UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 11
ULTRA PETROLEUM CORP., *et al.*,[1]	§	Case No. 16-32202 (MI)
Debtors.	§	(Jointly Administered)

MOTION BY THE SENIOR CREDITOR COMMITTEE FOR AN ORDER PURSUANT TO BANKRUPTCY RULE 3013 DETERMINING THAT CLAIMS IN CLASSES 4, 5, 9 AND 10 ARE IMPROPERLY CLASSIFIED AND CLAIMS IN CLASS 6 ARE IMPAIRED UNDER THE DEBTORS' PLAN

A HEARING WILL BE CONDUCTED ON THIS MATTER ON JANUARY 19, 2017 AT 9:00 AM (CT) IN COURTROOM 404, 4th FLOOR, UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, 515 RUSK AVENUE, HOUSTON, TEXAS 77002. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY-ONE DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

The *ad hoc* committee (the "Senior Creditor Committee") of unsecured creditors of Ultra Resources, Inc. ("OpCo")[2] files this motion to request an order pursuant to Rule 3013 of the Federal Rules of Bankruptcy Procedure ("Rule 3013") determining that (i) the classification of claims in Classes 4, 5, 9, and 10 under the Debtors' *Joint Chapter 11 Plan of Reorganization*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number (if any), are: Ultra Petroleum Corp. (3838); Keystone Gas Gathering, LLC; Ultra Resources, Inc. (0643); Ultra Wyoming, Inc. (6117); Ultra Wyoming LGS, LLC (0378); UP Energy Corporation (4296); UPL Pinedale, LLC (7214); and UPL Three Rivers Holdings, LLC (7158).

[2] The Senior Creditor Committee is comprised of senior unsecured creditors of OpCo that collectively hold, control, or otherwise have discretionary authority over a substantial portion of OpCo's funded indebtedness arising under or in connection with (i) senior notes issued under that certain Master Note Purchase Agreement dated as of March 6, 2008 among OpCo, as issuer, and the purchasers party thereto from time to time; and (ii) that certain Credit Agreement dated as of October 6, 2011 among OpCo, as borrower, the lenders party thereto from time to time, and Wilmington Savings Fund Society, FSB (as successor to JPMorgan Chase Bank, N.A.), as administrative agent.

[ECF No. 817] (the "Plan") is impermissible under section 1122 of title 11 of the United States Code (as amended, the "Bankruptcy Code"), (ii) claims in Class 6 are improperly characterized as "unimpaired" under the Plan for purposes of section 1124 of the Bankruptcy Code, while, in fact, they are impaired and, (iii) thus, pursuant to section 1126 of the Bankruptcy Code, the holders of such Class 6 claims must be allowed to vote on the Plan and to do so separately both (a) on the Plan for HoldCo[3] and (b) on the Plan for UP Energy Corporation ("MidCo").[4]

PRELIMINARY STATEMENT

1. To formulate the Plan, the Debtors aligned themselves with creditors and equity holders of HoldCo whose claims and interests are structurally junior to the claims against OpCo, striking a deal that seeks to shift value from OpCo's estate and from the recoveries of the holders of the senior funded debt claims against OpCo (the "Senior Funded Debt Holders") to HoldCo's stakeholders in contravention of the most basic precepts of bankruptcy policy. In a rush to confirm a plan of reorganization by the artificially imposed deadlines dictated by their junior constituents, the Debtors have proposed a Plan riddled with problems, among which is the Plan's classification scheme.

2. Although classification issues can be addressed at confirmation, Rule 3013 reflects an acknowledgment that "there are occasions when classification issues may be so obvious and their resolution so central to the confirmability of the plan that the question of proper classification is best addressed prior to consideration of a plan at a confirmation hearing." 9 Collier on Bankruptcy ¶ 3013.01 (16th ed.); *see also id.* (Rule 3013 allows courts to "test

[3] Capitalized terms not otherwise defined herein have the respective meanings ascribed to them in the Plan.

[4] The Plan constitutes "a separate Plan proposed by each Debtor." *See* Plan § 3.1. "For all purposes under the Plan, each Class will contain sub-Classes for each of the Debtors" such that "there will be 15 Classes for each Debtor." *Id.* Thus, under the Plan, there is a separate Class 6 with respect to each of HoldCo and MidCo.

classification prior to undertaking an expensive and time-consuming solicitation and confirmation process").[5] This is such an occasion.

3. No chapter 11 plan for OpCo can be confirmed unless at least one class of impaired claims against OpCo votes to accept the Plan. Although the Plan promises OpCo's general unsecured creditors payment in full in cash with interest (albeit not for at least six months after the effective date of the Plan), there can be no guarantee that the general unsecured creditors will vote to accept the Plan. Apparently in an attempt to ***assure*** themselves of having the requisite impaired accepting class at OpCo, the Debtors resorted to blatant gerrymandering and classification chicanery, which is impermissible under section 1122 of the Bankruptcy Code.

4. First, the Debtors seek to "divide and conquer" the senior funded debt claims against OpCo by promising enhanced cash recoveries to those Senior Funded Debt Holders that opt into a separate class and vote to accept the Plan. Put plainly, the Debtors are offering to buy the votes of the Senior Funded Debt Holders and channeling any accepting votes they are able to buy into a separate class so that they cannot be outvoted. Second, the Debtors also divide OpCo's general unsecured claims into two classes despite providing both classes with identical recoveries—a classification scheme that can have no rationale other than doubling the Debtors' chances to obtain an accepting general unsecured class.[6]

5. As the Fifth Circuit memorably stated, it is a fundamental commandment for structuring a reorganization plan that: "[T]hou shalt not classify similar claims differently in

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[5] For the avoidance of doubt, by filing this motion, the Senior Creditor Committee is not waiving any other objections it may have to the confirmability of the Plan.

[6] Notably, the Debtors have objected to the largest general unsecured claims asserted against OpCo, thus putting into question whether those general unsecured creditors that might be inclined to vote to reject the Plan will be permitted to vote. *See* Disclosure Statement § XI.A; *id.* § XI.D (contemplating that holders of Disputed Claims will not be entitled to vote on the Plan unless allowed by a court order).

order to gerrymander an affirmative vote on a reorganization."[7] The Plan, however, defies this commandment. Separately classifying claims in Class 4 from those in Class 5, and claims in Class 9 from those in Class 10, serves no independent business, legal, or equitable purpose. The only credible reason for the Debtors' classification scheme is to assure an affirmative vote on the OpCo Plan from an impaired class of OpCo creditors. This design flaw renders the Plan patently unconfirmable. Moreover, at least with respect to Classes 4 and 5, the Debtors cannot amend their defective classification scheme later in the confirmation process without re-soliciting the votes of the affected creditors. The Court should therefore enter an order now, before Plan solicitation commences, determining that the classification of claims in Classes 4, 5, 9, and 10 under the Plan is impermissible under section 1122 of the Bankruptcy Code.

6. The Debtors' attempt at vote manipulation also extends to the Plans for OpCo's ultimate parent, HoldCo, and its immediate parent, MidCo. Under the Plan, claims against HoldCo and MidCo on account of their respective guarantees of OpCo funded debt are classified in Class 6. The Plan designates these claims as "unimpaired" despite changing profoundly the legal and contractual rights of their holders. By doing so, the Plan impermissibly disenfranchises the Senior Funded Debt Holders *vis-à-vis* HoldCo's and MidCo's Plans. To prevent the disenfranchisement of the Senior Funded Debt Holders with respect to HoldCo's and MidCo's Plans, the Court should enter an order now, before Plan solicitation commences, determining that Class 6 claims are impaired and their holders are entitled to vote on the Plan, and to do so separately both (a) on the Plan for HoldCo, and (b) on the Plan for MidCo.

[7] *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991).

JURISDICTION, VENUE, AND PREDICATES FOR RELIEF

7. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

8. The legal predicates for the relief requested in this motion are sections 105 1122, 1124, and 1126 of the Bankruptcy Code and Rule 3013.

PERTINENT BACKGROUND

A. The Plan's Classification of Funded Debt Claims Against OpCo

9. The Plan divides funded debt claims against OpCo into three separate classes: (i) Class 4 is a "default" class for the OpCo Note Claims and OpCo RCF Claims, (ii) Class 5 consists of all OpCo Note Claims and OpCo RCF Claims whose holders make the election of receiving Class 5 treatment (the "Class 5 Election"), and (iii) Class 7 consists of all OpCo Note Makewhole Claims.

10. Each holder of an allowed claim in Class 4, regardless of how the class votes, is to receive (a) its *pro rata* share of $2 billion of the New OpCo Notes, plus (b) cash in an amount equal to the difference between the allowed amount of that holder's claim and the amount of the New OpCo Notes received. Plan § 3.2(d)(3). As the Disclosure Statement for the Plan estimates the maximum aggregate allowed amount of Class 4 claims (assuming that no holder makes the Class 5 Election) to be approximately $2.5 billion (*see* Disclosure Statement at 11), the holders of Class 4 claims stand to receive cash payments equal to approximately 20% of their allowed principal plus interest claims.

11. If, however, any holder of the OpCo Note Claims or the OpCo RCF Claims makes the Class 5 Election, and Class 5 as a whole votes to accept the Plan, the distribution to such holder is flipped, and each such holder will receive (i) between 20% and

100% of its allowed claim in cash, and (ii) the balance in New OpCo Notes. Plan § 3.2(e)(3). If, however, Class 5 rejects the Plan, all creditors in that class will receive the exact same distribution as the creditors in Class 4. *Id*. Thus, not only does the Plan create a clear incentive for the Senior Funded Debt Holders to both make the Class 5 Election and vote to accept the Plan—by providing such holders the chance to receive a much greater percentage of cash recovery—it also separately classifies those claims that make the Class 5 Election from those that do not with the transparent intent of assuring the existence of a class that will solely contain "yes" votes.

B. The Plan's Treatment of Class 6 Claims

12. The Plan also separately classifies in Class 6 the claims of the Senior Funded Debt Holders on account of HoldCo's and MidCo's guarantees of OpCo's funded debt. *See* Plan § 3.2(f)(1). The Plan provides that these existing guarantees will be canceled on the effective date of the Plan. *Id.* § 4.9. In place of these guarantees, reorganized HoldCo and MidCo will provide new guarantees of the New OpCo Notes issued to holders of allowed claims in Classes 4 and 5 "on the same terms (except as to amount) as the current guarantees." *Id.* § 3.2(f)(2).

13. The Plan treats Class 6 as unimpaired, and provides that holders of Class 6 claims are not entitled to vote to accept or reject the Plan. Plan § 3.2(f)(3).[8]

[8] As to the treatment of Class 7, the Plan provides that, to the extent the Court allows the OpCo Note Makewhole Claims, each holder of such allowed claim will receive an amount of Additional New OpCo Notes equal to the allowed amount of such claim. No cash component is envisioned for the holders of claims in Class 7. As the Senior Funded Debt Holders in Class 7 will vote to reject the Plan in its current formulation, the Debtors will have to prove that the Plan does not discriminate unfairly against holders of Class 7 claims. The Debtors will not be able to do so, but this is not a classification issue, and the Senior Creditor Committee will address this issue in its objection to the confirmation of the Plan.

C. The Plan's Separation of Claims in Classes 9 and 10

14. Finally, the Plan also divides general unsecured claims against OpCo into two classes. Specifically, "trade" claims, which constitute Class 9, are classified separately from all "other" general unsecured claims, which constitute Class 10. *See* Plan § 3.2(i), (j). Despite this separate classification, allowed claims in Classes 9 and 10 get the exact same treatment: payment in full in cash. *Id.* § 3.2(i)(3), (j)(3). The only "difference" in the proposed treatment is that the Plan allows the holders of Class 9 trade claims to elect a different treatment on whatever terms the parties may settle any such claim. *Id.* § 3.2(j)(3).

RELIEF REQUESTED

15. The Plan's classification of claims in Classes 4, 5, 9 and 10 clearly violates section 1122 of the Bankruptcy Code and constitutes impermissible gerrymandering. Furthermore, the Plan's designation and treatment of Class 6 claims as "unimpaired" is erroneous and, accordingly, the disenfranchisement of the holders of allowed claims in such class is impermissible. Accordingly, pursuant to Rule 3013, the Senior Creditor Committee requests an order, substantially in the form attached hereto as Exhibit A, determining that the Plan's classification scheme is impermissible.[9]

ARGUMENT

I. THE PLAN CLASSIFICATION SCHEME IS DESIGNED TO IMPERMISSIBLY GERRYMANDER AN IMPAIRED ACCEPTING CLASS FOR OPCO

16. To be confirmable, a chapter 11 plan must satisfy all of the requirements of section 1129(a) of the Bankruptcy Code, including the requirement that "at least one class of claims that is impaired under the plan" votes to accept the plan. 11 U.S.C. § 1129(a)(10). Congress included this "impaired accepting class" requirement as one of several checks on the

[9] Rule 3013 states that "[f]or purposes of the plan and its acceptance, the court may . . . determine classes of creditors and equity security holders pursuant to §[ ] 1122 . . . of the Code." Fed. R. Bankr. P. 3013.

fairness of the plan. *See Western Real Estate Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (In re Vill. at Camp Bowie I, L.P.)*, 710 F.3d 239, 246 n.29 (5th Cir. 2013) ("[T]he purpose of [section] 1129(a)(10) is to assure at least a little support for what the debtor is doing . . . .").[10]

17. Section 1122 of the Bankruptcy Code, which governs the classification of claims, prevents debtors from circumventing the protection Congress sought to establish in section 1129(a)(10). Numerous courts, including the Fifth Circuit, have recognized that section 1129(a)(10) and Congress' intent, could be completely undermined if debtors had unfettered discretion to classify claims so as to gerrymander an impaired accepting class. As the Fifth Circuit stated in *Greystone,* "[c]lassification of claims [ ] affects the integrity of the voting process, for, if claims could be arbitrarily placed in separate classes, it would almost always be possible for the debtor to manipulate 'acceptance' by artful classification." *Greystone*, 995 F.2d at 1277. "Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class." *Id.* at 1279 (quotation omitted).

18. To reinforce the protection afforded by section 1129(a)(10), courts interpret section 1122 as mandating that debtors may "not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *Id.* "[O]rdinarily 'substantially similar claims' . . . should be placed in the same class." *Id*. Separate classification of similar claims "may only be undertaken for reasons independent of the debtor's motivation to secure the vote of an impaired, assenting class of claims." *Id.* Thus, separation classification generally is only permissible when there is (i) a business or economic reason for such classification, (ii) a legal reason, or (iii) a "non-creditor" interest that "taints" a creditor's vote.

[10] *See also* 7 Collier on Bankruptcy ¶ 1129.02[10][a] (16th ed.) (Congress intended "to reverse pre-Code Chapter XII cases, which permitted the use of the cramdown powers without the consent of any class of creditors").

See In re Save Our Springs (S.O.S.) All., Inc., 388 B.R. 202, 235-37 (Bankr. W.D. Tex. 2008), *aff'd*, 2009 U.S. Dist. LEXIS 121177 (W.D. Tex. Sept. 29, 2009), *aff'd sub nom.*, *Save Our Springs All., Inc. v. WSI (II)-COS, L.L.C.*, 632 F.3d 168 (5th Cir. 2011).

19. When evaluating a plan that separately classifies similar claims, courts do not defer to the debtor's proffered explanations for a plan's classification scheme. *See Bank of N.Y. Trust Co., N.A. v. Official Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 251 (5th Cir. 2009) ("In many bankruptcies, the proffered reasons . . . will be insufficient to warrant separate classification.") (quotation omitted). Instead, courts must determine whether the debtor's proffered reasons for separately classifying similar claims "mask the intent to gerrymander the voting process." *Greystone*, 995 F.2d at 1279; *see also SOS All.,* 388 B.R. at 234 (the "debtor's motives must be scrutinized," and evaluated pursuant to "notions of basic fairness and good faith") (quotation omitted). After all, no sophisticated debtor versed in the law on claim classification would be so brash as to forthrightly declare that a plan's classification scheme was gerrymandered to create an impaired accepting class.

20. The plan proponent bears the burden of proving that its plan's separate classification of similar claims is permissible under section 1122 of the Bankruptcy Code. *See In re Idearc, Inc.*, 423 B.R. 138, 159 (Bankr. N.D. Tex. 2009). Here, the Debtors cannot meet their burden with respect to the Plan's separate classification of claims in Class 4 from those in Class 5, and claims in Class 9 from those in Class 10.

A. Separate Classification of Classes 4 and 5 Gives the Debtors a Chance to Buy An Impaired Accepting Class for OpCo's Plan

21. There is no credible explanation for the creation of Class 5 other than assuring the existence of an accepting impaired class, and the Disclosure Statement does not even purport to offer one.

22. The claims of the Senior Funded Debt Holders that the Plan would divide between Classes 4 and 5 are the exact same claims, based on the same documents and the same transactions—the quintessential example of "similar" claims that section 1122 of the Bankruptcy Code mandates must be classified together except in compelling narrow circumstances. *See Greystone*, 995 F.2d at 1278 (for purposes of section 1122, "substantially similar claims" are "those which share common priority and rights against the debtor's estate"). None of the limited circumstances that could justify separate classification of similar claims has any application here.

23. The sole criterion that the Plan uses for distinguishing between claims in Classes 4 and 5 is whether a claim holder made the Class 5 Election, and the sole reason that a claim holder might make such election is to take the Debtors up on their offer of receiving a greater percentage of its allowed claim paid in cash than the identical claims of those creditors that chose to remain in Class 4. If ***only one*** holder of the senior funded debt claim makes the Class 5 Election, Class 5 will serve as the requisite impaired accepting class for the OpCo Plan. The artifice of giving the opportunity to Class 5 to reject the Plan is not fooling anyone. Obviously, making the Class 5 Election only to reject the Plan is an exercise in futility. If Class 5 rejects the Plan, creditors that made the Class 5 Election would receive the same treatment as if they had remained in Class 4. Their election only gains them enhanced recovery if Class 5 accepts the Plan. Thus, the practical effect is the same as if the Debtors simply determined that those Senior Funded Debt Holders that voted to accept the Plan would be separately classified from those who rejected it. The Debtors, however, apparently recognized how repugnant such a plan would have been and therefore attempted to mask their gerrymandering of accepting claims of the Senior Funded Debt Holders by designing Class 5 to attract only those Senior Funded Debt Holders that would be willing to accept the Plan.

24. The Debtors' gerrymandering purpose is further laid bare when one considers that the Debtors did not need to separately classify claims of the Senior Funded Debt Holders to provide enhanced recovery based on their vote. The Plan could just as easily have achieved that goal by (i) classifying all claims of the Senior Funded Debt Holders in the same class, (ii) providing to all members of such class the treatment currently provided to Class 4 if such class rejects the Plan, and (iii) providing to all members of such class the treatment currently provided to Class 5 if such class accepts the Plan. Structuring the Plan in this way still would have allowed the Debtors to incentivize the Senior Funded Debt Holders to accept the Plan, without violating section 1122 of the Bankruptcy Code.

25. The only thing that introducing a separate Class 5 enables the Debtors to accomplish that they could not otherwise achieve by classifying all claims of the Senior Funded Debt Holders in a single class is the creation of a potentially accepting impaired class. The Plan's classification scheme with respect to the claims of the Senior Funded Debt Holders is as brazen an example of impermissible gerrymandering as can be found.

B. Separate Classification of Classes 9 and 10 Also Gives the Debtors a Chance to Create An Impaired Accepting Class for OpCo's Plan

26. The separation of OpCo Trade General Unsecured Claims in Class 9 from Other OpCo General Unsecured Claims in Class 10 constitutes equally impermissible and, in light of on-point Fifth Circuit law, even more flagrant gerrymandering. The OpCo Trade General Unsecured Claims and Other OpCo General Unsecured Claims are all unsecured claims that have the same priority against the Debtors' assets, and are thus "similar" claims for purposes

of section 1122 of the Bankruptcy Code. *See Greystone*, 995 F.2d at 1278. And, here again, there is no independent, non-vote based reason for separately classifying these similar claims. [11]

27. Although bankruptcy courts have approved reorganization plans that separately classify trade claims from other general unsecured claims, in those cases, the separate classification served an independent business reason—generally, the debtors wished to provide better treatment to their trade creditors to preserve business relationships or as consideration for new, more favorable business terms post-emergence.[12] However, as the Fifth Circuit held in *Greystone*, where, as here, "there is no separate treatment of the trade creditors" under the plan, no business reason exists to justify their separate classification. 995 F.2d at 1280-81.

28. The same result should obtain in this case as in *Greystone*. There, the Fifth Circuit found that a plan's classification scheme violated section 1122 of the Bankruptcy Code where the debtor "faced a dilemma in deciding how to obtain the approval of its . . . plan by at least one class of 'impaired claims,' as the Code requires," and attempted to "surmount[ ] the hurdle by classifying [an] unsecured deficiency claim separately from the trade claims, although both classes were to be treated alike under the plan." *Id.* at 1278. Similarly, here, although the Plan separately classifies the OpCo Trade General Unsecured Claims and Other

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[11] Should the Debtors attempt to justify the separation of Classes 9 and 10 based on business reasons, they bear the burden of substantiating those business reasons with actual evidence. *See Greystone*, 995 F.2d at 1281 & n.7 (holding that "[w]hether there are any good business reasons to support the debtor's separate classification of claims is a question of fact," and reversing bankruptcy court's decision as clearly erroneous because the debtor's proffered business reasons were "without support in the record"); *In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 861 (Bankr. S.D. Tex. 2001) (rejecting plan's separate classification of trade creditors where "the Plan proponents have not met their burden to prove that [the trade creditor class] is appropriately designed to implement the announced purpose of enhancing the value of the assets" because "many entities [in that class] do not appear to be related to the ongoing goodwill and continued operations of the funeral homes [the debtors' businesses]").

[12] *See, e.g., Beal Bank, S.S.B. v. Way Apts., D.T. (In re Way Apts., D.T.)*, 201 B.R. 444, 452 (N.D. Tex. 1996) (plan that separately classified small trade claims and provided for expedited payment on such claims was permissible because "[u]nless the debtor pays a portion of their claims quickly, the small trade creditors likely will cease to provide services to the debtor that are necessary to maintain and run the Property, the primary asset of the debtor").

OpCo General Unsecured Claims, both classes get the same treatment—payment in full in cash. Plan §§ 3.2(i)(3), (j)(3). Trade creditors thus receive no economic advantage from being separately classified that might affect their willingness to maintain their relationship with the Debtors or provide new, more favorable business terms. Accordingly, here, just as in *Greystone*, the Plan's division of general unsecured claims against OpCo between Classes 9 and 10 cannot be justified based on business reasons.

29. The only purported "difference" between the treatment offered to the holders of claims in Classes 9 and 10 is the "option" given to the holders of OpCo Trade General Unsecured Claims to receive "such other treatment as may be provided by [a] settlement agreement related to such" trade claims. Plan § 3.2(i)(3). This Plan provision, however, cannot justify separate classification of the OpCo Trade General Unsecured Claims because, under section 1123(a)(4) of the Bankruptcy Code, ***all*** creditors have the option of settling their claims and receiving treatment different from the default treatment provided to their class under a chapter 11 plan. *See* 11 U.S.C. § 1123(a)(4) (permitting differential treatment within a class where "the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim"); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 306-307 (Bankr. N.D. Tex. 2007) ("[T]he Bankruptcy Code specifically permits holders of claims within a particular class to agree to a less favorable treatment than that being received by other claimants within the same class.").

30. Instead, the only plausible rationale for the Debtors' separate classification of OpCo's trade creditors is their apparent belief that general unsecured creditors represent their best shot at obtaining an impaired accepting class and that dividing such creditors into two classes increases the probability that at least one of the classes will vote to accept the Plan. Presumably, the Debtors are expecting that trade creditors, because of their ongoing business

relationships with the Debtors, are more likely to accept the Plan than, for instance, litigation claimants, and that segregating OpCo Trade General Unsecured Claims decreases the likelihood that the holders of those claims will be outvoted by the holders of the Other OpCo General Unsecured Claims. This voting-oriented justification for separately classifying similar claims is precisely what the commandment against gerrymandering says "[t]hou shalt not" do. *Greystone*, 995 F.2d at 1279.

31. Based on the foregoing, the Senior Creditor Committee submits that the Court should determine the proper classification of claims before the solicitation of votes on the Plan commences. Creditors are entitled to accurate information as to how their allowed claims ultimately will be classified and treated under the Plan. *Cf.* 11 U.S.C. § 1127(c) (modification to plan requires new disclosure and solicitation). Furthermore, the Debtors also will benefit from an early determination of this issue by potentially avoiding the wasted time and expense of re-soliciting votes on an amended plan after their improper classification scheme is rejected.

II. CLASS 6 IS IMPAIRED, AND THE HOLDERS OF CLAIMS IN CLASS 6 MUST HAVE THE RIGHT TO VOTE ON THE PLAN

32. In addition to gerrymandering claims against OpCo, the Debtors also have engaged in a different form of vote manipulation at the HoldCo and MidCo levels by erroneously designating claims in Class 6 "unimpaired." If left unchallenged, this designation would result in Class 6 being "conclusively presumed to have accepted the [P]lan" without the holders of allowed claims in that class (*i.e.*, the Senior Funded Debt Holders) having an opportunity to vote. *See* 11 U.S.C. § 1126(f). In addition to impermissibly disenfranchising the Senior Funded Debt Holders, such presumed acceptance would excuse the Debtors from having to prove that the Plan is "fair and equitable" to claims in Class 6 under section 1129(b) of the Bankruptcy Code. *See*

11 U.S.C. § 1129(b)(1) (requiring that a cram up plan be "fair and equitable" "with respect to each class of claims . . . that is impaired under, and has not accepted, the plan.").

33. Contrary to the terms of the Plan, however, the Senior Funded Debt Holders' guarantee claims are indeed impaired under the Plan. Under section 1124 of the Bankruptcy Code, a claim is impaired unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim." *See also Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.-Irving)*, 939 F.2d 289, 291 (5th Cir. 1991) ("Impaired creditors are those whose legal, equitable, or contractual rights are altered by the plan."). Even minor changes to the legal, equitable, or contractual rights of the relevant creditor constitute impairment within the meaning of section 1124. *See In re M & S Assocs., Ltd.*, 138 B.R. 845, 853 (Bankr. W.D. Tex. 1992) ("[A] claim is impaired within the meaning of section 1124 even if it is not significantly impaired.").

34. Here, the Debtors' position that Class 6 is not impaired is demonstrably wrong as a matter of law. The Debtors assert that the Senior Funded Debt Holders' guarantee Claims are not impaired because reorganized HoldCo and MidCo will guarantee the New OpCo Notes "on the same terms (except as to amount) as the current guarantees." Plan § 3.2(f)(2). However, whatever the terms of the actual guarantees to be issued by reorganized HoldCo and MidCo, the primary obligations underlying these new guarantees (*i.e.*, the New OpCo Notes) are certain to be different from the obligations underlying the existing guarantees. Indeed, the Disclosure Statement indicates that the new notes all will have the same interest rate and maturity. *See New OpCo Notes Terms Sheet*, Disclosure Statement Ex. H [ECF No. 872]. The existing OpCo funded debt obligations, in contrast, are comprised of revolving credit facility debt and several series of private placement notes that all have different maturities and interest

rates. *See Amended Declaration of Garland H. Shaw In Support of Chapter 11 Petitions and First Day Motions* [ECF No. 44] ¶ 37 (capitalization table). This hardly amounts to leaving the legal, contractual and equitable rights of the Senior Funded Debt Holders unaltered.

35. It is black letter law that a guarantee obligation depends not only on the terms of the guarantee itself but also on the terms of the primary (*i.e.*, underlying) obligation that is being guaranteed. Thus, any alteration to the primary obligation "indirectly operates to modify the extent of the guarantee." *Midland Steel Warehouse Corp. v. Godinger Silver Art Ltd.*, 276 A.D.2d 341, 344 (N.Y. App. Div. 1st Dep't 2000);[13] *see also, PAF-PAR LLC v. Silberberg*, 118 A.D.3d 446, 446 (N.Y. App. Div. 1st Dep't 2014), *aff'd*, N.Y.3d 930 (2016 N.Y. Slip Op. 02124) ("It is well settled that since a guaranty is a contract of secondary liability a guarantor will be required to make payment only when the primary obligor has first defaulted.") (internal quotation and alteration omitted); *Kensington House Co. v. Oram*, 293 A.D.2d 304, 305 (N.Y. App. Div. 1st Dep't 2002) ("[T]he language of the guaranty, obligating the guarantors to the full performance of all monetary obligations under the lease, incorporates the explicit terms of the lease . . . .").

36. Just as changes in the maturity date[14] or interest rate[15] result in the impairment of a claim against a primary obligor, the changes to the maturity date and/or interest rate of the obligations underlying reorganized HoldCo's and MidCo's new guarantees clearly

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[13] In fact, under applicable non-bankruptcy law, altering the primary obligation without the guarantor's consent discharges the guarantor from the guarantee "because the parties have substituted a new contract, to which [the guarantor] never agreed, for the original." *Id.*

[14] *See, e.g.*, *Block Shim Dev. Co.-Irving,* 939 F.2d at 291 (extending a note's maturity date by two years impaired the noteholder's claim); *In re B&B W. 164th St. Corp.,* 147 B.R. 832, 838 (Bankr. E.D.N.Y. 1992); *see also* 7 Collier on Bankruptcy ¶ 1124.03 (16th ed.) ("[A] delay in payment of a claim beyond its contractual maturity date results in impairment.").

[15] *See, e.g., In re RAMZ Real Estate Co., LLC*, 510 B.R. 712, 717 (Bankr. S.D.N.Y. 2014) (creditor's claim impaired where plan reduced the interest rate owed to a creditor from 12% to 9%); *In re B&B W. 164th St. Corp.,* 147 B.R. at 838 (reduction of interest rate from a floating rate to a fixed 9% rate impaired claim).

indicate that Class 6 claims are impaired within the meaning of section 1124 of the Bankruptcy Code. Accordingly, pursuant to section 1126 of the Bankruptcy Code, the holders of allowed Class 6 claims must be allowed to vote to accept or reject the Plan, and to do so separately both (a) on the Plan for HoldCo, and (b) on the Plan for MidCo. *See* 11 U.S.C. § 1126(a).

37. Courts in this circuit and others have allowed creditors to challenge, pre-confirmation, under Rule 3013, a plan's designation of their claims as unimpaired for purposes of section 1124 of the Bankruptcy Code.[16] Because the Plan's treatment of Class 6 claims as unimpaired deprives the holders of such claims of their right to vote on the Plan, resolving the impairment issue now prior to the solicitation of votes on the Plan is critical to avoid the need for re-solicitation if it is later determined at confirmation that Class 6 is in fact impaired.

RESERVATION OF RIGHTS

38. Just three days after the Debtors filed the Plan, on December 9, 2016, the Senior Creditor Committee served the Debtors with document requests (informally, by agreement) relating to, among other things, the Plan's classification of claims and treatment of certain claims as unimpaired. The Debtors began producing documents on December 27, 2016, which documents the Senior Creditor Committee is in the process of reviewing, but the Debtors have not represented that their production is complete. The Senior Creditor Committee reserves all rights to supplement this motion based on the documents obtained through discovery.

[16] *See In re Meadow Glen, Ltd.*, 87 B.R. 421, 427 (Bankr. W.D. Tex. 1988) (granting Rule 3013 motion and rejecting "abusive" impairment of unsecured claims where "there is no need to 'impair' any of the creditors"); *see also In re Rexford Props. LLC*, 558 B.R. 352, 369 (Bankr. C.D. Cal. 2016) (ruling in connection with a Rule 3013 motion that "the proposed treatment of the Trade Class claims constitutes impairment"); *In re Marlow Manor Downtown, LLC*, No. A12-00421, 2014 Bankr. LEXIS 1202, at *1 (Bankr. D. Alaska Mar. 24, 2014), *aff'd*, 2015 Bankr. LEXIS 391 (B.A.P. 9th Cir. Feb. 6, 2015) (ruling on a Rule 3013 motion that certain claims "were improperly classified as secured and unimpaired, when they were both unsecured and impaired").

CONCLUSION

Based on all of the foregoing, the Senior Creditor Committee respectfully requests that the Court enter an order (i) determining that the Plan's classification of Claims in Classes 4, 5, 9, and 10 violates section 1122 of the Bankruptcy Code, (ii) determining that claims in Class 6 designated under the Plan as "unimpaired" are, in fact, impaired for purposes of section 1124 of the Bankruptcy Code, (iii) determining that holders of claims in Class 6 are entitled to vote on the Plan and to do so separately both on the Plan for HoldCo and on the Plan for MidCo, and (iv) granting such other relief as the Court deems appropriate.

Dated: December 28, 2016
Houston, Texas

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