

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE:	§	
	§	
SH 130 CONCESSION COMPANY, LLC	§	CASE NO. 15-10262-tmd
ZACHRY TOLL ROAD-56 LP	§	CASE NO. 16-10263-tmd
CINTRA TX 56 LLC	§	CASE NO. 16-10264-tmd
	§	
DEBTORS.	§	CHAPTER 11
	§	
	§	JOINTLY ADMINISTERED UNDER
	§	CASE NO. 16-10262

**TEXAS DEPARTMENT OF TRANSPORTATION’S LIMITED OBJECTION TO THE DEBTORS’ DISCLOSURE STATEMENT**

[Relates to Docket Numbers 288 & 289]

COMES NOW, the Texas Department of Transportation (“TxDOT”) by and through the Office of the Texas Attorney General, hereby files this *Limited Objection to the Debtors’ Disclosure Statement* and in support respectfully states as follows:

**I. PRELIMINARY STATEMENT**

1. Debtors have proposed a plan of reorganization that results in the quintessential debt/equity swap whereby the, primarily Spanish-Bank, lenders will exchange their debt in the company and take over as new owners. The plan proposes to pay all allowed general unsecured trade claims in full under Class 5 and accordingly the “adequacy” of the disclosure statement would ordinarily not seem to be of much consequence to most unsecured creditors if their allowed claims are going to be paid in full or to overseas secured creditors who have elected to take over ownership.

2. The dilemma is that consummation of the plan is wholly contingent on Debtor's assumption of its sole asset, a 50 year concession contract with TxDOT. The contract<sup>1</sup> with TxDOT pertains to the financing, construction, maintenance and operation of the 40 mile toll road on segments 5 & 6 of State Highway 130 (the "Toll Road"), including rights to the toll revenues generated by the Toll Road over the term of the contract. Debtor intends to assume the TxDOT executory contracts and cure all defaults,<sup>2</sup> but the path laid by Debtors diverges from the requirements of those contracts and sets the Reorganized Debtor up for a material breach of the contracts. Those potential material breaches include, failure to obtain TxDOT approval for the New Operator as a Key Contractor<sup>3</sup> and failure to obtain TxDOT approval of any new Key

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<sup>1</sup> The references herein are to the executory contract between Debtor and TxDOT titled Facility Concession Agreement, SH 130 Segments 5 and 6 Facility, dated March 22, 2007 as amended from time to time. *See Plan*, Docket Number 289, page 7 of 67, ¶23. The agreement and related Facility Lease are not attached to this objection as those documents are approximately 1200 pages long, including exhibits and the Technical Requirements documents.

<sup>2</sup> See Disclosure Statement, Dkt #288, page 37, "Pursuant to the Plan, SH 130 seeks to assume on the current terms the Concession Agreement, the Toll Road Lease, and all other concession agreements with TxDOT relating to the operation of the Tollway. In connection with such assumption, SH 130 will pay all required cure costs agreed to by the parties or as determined by the Court."

<sup>3</sup> Per Exhibit 1 to the "FCA", **Key Contractor** means the Contractor under any Key Contract. Also, **Key Contract** means any one of the following Contracts for Work Developer causes to be performed:

- (a) All prime construction Contracts, including the Design-Build Contract;
  - (b) All prime Contracts for design or construction of the Electronic Toll Collection System, unless with TxDOT;
  - (c) All O&M Contracts, including any to operate the Electronic Toll Collection System or collect tolls, unless with TxDOT;
  - (d) All prime maintenance contracts, if any, unless with TxDOT; and
  - (e) All other prime contracts with a single contractor which individually or in the aggregate total in excess of \$25 million; and
- the term "Key Contracts" shall mean all such Contracts in the aggregate or more than one of such Contracts.

Personnel<sup>4</sup>, as required by the Facility Concession Agreement (the “Concession Agreement” or “FCA”), and also a failure to address the Persistent Developer Default.<sup>5</sup>

3. Failure to satisfy those requirements could result in a material breach of the Concession Agreement, the relevant terms of such which are:

- If there occurs any voluntary or involuntary Change of Control without TxDOT’s prior written approval, TxDOT, at its option, may, by Warning Notice, declare it to be a material Developer Default. §21.2.2.
- A Warning Notice may also be issued for “Any other material Developer Default” (e.g., change in operator, Key Personnel, Key Contractor, etc. without TxDOT approval). §17.2.1.3.
- The issuance of a Warning Notice may trigger a Default Termination Event as provided in Section 19.3. §17.2.3.2.
- In the event of any Developer Default that is or becomes a Default Termination Event set forth in Section 19.3.1, TxDOT may terminate the FCA and the Lease and thereupon enter and take possession and control of the Facility by summary proceeding available to landlords under applicable Law. §17.3.1.
- TxDOT may terminate the FCA if “there occurs any other Developer Default for which TxDOT issues a Warning Notice under Section 17.2 and such Developer Default is not fully and completely cured within the applicable cure period, if any, set forth in Section 17.2.2.2 or available to Lenders under Section 20.4. §19.3.1.2.

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<sup>4</sup> Per Exhibit 1 to the “FCA”, **Key Personnel** means those individuals appointed by Developer and approved by TxDOT from time to time to fill the “Key Personnel” positions identified in Table A1-2 of the “Facility Management Plan Contents” in Attachment 1 of the Technical Requirements. Table A1-2 lists the following Key Personnel positions: Facility Manager; Quality Manager; Design Manager; Construction Manager; Environmental Compliance Manager; Public Information Coordinator; and ROW Acquisition Manager.

<sup>5</sup> The Office of the Texas Attorney General as Bankruptcy Counsel for TxDOT has been in communication with counsel for debtor and counsel for the secured creditors and will continue to work with counsel to obviate the objections stated herein. This objection is filed to apprise the Court and other creditors and parties in interest of TxDOT’s concerns about the adequacy of the Disclosure Statement and ultimately feasibility of the Plan.

4. The Court should be aware that subsequent to the filing of the Disclosure Statement, TxDOT issued a letter (Copy attached as Exhibit A) to SH130 Concession Company, LLC that notifies it of the existence of a Persistent Developer Default. The letter recites in pertinent part:

TxDOT has determined that the Developer's breaches or failures listed in the above table are consistent with the requirements set forth in the Persistent Developer Default definition in Exhibit 1. The cumulative total of 122 breaches or failures far exceeds the threshold number of 52 necessary for establishing the occurrence of a Persistent Developer Default pursuant to Section 3.2 of Exhibit 20. Accordingly, this letter serves as TxDOT's notice of determination that a Persistent Developer Default exists.

5. As demonstrated therein, Debtor is not in compliance with the Concession Agreement and is facing a potential material default under the terms of the contract. Correcting this issue cannot be separated from the consideration of the Disclosure Statement or the Proposed Plan. Debtor currently employs Cintra Infraestructuras S.A. (Hereinafter "Cintra") as "Operator" to supply, inter alia, the following key services for the performance of the contract:

Operator Services as defined by the Disclosure Statement, "means the pre-petition, post-petition, and/or post-Effective Date operation and maintenance services provided by Cintra to the Concessionaire or Reorganized Concessionaire, as applicable, including: (a) back office tolling services, (b) disaster recovery services, (c) general administrative services (post-Effective Date general administrative services to be provided pursuant to the New Services Agreement), and (d) employee secondment services (post-Effective Date Employee secondment services to be provided pursuant to the New Collaboration Agreement)."

Disclosure Statement, Page 96 of 155, ¶91.

6. Debtor's plan says it intends to replace Cintra with a new operator, not identified. The Plan further states that Cintra will continue to supply services for a period of not more than 18 months.<sup>6</sup> On information and belief formed after inquiry to debtor and lender's counsel,<sup>7</sup> no such transition agreement with Cintra yet exists or has been signed.

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<sup>6</sup> Disclosure Statement, Page 41 of 155.

<sup>7</sup> Prior to the filing of the Disclosure Statement and the Plan, the undersigned reached out to opposing counsel and asked them to not file the incomplete Plan and Disclosure Statement without first seeking approval of the Directors, Officers, and Operator of the Reorganized Debtor.

7. Debtor's Disclosure Statement fails to disclose the names of its new officers and directors but says it will do so in a "Plan Supplement."<sup>8</sup>

8. The concern raised by TxDOT is that Debtors will not provide sufficient time for TxDOT to vet and approve the new Key Personnel or vet and approve the replacement operator. Therefore, TxDOT argues that any plan which would result in the Reorganized Debtor being in breach of the assumed Concession Agreement should be denied.

## II. OBJECTION

9. Debtors' successful reorganization plan depends upon continued performance under the Concession Agreement, which they will assume *cum onere*. One of the fundamental aspects of that Concession Agreement is that TxDOT retains the right to approve changes to Key Personnel and Key Contractors, including the Operator of the Toll Road.<sup>9</sup> Underscoring this objection is TxDOT's charge to ensure the safety of the public on State Highways. In its current form, the Court should not approve the Disclosure Statement because it does not mesh with the Concession Agreement or provide adequate information as to the new Key Contractor(s) and Key Personnel.

10. The limited opposition to the Disclosure Statement is born out of the desire to not waste the Court's time, Debtors' time, or any other party's time with the consideration of an incomplete Disclosure Statement. Pursuant to the Court's equitable powers under 11 U.S.C. § 105, a "[c]ourt [should] not proceed with the time-consuming and expensive proposition of hearings on a disclosure statement and plan when the plan may not be confirmable because it does not comply

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<sup>8</sup> Debtors' timeframe for filing the Plan Supplement is inconsistent, it will be either 5 days (per the plan) or 10 days (per the Disclosure Statement) before the confirmation hearing. *See* Debtors' Plan, Dkt #289, page 12 of 67, ¶98, and *see also* Disclosure Statement, Dkt #288, page 20 of 155.

<sup>9</sup> Included in the Concession Agreement, but not raised here, is that Debtors should seek TxDOT approval before any change of equity holder that would amount to a "Change of Control" as defined in the Concession Agreement.

with [confirmation requirements].” *In re Am. Cap. Equip., LLC*, 688 F.3d at 154 (citing *In re Kehn Ranch, Inc.*, 41 B.R. 832, 832–33 (Bankr. S.D. 1984). Here, the Debtor’s Disclosure Statement ambiguously refers to a New Operator and fails to identify the new Key Personnel.

**A. The Court Should Reject the Disclosure Statement Because it Fails to Provide Adequate Information and Relies Upon a Patently Unconfirmable Plan**

11. Debtors’ Disclosure Statement and Proposed Plan currently lack fundamental information necessary for approval of Disclosure Statement and confirmation of the Plan. Specifically, neither the Disclosure nor the Plan identifies the individuals that will be serving in a Key Personnel capacity or identifies the firm that will serve as the new Operator, if any. Disclosure Statements, as a matter of law, must provide adequate information about the debtor which would allow a claimholder or a party-in-interest to “make an informed judgment about the plan.” 11 U.S.C. § 1125(a)(1). On a basic level, TxDOT cannot make an informed decision about the plan until and unless Debtors provide this information at least 30 days before confirmation.

12. Identification of these parties that will directly control operation and maintenance of a state highway and performance of the Concession Agreement is simple yet important information without which TxDOT cannot make an informed decision. Although the test for adequate information is subjective and is determined on a case by case basis, *In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 29 (S.D.N.Y. 1995), the disclosure statement must include “sufficient information to permit enlightened voting by holders of claims or interests,” *In re BSL Operating Corp.*, 57 B.R. 945, 950 (Bkrtcy.S.D.N.Y. 1986), and enable such holders to participate in an informed way in the confirmation process. *In re A.H.Robins Co.*, 880 F.2d 694, 696 (4th Cir. 1989).

13. Moreover, a disclosure statement that is predicated upon an unconfirmable plan fails to meet the above standard as a matter of law. *See, e.g., In re M.J.H. Leasing, Inc.*, 328 B.R. 363, (Bkrtcy.D.Mass. 2005) (citations omitted) (appropriate for Court to consider such objections

during disclosure statement phase). “An unconfirmable plan is grounds for rejection of the disclosure statement; a disclosure statement that describes a plan patently unconfirmable on its face should not be approved.” *In re GSC, Inc.*, 453 B.R. 132, 157 n.27 (Bankr. S.D.N.Y. 2011); *see also In re Am. Cap. Equip., LLC*, 688 F.3d 145, 154 (3d. Cir. 2012) (“[I]f it appears there is a defect that makes a plan inherently or patently unconfirmable, the Court may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing.”) The Disclosure Statement and Plan are incongruous with the terms of the Concession Agreement and therefore, in the current form, should not be approved.

**B. Non-Monetary Defaults Under the Concession Agreement Respecting the Operator**  
**a. Waiting to Propose a New Operator Until Just Before Confirmation is a Gamble**

14. TxDOT cannot overstate the extent to which the Debtors’ Disclosure Statement and Proposed Plan fall short in regards to the Operator of the Toll Road. The ambiguity of the Disclosure Statement may comfort Debtor, but it does not comfort TxDOT. Specifically, the Disclosure Statement states:

If a New Operator Agreement has not been entered into prior to the Effective Date, the Operator shall continue to perform its roles operating and maintaining the Toll Road after the Effective Date, under the contractual arrangements in effect as of the Confirmation Date; *provided, however*, that the Operator shall only continue to perform the Operator Services for a maximum of 18 months following the Effective Date, unless otherwise agreed to among the applicable parties. Notwithstanding anything to the contrary in the Plan, to the extent the Required Consenting Senior Lenders seek to enter into a New Operator Agreement prior to the Effective Date, such agreement will be subject to any rights of TxDOT under the Concession Agreement.

*Disclosure Statement*, Dkt No 288, page 41, ¶2

15. The Disclosure Statement fails to identify a replacement operator, fails to identify a concrete timeframe to approve the New Operator, and fails to provide an assurance that Cintra is under contract to continue operations at this time. If Debtors seek to change the “Operator” of

the Toll Road before the Effective Date, TxDOT will need time to approve the change in accordance with the Concession Agreement.<sup>10</sup> TxDOT's insistence that Debtors' Disclosure Statement and Proposed Plan comply with the Concession Agreement comes with good reason, as a material breach of the Concession Agreement could start the process of TxDOT terminating the FCA and the Lease. *See* §19.3.1.2 of the FCA quoted above, page 3.

16. TxDOT was informed that there is not an Operator Agreement currently in place which guarantees the Reorganized Debtor that Cintra will remain in place. Considering that a successful reorganization depends upon effective operation of the Toll Road, the process of approving who the new Operator is or will be is of paramount importance.

**b. Persistent Developer Default**

17. For the Court's consideration, TxDOT includes the Persistent Developer Default notice letter dated August 31, 2016 in this objection. *See* Exhibit A. As the subject of the letter implies, Debtor, SH 130 Concession Company, LLC, has accrued an excessive number of breaches or failures to perform. Over the last 11 months, TxDOT has identified 122 breaches; 52 such breaches constitute a Persistent Developer Default. Accordingly, the Developer must submit a remedial plan within 45 days after delivery of the Persistent Developer Default notice letter. Furthermore, a failure to submit the remedial plan or to comply with the remedial plan would

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<sup>10</sup> **O&M Contract** means any Contract entered into by Developer for third party management, direction, supervision or performance of the O&M Work or any significant portion thereof. O&M Contract includes any Contract that Developer enters into for operation or maintenance of all or any part of the tolling system for the Facility (which may consist of any separate agreement that Developer may execute with the developer under the certain "Comprehensive Development Agreement, TxDOT Statewide Open-Road Toll Collection System" to which TxDOT is or becomes a party, pursuant to Article 26 of such Comprehensive Development Agreement). There may be more than one O&M Contract concurrently in effect.

**O&M Work** means any and all operation, management, administration, tolling, maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Facility from and after the Service Commencement Date, including Renewal Work and potential Upgrades.



constitute a “Material Default.” TxDOT would be remiss if it did not keep the Court aware of the monetary and the non-monetary defaults in the Concession Agreement.

18. In order to provide creditor with the requisite “adequate information” about the Plan, TxDOT respectfully requests a copy of the August 31, 2016 Persistent Developer Default letter be referenced by Debtors in their Disclosure Statement and included as an exhibit to the Disclosure Statement.

19. The Disclosure Statement respectfully refers to approval from TxDOT for any change in the operator, but provides too much ambiguity for TxDOT to be able to make an informed decision. For example, the ambiguous language would allow the Debtor to propose a new Operator 5 to 10 days before the confirmation hearing. For many reasons, this would be unacceptable to TxDOT, and would put the new operator in a bind given the Persistent Developer Default letter.

**C. The Disclosure Statement and Plan Will Not Allow Sufficient Vetting of the Anticipated Officers and Directors.**

20. Debtors’ Disclosure Statement and Plan both reference the Directors and Officers of the Reorganized Debtors, New Holdco, without identifying the intended individuals. *See* Disclosure Statement, Dkt. No. 288 at 44 of 155, ¶2. *See also* Debtors’ Plan of Reorganization, Dkt. No. 289 at ¶ 2 on page 25. Section 1129(a)(5) of the Bankruptcy Code requires the disclosure of the “identity and affiliations” of the individuals proposed to serve as a director or officer. Debtors’ Disclosure Statement and Plan indicates that new members of the board will be identified in a “Plan Supplement” to be filed either 5 or 10 days before the confirmation hearing. *Id.* At this point, the Disclosure Statement and Plan both reference information which has not been provided. If Debtors provide the information shortly before the Confirmation Hearing, TxDOT will not be able to properly vet and approve the candidates.

21. Beyond the statutory requirement, Debtors disclosure statement and plan are not in compliance with the Concession Agreement which requires:

§ 10.4.2 Developer shall notify TxDOT in writing of any proposed replacement for any Key Personnel position. TxDOT shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Contractors to fill any such position) and to approve or disapprove use of such individual in such position prior to the commencement of any Work by such individual. TxDOT will not unreasonably withhold its approval of individuals with substantially equivalent capabilities in the relevant areas.

22. If Debtors wish to comply with the Concession Agreement and the Bankruptcy Code, they need to provide adequate information with sufficient time to vet and approve the individuals who are proposed as Key Personnel.

23. In fact, the Disclosure Statement and Plan anticipate this limited objection by making reference to a “Plan Supplement.” *See* Disclosure Statement, Dkt. No. 288 at ¶2 on page 44 of 155. *See also* Debtors’ Plan of Reorganization, Dkt. No. 289 at ¶ 2 on page 25. While the place holder of a “Plan Supplement” would ordinarily placate most parties in most cases, this case is out-of-the-ordinary due to the private-public relationship of the parties and the nature of the asset, a state highway.

### **III. CORRECTIVE LANGUAGE**

24. To obviate these infirmities in Debtors’ Disclosure Statement, TxDOT respectfully requests the following language be included in any Order approving the Disclosure Statement:

The Debtors shall, not less than thirty days prior to the confirmation hearing date, provide TxDOT with the names, contact information, and biographical information (Curriculum Vitae) of its proposed [replacement Directors and Officers and] proposed new Key Personnel and cooperate fully with TxDOT’s efforts to diligently consider whether to approve such [replacement Director or Officer and] proposed new Key Personnel including making such individuals available for interview and providing TxDOT with any requested documentation related thereto. If the Debtor fails to provide TxDOT with the name of such [proposed replacement Director or Officer or] proposed new Key Personnel by the date

that is thirty days prior to the confirmation hearing date, then the Debtors shall file a motion seeking to continue the confirmation hearing to a date that is at least thirty days after the date the names of the [proposed Directors and Officers and] proposed new Key Personnel are provided to TxDOT.

25. Regarding the Operator,

The Debtors shall, not less than thirty days prior to the confirmation hearing date, provide TxDOT with the name and contact information of its proposed replacement Operator. Debtors shall cooperate fully with TxDOT's efforts to diligently consider whether to approve such replacement Operator including making key persons of the replacement Operator available for interview and providing TxDOT with any requested documentation related thereto. If the Debtor fails to provide TxDOT with the name of such proposed replacement Operator by the date that is thirty days prior to the confirmation hearing date, then the Debtor shall either a) file a motion seeking to continue the confirmation hearing to a date that is at least thirty days after the date the name of the proposed replacement Operator is provided to TxDOT or, b) affirmatively state that no New Operator Agreement will be sought before plan confirmation.

26. Regarding the Persistent Developer Defaults,

TxDOT has alleged there to be a Persistent Developer Default under the terms of the Concession Agreement due to an excessive number of breaches. Under the terms of the Concession Agreement, Debtor will present a remedial plan to cure these alleged non-monetary breaches within 45 days of the issuance of the letter or the contract is in jeopardy of being declared in default. The other timelines expressed in the Persistent Developer Default letter apply.

#### **IV. RELIEF REQUESTED**

27. WHEREFORE, the Texas Department of Transportation, by and through the Office of the Texas Attorney General respectfully request that the Court deny, without prejudice, Debtors' Disclosure Statement unless Debtors includes the revisions contained in the paragraphs above in their order. The Office of The Texas Attorney General as bankruptcy counsel to TxDOT and business and legal staff at TxDOT are in communication with counsel for the Debtors and Debtors' business representatives along with counsel for the lenders about concerns raised in this limited

objection and will continue to endeavor to work with Debtors' and Lenders' counsel to address these concerns.

Dated: September 1, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served via the Court's Electronic Filing System on all parties requesting notice in this proceeding and that copies were mailed to the counsel and parties listed below via first class U.S. Mail, postage prepaid, on September 1, 2016.

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