan and Disclosure Statement fail to describe Thru's valuable causes of action against insiders with sufficient particularity to preserve them. In order to preserve a cause of action in a plan the reservation must be specific and unequivocal. *Spicer v. Laguna Madre Oil & Gas II, LLC (In re Texas Wyoming Drilling, Inc.)*, 657 F.3d 547, 550 (5th Cir. 2011). Courts may consider both the plan and disclosure statement to determine if a cause of action has been preserved. *Id.* at 551. Here, neither the Plan nor the Disclosure Statement adequately preserves avoidance actions against the insider-lenders or causes of action for breach of fiduciary duty against Thru's officers and directors and other insiders for the damages they caused Thru based upon their unreasonable delay and bad-faith litigation tactics.

31. Thru's prepetition activities indicate that Thru owns causes of action against its insiders, including its officers and directors and its parent company. Within one month before the Petition Date, Thru borrowed $865,000.00 from three insiders and purportedly granted them a

blanket lien[20] on all of Thru's assets. There are no other secured creditors in this case. Without the insider lien, all of Thru's assets would have been available to pay Thru's creditors. Instead, Thru's insiders have tried to take those assets for themselves to the detriment of other creditors.

32. There are several other problems with the loan. Immediately after Thru borrowed the money, it paid $200,000.00 to its parent, Thru LLC, to allegedly repay an unsecured loan. The three insiders who lent the money to Thru are all members of the parent, Thru LLC, so they effectively converted an indirect unsecured[21] claim into a direct secured claim within the preference and fraudulent transfer period.[22]

33. In addition, Mr. Harrison testified that he contributed $50,000.00 to the $865,000.00 loan, but, upon receiving the funds, Thru immediately repaid $50,000.00 to Mr. Harrison through an entity known as I/O Partners. According to Thru's SOFA, this payment was for "regular salary," but the payment is not consistent with previous regular-salary payments.[23] There is no question, therefore, that Mr. Harrison once again converted a prepetition unsecured claim to an alleged secured claim in exchange for no value whatsoever. In addition, Thru apparently paid millions of dollars for the benefit of Mr. Harrison in alleged "expense reimbursements" charged to an American Express card.[24]

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20 Dropbox disputes that the pre-petition loan is properly perfected.

21 Mr. Harrison was unable to recall at the 341 meeting whether the loan from Thru LLC was secured or unsecured. He did testify, however, that previous loans from Thru LLC were typically converted to equity rather than actually being repaid. Tr. 25:24 – 26:19.

22 There is also reason to believe that the insiders' lien may not be perfected and may therefore be subject to avoidance. The debtor is listed as "Thru, Inc., a Delaware Corporation" on its UCC-1, which in Texas, at least, results in the debtor's name being materially misleading.

23 In fact, Mr. Harrison testified that, prior to the bankruptcy filing, he was paid a nominal salary and received additional payments as an independent contractor. Now, Mr. Harrison is drawing a $200,000 a year salary. Mr. Harrison's wife is also paid money by Thru as an independent contractor.

24 It is unclear who owns the American Express card, but Dropbox has reason to believe that the card is owned by I/O Partners and not the Debtor and that the alleged "expense reimbursements" were in many cases not legitimate business expenses.

34. After the initial $50,000 payment, Thru paid Mr. Harrison at least another $30,000 and several hundred thousand in alleged expense reimbursements.[25] Thus, much of the proceeds from the insider "loan" were used to pay presumably unsecured claims of Mr. Harrison and other insiders, the last payment being made the day before the Petition Date. Other proceeds went to pay retainers for Thru's bankruptcy and appellate counsel, and still more proceeds went to make preferential payments to Thru's other creditors and counsel. Yet Thru does not schedule or otherwise disclose fraudulent transfer, preference, or breach of fiduciary duty claims against Mr. Harrison and Thru's other officers and directors and insiders. Nor does Thru expressly preserve those causes of action in the Plan or Disclosure Statement.

35. Then there is Thru's conduct in the litigation. One of, if not the principal ground for the judgment against Thru is Thru's "pattern of misrepresentations" and misconduct in the case. Those misrepresentations were directed by Thru's executives, specifically its CEO, who lied repeatedly under oath. The company certainly has a direct claim against its chief executive for that misconduct. But if the same chief executive remains in control of the company/estate, it is not going to pursue that claim despite the fact that it would redound to creditors' benefit..[26]

36. The company/estate likewise has a strong malpractice claim against its counsel who, together with the insiders, orchestrated Thru's strategic delay in hopes of cashing in a "lottery ticket." That bad faith scheme not only occasioned the substantial judgment against Thru, but also cost Thru roughly $1 million that Thru spent in pursuing the misguided litigation. Again, that

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[25] Dropbox has not seen documentation to support these alleged expense reimbursements but notes that prior reimbursements to Mr. Harrison have included items such a gym memberships, apparent cash withdrawals, and unexplained department store charges.

[26] Given that Thru scheduled an errors and omission policy, claims against Mr. Harrison and his colleagues at least warrant investigation.

malpractice claim is one that would likely benefit creditors. But it is one that will not be brought if the current executive team remains in control of the company/estate.

37. Thru does not even mention the existence of these claims in its schedules. To the contrary, Thru is also attempting to fast track a plan of reorganization that would waive them. That demonstrates the need for appointment of a chapter 11 trustee or conversion of the case. Moreover, Thru undoubtedly owns substantial preference and fraudulent transfer claims against multiple creditors and insiders, and such claims should be brought for the benefit of Thru's estate. Even setting aside plan confirmability and the other issues discussed above, the lender-insiders' prepetition machinations weigh heavily in favor of appointing a chapter 11 trustee or converting the case.

38. Accordingly, the Plan and Disclosure Statement fail to preserve the following causes of action adequately:

(a) Preference and fraudulent transfer claims against the Prepetition Lenders;

(b) Preference and fraudulent transfer claims against Thru, LLC;

(c) Preference and fraudulent transfer claims against other creditors;

(d) Breach of fiduciary duty claims (and all other applicable claims) against Thru's officers and directors; and

(e) Malpractice claims against any attorney(s) who advised Thru with respect to its claim to the Dropbox name from 2009 to present.

C. THE DISCLOSURE STATEMENT FAILS TO DISCLOSE THRU'S FINANCIAL CONDITION OR HOW THRU PROPOSES TO FIX IT.

39. The Disclosure Statement does not disclose Thru's abysmal financial condition or how Thru proposes to fix it. Thru is not currently a profitable company and has not been profitable for some time (to the extent that it ever was). According to the 2016 deposition testimony of Thru's CEO Lee Harrison, Thru was not profitable in 2013, 2014, or 2015. And at the 341 meeting,

Mr. Harrison admitted that Thru continues to lose an average of $83,000.00 per month. Nevertheless, in addition to paying healthy salaries and independent contractor payments to Mr. Harrison and his wife, Thru also pays for its executives' country club memberships and, in certain instances, luxury cars.

40. The Disclosure Statement does not disclose any of these facts. More importantly, the Disclosure Statement does not disclose how Thru proposes to turn its business around and generate enough profit to pay all of the claims against it in full. Thru scheduled a total of approximately $2.8 million dollars in unsecured claims. Before interest, Thru would have to pay $23,333.33 per month for ten years to repay that debt. That means Thru would have to increase its *profits* by more than $106,000.00 per month or $1,276,000.00 per year in order to make those payments. Creditors are entitled to know how Thru proposes to make such a miraculous turnaround.

D. THE DISCLOSURE STATEMENT DOES NOT CONTAIN A LIQUIDATION ANALYSIS OR FINANCIAL PROJECTIONS.

41. The Disclosure Statement lacks a liquidation analysis and lacks financial projections. The Disclosure Statement provides that creditors may refer to Appendix 1 for a liquidation analysis, but there are no appendices attached to the Disclosure Statement. Nor are there any financial projections attached. As discussed above, Thru is going to have to make a dramatic improvement to its profitability in order to pay its creditors in full. In order to evaluate whether liquidation might be preferable to reorganization, creditors need to see both a comprehensive liquidation analysis and future financial projections. And both the analysis and the projections should account for Thru's causes of action against insiders, discussed above. Without that information, the Disclosure Statement does not contain adequate information.

E. THE DISCLOSURE STATEMENT DOES NOT DISCLOSE OVER HOW LONG THRU PROPOSES TO REPAY ITS UNSECURED CREDITORS.

42. Finally, the Plan and Disclosure Statement provide that unsecured claims will be paid in full over time, but both documents fail to state how long that time period will be. Thru has indicated before that it will supplement the Plan and Disclosure Statement before either is approved, and Dropbox recently received an email from Thru's counsel indicating that the repayment period for Dropbox's claim would be ten years, whereas all other unsecured creditors would be repaid in five years. As of the filing of this objection, however, no formal supplementation has been filed. The basic terms of unsecured creditors' treatment under the Plan are perhaps the most critical pieces of information without which creditors cannot possibly decide whether to vote to accept or reject the Plan.

IV. PRAYER

BASED UPON THE FOREGOING, Dropbox respectfully requests that the Court enter an order disapproving the Disclosure Statement and providing Dropbox such other and further relief to which it is entitled.

Dated May 8, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the attached service list by CM/ECF on May 8, 2017.

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