IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 11
COBALT INTERNATIONAL ENERGY, INC., *et al.*,[1]	§	Case No. 17-36709 (MI)
	§	Jointly Administered
Debtors.	§	
	§	**Re: Docket Nos. 275, 464**

OBJECTION OF AD HOC FIRST LIEN GROUP TO DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING DISCLOSURE STATEMENT

The ad hoc group of holders (collectively, the "**Ad Hoc First Lien Group**") of certain First Lien Notes issued under the First Lien Indenture, dated as of December 6, 2016 (the "**First Lien Indenture**") in the cases of the above-captioned debtors (collectively, the "**Debtors**"), hereby files this objection to the Disclosure Statement for the Second Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and its Debtor Affiliates (Docket No. 464) (the "**Disclosure Statement**") and the Debtors' Motion For Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Plan of Reorganization, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief (Docket No. 275) (the "**Disclosure Statement Motion**"),[2] and respectfully represents:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Cobalt International Energy, Inc. (1169); Cobalt International Energy GP, LLC (7374); Cobalt International Energy, L.P. (2411); Cobalt GOM LLC (7188); Cobalt GOM # 1 LLC (7262); and Cobalt GOM # 2 LLC (7316). The Debtors' service address is: 920 Memorial City Way, Suite 100, Houston, Texas 77024.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Disclosure Statement, the Disclosure Statement Motion, and/or the Second Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and its Debtor Affiliates (Docket No. 462) (the "**Plan**"), as applicable.

PRELIMINARY STATEMENT

1. The Disclosure Statement fails to comply with applicable law for at least two reasons — (i) it fails to provide "adequate information" as required by section 1125(a) of the Bankruptcy Code and (ii) the Plan, as proposed, is patently unconfirmable and solicitation of the Plan in its current form is a waste of estate resources (the collateral of the very creditors the Debtors are trying to treat in contravention of the Bankruptcy Code and applicable law).

2. The Disclosure Statement fails to inform voting creditors that the Plan is not reasonably acceptable to the Ad Hoc First Lien Group, thereby creating an immediate and continuing default under the Final Cash Collateral Order (Docket No. 301). The Debtors are well aware that the proposed treatment of the Class 3 First Lien Notes Claims under the Plan is not reasonably acceptable to the Ad Hoc First Lien Group. The Ad Hoc First Lien Group has always tried to work productively with the Debtors, but will not sit idly by and accept a chapter 11 plan imposed upon them that proposes to treat the First Lien Notes Claims in a manner inconsistent with the First Lien Indenture and that is intended to "materially reduce" recoveries the First Lien Noteholders are entitled to receive as a matter of law and contract.

3. The Disclosure Statement also includes numerous legal and factual errors, notably: (i) the First Lien Indenture precludes the Debtors from seeking reinstatement of the First Lien Notes as proposed in the Plan; (ii) the Debtors cannot possibly satisfy all of the requirements of section 1124(2) of the Bankruptcy Code; and (iii) reinstatement will not enable the Debtors to "materially reduce" the amount of the First Lien Notes Claims by calculating the Applicable Premium (as defined in the First Lien Indenture) as of the Effective Date as opposed to the Debtors' petition date because the First Lien Noteholders would be entitled to recover any such reduction as contractual damages under the First Lien Indenture. Moreover, because Class 3 is deemed unimpaired, the Debtors must disclose that the First Lien Notes Claims must be

satisfied in full in cash and in accordance with section 1124(1) of the Bankruptcy Code if reinstatement fails under section 1124(2).

4. In addition to the information deficiencies, the Court should deny approval of the Disclosure Statement Motion because the Debtors' proposed treatment of the Class 3 First Lien Notes Claims renders the Plan patently unconfirmable on its face. If the Debtors believe they can satisfy section 1124(2), they should provide evidence demonstrating as much at any hearing to consider approval of the Disclosure Statement Motion to avoid wasting estate resources (including the First Lien Noteholders' cash) on a fatally flawed chapter 11 plan. Thus, the Disclosure Statement Motion should be denied.

BACKGROUND

5. On December 14, 2017 (the "**Petition Date**"), each of the Debtors commenced a case with this Court by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "**Chapter 11 Cases**").

6. On January 25, 2018, the Court entered the Final Cash Collateral Order, authorizing the Debtors to use Cash Collateral, subject to the terms and conditions set forth therein, and granting related relief on a final basis.

7. Pursuant to the Final Cash Collateral Order, the Debtors stipulated that under to the First Lien Indenture and related agreements, the Debtors are indebted to the First Lien Notes Secured Parties, without defense, counterclaim, offset, claim, or cause of action of any kind, in the aggregate amount of not less than (i) 500,000,000 of outstanding principal under the First Lien Notes plus (ii) the Applicable Premium, plus (iii) accrued and unpaid interest with respect thereto, fees, costs, and expenses, and all other "Obligations" (as defined in the First Lien Indenture). Final Cash Collateral Order, ¶ D.1(a).

8. The Final Cash Collateral Order further provides that an event of default shall occur under the Final Cash Collateral Order three business days after counsel to the Ad Hoc First Lien Group provides written notice to the Debtors and their restructuring counsel of the Debtors' failure to satisfy certain milestones including, among others, the Debtors' obligation to file "a chapter 11 plan . . . and related disclosure statement, each in form and substance reasonably acceptable to the First Lien Indenture Trustee and counsel to the [Ad Hoc First Lien] Group" on or before March 24, 2018 (the "**Plan Milestone**"). Final Cash Collateral Order, at ¶ 5(l)(iii). In addition, upon five business days' written notice of an event of default under the Final Cash Collateral Order, "counsel to the Ad Hoc First Lien Group may . . . revoke the Prepetition Secured Parties' consent to the Debtors' use of Cash Collateral," and the Debtors "shall immediately cease using Cash Collateral." *Id*., at ¶ 6.

9. Under the Final Cash Collateral Order, the Prepetition Secured Parties (including the Ad Hoc First Lien Group) expressly reserved their rights: (a) under any of the Prepetition Loan Documents (including the First Lien Indenture); (b) to seek any other or supplemental relief in respect of the Debtors; (c) to seek modification of the grant of adequate protection provided under the Final Cash Collateral Order; (d) under the Bankruptcy Code or nonbankruptcy law to, among other things, (i) request modification of the automatic stay of section 362, (ii) request dismissal of the Chapter 11 Cases, or (iii) propose, subject to section 1121 of the Bankruptcy Code, a chapter 11 plan or plans; and (e) any other rights, claims, or privileges (whether legal, equitable, or otherwise). *Id*., at ¶¶ 10(a)–(e).[3]

[3] The Final Cash Collateral Order also states that nothing contained therein "shall preclude, limit, determine, or otherwise modify the right of any party in interest, including the Debtors, from (a) proposing, pursuing, soliciting, or obtaining confirmation of any chapter 11 plan that provides the Prepetition Secured Parties with treatment consistent with § 1124 or any subsection thereof or (b) opposing such treatment." *Id*., at ¶ 24.

10. On February 21, 2018, the Debtors filed the Plan and the Disclosure Statement.

11. The Plan provides the following treatment for the Class 3 First Lien Notes Claims:

> On the Effective Date, or as soon thereafter as reasonably practicable, except to the extent that a holder of an Allowed First Lien Notes Claim agrees to less favorable treatment, in full and final satisfaction, compromise, settlement, release, and discharge of and in exchange for each Allowed First Lien Notes Claim, each holder of an Allowed First Lien Notes Claim shall receive treatment **rendering its Allowed First Lien Notes Claims Unimpaired under applicable provisions of the Bankruptcy Code**. Plan, § III.A.3.

12. Regarding the treatment of the Class 3 First Lien Notes Claims, the Disclosure Statement provides:

> On the Effective Date, (a) Class 3 shall be **rendered Unimpaired pursuant to section 1124(2)** of the Bankruptcy Code and satisfied in accordance with the terms of the First Lien Indenture or (b) if it is determined by a Final Order that Class 3 cannot be rendered Unimpaired in accordance with section 1124(2) of the Bankruptcy Code, or if any dispute regarding the Debtors' seeking to render Class 3 Unimpaired is consensually resolved, then holders of Allowed First Lien Notes Claims will receive payment in full in Cash. Disclosure Statement, § II.
>
> [T]he Debtors intend to reinstate Class 3 . . . pursuant to section 1124(2) of the Bankruptcy Code and satisfy the First Lien Notes . . . in accordance with the First Lien Indenture and . . . to redeem the First Lien Notes . . . shortly thereafter. The Debtors believe that reinstating Class 3 . . . pursuant to section 1124(2) of the Bankruptcy Code and redeeming the First Lien Notes . . . shortly thereafter will materially reduce the amount of any [Applicable Premium] owed under the First Lien Indenture. *Id.*, at § IV.D.

13. At the hearing to consider entry of the Final Cash Collateral Order on January 25, 2018, the Ad Hoc First Lien Group, through counsel, reserved its rights to notice a default under the Final Cash Collateral Order in the event the Debtors filed a chapter 11 plan that

was not reasonably acceptable to the Ad Hoc First Lien Group. *See* Jan. 25, 2018 Hrg. Tr. at 163:14-25.

14. Counsel for the Ad Hoc First Lien Group has informed Debtors' counsel on numerous occasions that the Plan and the Disclosure Statement are not reasonably acceptable, thereby notifying the Debtors of their continuing default under the Final Cash Collateral Order.

OBJECTION

15. Section 1125(b) of the Bankruptcy Code requires a plan proponent to furnish creditors with "a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information" in order to solicit acceptances or rejections of a proposed chapter 11 plan. 11 U.S.C. § 1125(b). "Adequate information" is defined in the Bankruptcy Code as:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable . . . a hypothetical investor of the relevant class to make an informed judgment about the plan[.]

11 U.S.C. § 1125(a)(1).

16. Importantly, "[t]he code requires that the debtors adequately, not selectively, disclose fully and precisely all information a creditor would reasonably want before voting on the plan." *Westland Oil Dev. Corp. v. MCorp Mgmt. Solutions, Inc. v. Fed. Deposit Ins. Corp. (In re Westland Oil)*, 157 B.R. 100, 104 (S.D. Tex. 1993). "The determination of what is adequate information is made on a case by case basis." *In the Matter of Tex. Extrusion Corp.,* 844 F.2d 1142, 1157 (5th Cir. 1988); *see also In re Cajun Elec. Power Co-op, Inc.*, 150 F.3d 503, 518 (5th Cir. 1998) (citing legislative history indicating that determination of what constitutes adequate information must be made by presiding court based on circumstances of case).

17. For the reasons set forth below, the Disclosure Statement in its current form is both facially and substantively deficient, fails to satisfy the basic disclosure requirements of section 1125(a) of the Bankruptcy Code, and is patently unconfirmable as a matter of law.

A. Disclosure Statement Lacks Adequate Information

i. Disclosure Statement Lacks Adequate Information Regarding Potential Termination of Final Cash Collateral Order and Related Adverse Impacts on Chapter 11 Cases

18. By filing the Plan, the Debtors intentionally breached covenants and created material defaults under the Final Cash Collateral Order. *See, e.g.*, Final Cash Collateral Order, ¶ 5(l)(iii) (setting forth Plan Milestone); *id.*, at ¶ 5(m) (stating that an event of default occurs whenever "Debtors have failed to comply with any other provision hereof in a material respect."). The Debtors believe that the terms of the Final Cash Collateral Order prevent the Ad Hoc First Lien Group from taking any action to revoke consent to the Debtors' use of Cash Collateral until after the March 24 deadline to satisfy the Plan Milestone. The Ad Hoc First Lien Group strongly disagrees and believes it is authorized to notice an event of default under the Final Cash Collateral Order immediately. If the Court approves the Disclosure Statement Motion and the Debtors commence solicitation of the Plan as currently drafted, the Ad Hoc First Lien Group will seek to enforce all of its rights and claims against the Debtors under the Final Cash Collateral Order in accordance with applicable law.

19. If the Debtors intend to solicit this Plan, the Debtors should include information in the Disclosure Statement regarding their continuing default under the Final Cash Collateral Order and the related risks associated with solicitation of the Plan.

ii. Disclosure Statement Lacks Adequate Information Regarding Proposed Treatment of Class 3 Including Debtors' Ability to Reinstate First Lien Notes or Materially Reduce Amount of Class 3 First Lien Notes Claims

20. Based upon the provisions of the First Lien Indenture and the information provided in the Disclosure Statement regarding the Plan, including the contemplated Sale Transaction,[4] the Ad Hoc First Lien Group believes it is not possible to reinstate the First Lien Notes under section 1124(2) and redeem the First Lien Notes, while, at the same time, executing a sale of all or substantially all of the Debtors' assets without creating incurable defaults under the First Lien Indenture.

21. Even if, however, the Debtors could somehow satisfy the requirements of section 1124(2), reinstating the First Lien Indenture will **not** materially reduce the amounts required to satisfy the Class 3 First Lien Notes Claims because the Debtors would then be required to pay the First Lien Noteholders pecuniary damages in an amount equal to the any corresponding reduction in the Applicable Premium. Accordingly, the Disclosure Statement should be supplemented with additional information regarding the mechanics of the Sale Transaction, as well as information indicating how the Debtors intend to satisfy the requirements of 1124(2) in the context of the Sale Transaction and the contemporaneous or near-contemporaneous reinstatement and redemption of the First Lien Notes.

22. Finally, to confirm the Debtors intend to comply with applicable law, the Debtors should revise the second bullet point on page 3 of the Disclosure Statement as follows:

> On the Effective Date, (a) Class 3 shall be rendered Unimpaired pursuant to section 1124(2) of the Bankruptcy Code and satisfied in accordance with the terms of the First Lien Indenture or (b) if it is determined by a Final Order that Class 3 cannot be rendered Unimpaired in accordance

[4] The Plan defines a "Sale Transaction" as "one or more sales of any or all of the Debtors' assets or equity interests in the Debtors or one or more of its direct and indirect subsidiaries . . . pursuant to the Plan."

> with section 1124(2) of the Bankruptcy Code, or if any dispute regarding the Debtors' seeking to render Class 3 Unimpaired is consensually resolved, then holders of Allowed First Lien Notes Claims will receive payment in full in Cash **[<u>in accordance with section 1124(1) of the Bankruptcy Code</u>]**. Disclosure Statement, § II.

iii. <u>Even Assuming Debtors Can Reinstate First Lien Notes, Disclosure Statement Fails to Disclose that First Lien Noteholders Are Entitled to Applicable Premium or Pecuniary Damages of an Equal Amount</u>

23. The Debtors believe that reinstating the First Lien Notes "will materially reduce the amount of any [Applicable Premium] owed under the First Lien Indenture."[5] This belief, however, is not supported by any applicable law or facts. Section 1124(2) does not "grant debtor the substantive right, by reinstating original maturity date of an obligation which had been accelerated based on its prepetition default, to truncate creditor's contractual and state law rights." *In re Moody Nat'l SHS Houston H, LLC*, 426 B.R. 667, 672 (Bankr. S.D. Tex. 2010). The cure required under section 1124(2) to render the First Lien Noteholders unimpaired must "be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d); *see also Moody*, at 674–75.

24. Under the First Lien Indenture, the commencement of the Chapter 11 Cases triggered the Debtors' obligation to pay the Applicable Premium. *See* First Lien Indenture, § 6.02(b).[6] Assuming the Debtors could reinstate the First Lien Notes, the Ad Hoc First Lien Group is entitled to recover the outstanding principal amount of the First Lien Notes, plus the Applicable Premium calculated as of the Petition Date, plus accrued and unpaid interest.

---

[5] Disclosure Statement, § IV.D.

[6] First Lien Indenture, § 6.02(b) ("In case an Event of Default described in clauses (8) or (9) of Section 6.01(a) [(including commencing a voluntary chapter 11 case)] occurs and is continuing, the principal of, premium, if any, and accrued and unpaid interest, if any, on all the Notes will become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.").

See id., at §§ 3.07; 6.02(d).[7] First Lien Noteholders would also be entitled default rate interest — equal to 1.00% above the non-default rate — on all such amounts calculated as of the Petition Date through the Effective Date. *See id*., at § 2.12; *see also In re Ultra Petroleum Corp.*, 575 B.R. 361, 370 (Bankr. S.D. Tex. 2017) (awarding postpetition default interest on principal, unpaid interest, and make-whole premium as damages for Debtors' failure to pay such amounts when they became due upon acceleration triggered as of petition date).[8]

25. Moreover, any attempt by the Debtors to reduce the cure amount required pursuant to section 1123(d) by arguing that reinstatement does not require cure of *ipso facto* defaults set forth in section 365(b)(2) of the Bankruptcy Code, including the Applicable Premium and/or the postpetition default interest, is not supported by applicable case law in this District. For example, in *Moody* the Court "decline[d] to apply the § 365(b)(2) exception that is contained in § 1124(2)(A) to determine whether the holder of a claim secured by a . . . [non-executory] real estate mortgage is unimpaired." *Moody*, at 674. The First Lien Indenture is not an executory contract. Therefore, section 1124(2) would not excuse the Debtors' obligation to pay the Applicable Premium triggered as of the Petition Date.[9]

26. If, however, the Court determined otherwise and only required payment of the Applicable Premium upon the redemption of the First Lien Notes on the Effective Date, for

---

[7] *Id*., at § 6.02(d) ("If the [First Lien] Notes are accelerated or otherwise become due prior to their maturity date . . . as a result of an Event of Default prior to December 1, 2018, the amount . . . payable shall equal 100% of the principal amount of the [First Lien] Notes redeemed plus the Applicable Premium in effect on the date of such acceleration, as if such acceleration were an optional redemption of the [First Lien] Notes accelerated plus accrued and unpaid interest.").

[8] Because the cure required to satisfy section 1124(2) of the Bankruptcy Code is based upon the underlying agreement and nonbankrutpcy law in accordance with section 1123(d) of the Bankruptcy Code, the First Lien Noteholders are not required to rely upon section 506(b) of the Bankruptcy Code to justify their recovery of the Applicable Premium and/or postpetition interest. Nevertheless, as oversecured creditors, section 506(b) provides a separate basis entitling the First Lien Noteholders to recover such amounts in these Chapter 11 Cases.

[9] *In re Premier Entm't Biloxi LLC*, 445 B.R. 582, 617 (Bankr. S.D. Miss. 2010) (explaining that reference to "penalty provision" in 365(b)(D)(2) addresses liquidated damages provisions resulting from a nonmonetary breach).

the reasons described below, the First Lien Noteholders would still be entitled to pecuniary damages pursuant to section 1124(2)(D) based on the Debtors' decision to seek reinstatement, in breach of section 6.02(d) of the First Lien Indenture. The pecuniary damages owed would be the difference between the amount of the cure required under section 1124(2) and the amount the Debtors otherwise would have been required to pay if the Noteholders were rendered unimpaired pursuant to section 1124(1) of the Bankruptcy Code.

27. Therefore, the Disclosure Statement should include sufficient language to inform voting creditors that even if reinstatement of the First Lien Notes is possible under section 1124(2), which will be contested by the Ad Hoc First Lien Group, there is essentially no difference in the amounts owed to the First Lien Noteholders under section 1124(1) and section 1124(2).

B. Plan is Patently Unconfirmable

28. Putting aside the deficiencies in the Disclosure Statement, when an underlying chapter 11 plan is patently unconfirmable, approval of the disclosure statement is a futile act that risks squandering valuable estate and judicial resources on the solicitation of votes and a confirmation hearing for a plan that cannot be confirmed. Based on such reasoning, courts in this circuit and others have exercised their discretion to deny approval of disclosure statements where the underlying plan cannot be confirmed. *See In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996) ("Disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible."); *see also In re EQK Bridgeview Plaza, Inc.*, No. 10-37054, 2011 WL 2458068, at *2 (Bankr. N.D. Tex. June 16, 2011) (explaining that court declined debtor's disclosure statement because it accompanied a plan that appeared patently unconfirmable); *In re American Capital Equip., LLC,* 688 F.3d 145, 154 (3d Cir. 2012) ("We find the reasoning of

these many courts to be persuasive, and hold that a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable."); *In re Quigley Co., Inc.*, 377 B.R. 110, 115–16 (Bankr. S.D.N.Y. 2007) ("If the plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile.").

i. First Lien Indenture Precludes Debtors from Seeking Reinstatement of First Lien Indenture

29. Pursuant to the First Lien Indenture, the Debtors expressly: (a) agreed that commencing the Chapter 11 Cases triggered the obligation to pay the Applicable Premium;[10] (ii) waived their right to invoke the provisions of any statute or law, including section 1124(2) of the Bankruptcy Code, to prevent the Noteholders from collecting the Applicable Premium;[11] (iii) agreed that they are estopped from asserting claims or defenses that contravene the agreed statements set forth in section 6.02(d) thereof;[12] and (iv) acknowledged that payment of the Applicable Premium is a material obligation thereunder.[13]

[10] *See* First Lien Indenture, § 6.02(d) ("Without limiting the generality of the foregoing, **it is understood and agreed that if the [First Lien] Notes are accelerated or otherwise become due prior to their maturity date, in each case, in respect of any Event of Default (including, but not limited to, upon the occurrence of a voluntary or involuntary bankruptcy or insolvency event (including the acceleration of claims by operation of law) or pursuant to a plan of reorganization)**, the premium applicable with respect to an optional redemption of the [First Lien] Notes will also be due and payable as though the [First Lien] Notes were optionally redeemed and shall constitute part of the Obligations under the [First Lien] Notes hereunder…") (emphasis added).

[11] *See id*. ("…THE COMPANY EXPRESSLY WAIVES (TO THE FULLEST EXTENT IT MAY LAWFULLY DO SO) THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION…").

[12] *See id*. ("…The Company expressly agrees (to the fullest extent it may lawfully do so) that . . . **the Company shall be estopped hereafter from claiming differently than as agreed to in this paragraph**…") (emphasis added).

[13] *See id*. ("…The Company expressly acknowledges that its agreement to pay the premium to Holders as herein described is a material inducement to Holders to purchase the [First Lien] Notes.").

30. Notwithstanding the plain language of section 6.02(d) of the First Lien Indenture, the Debtors now seek to confirm the Plan, pursuant to which they "intend to reinstate Class 3 . . . pursuant to section 1124(2) of the Bankruptcy Code . . . [and then] redeem the First Lien Notes . . . shortly thereafter." Disclosure Statement, § IV.D. Additionally, the Debtors believe that reinstating and redeeming the First Lien Notes "will materially reduce the amount of any [Applicable Premium] owed under the First Lien Indenture." *Id*. Thus, not only would confirmation of the Plan contravene the provisions of the First Lien Indenture, because the Debtors expressly agreed that they are estopped from "claiming differently than as agreed" thereunder, by seeking to solicit and/or confirm the Plan, the Debtors have already breached the First Lien Indenture.

31. As noted above, there is no credible basis for the Debtors to avoid enforcement of section 6.02(d) of the First Lien Indenture as an unenforceable *ipso facto* provision under section 365(b) of the Bankruptcy Code. Section 365 of the Bankruptcy Code is applicable only to executory contracts, not to the First Lien Indenture. *See*, *e.g.*, *In re Moody*, 426 B.R. at 673 ("Although it is true that § 1124(2)(A) references defaults 'of a kind' described in § 365(b)(2), the defaults described in § 365(b)(2) are defaults under leases or executory contracts.").

32. Thus, to the extent the Debtors intend to prosecute a Plan that seeks to reinstate the First Lien Notes Claims under section 1124(2), there will be an ongoing default under section 6.02(d) of the First Lien Indenture, which prohibits the Debtors from relying on any statute, including section 1124(2) of the Bankruptcy Code, to prevent the First Lien Noteholders from collecting the full Applicable Premium calculated as of the Petition Date.

ii. Debtors Cannot Satisfy Requirements of Section 1124(2) to Reinstate First Lien Indenture

33. 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." 11 U.S.C. § 1124. "The Bankruptcy Code defines 'impairment' broadly, thereby maximizing creditor participation in the confirmation process, *i.e.*, even the smallest impairment nonetheless entitles a creditor to participate in voting." *In re Am. Solar King Corp*., 90 B.R. 808, 819 (Bankr. W.D. Tex. 1988). Accordingly, any alteration of a creditors' legal, equitable, or contractual rights means that a claim is impaired by a plan, regardless of whether it is significantly altered or such alteration adversely affects the claimant. *See Ronit, Inc. v. Block Shim Dev. Co.-Irving (In re Block Shim. Dev. Co.-Irving)*, 118 B.R. 450, 454 (N.D. Tex. 1990).

34. Section 1124(2) of the Bankruptcy Code provides a narrow exception to the impairment that would otherwise result when a debtor is allowed to reinstate a claim, but only if the debtor satisfies certain conditions. Under section 1124(2), a debtor may decelerate and reinstate a claim by (a) curing every other default other than those specified in section 365(b)(2) of the Bankruptcy Code (so-called *ipso facto* defaults),[14] (b) reinstating the maturity date in lieu of the accelerated date caused by a default, (c) compensating the creditor for any harm caused by reliance on the acceleration provision, (d) compensating the creditor for any pecuniary harm caused by the failure to perform nonmonetary obligations, and (e) otherwise honoring the legal, equitable, or contractual rights of the creditor. *See* 11 U.S.C. § 1124(2)(A)–(E).

[14] As previously discussed, the Court's holding in *Moody* limits the exception to curing *ipso facto* defaults to executory contracts and unexpired leases. 426 B.R. at 673; *see also In re General Growth Prop's, Inc.*, 451 B.R. 323 (Bankr. S.D.N.Y. 2011) (same).

35. The Debtors intend to liquidate all or substantially all of their assets pursuant to the Plan. *See e.g.*, Disclosure Statement, § IV. Allowing the Debtors to reinstate and then redeem the First Lien Notes in conjunction with a liquidating chapter 11 plan would contravene the rehabilitative purpose of section 1124(2), which Congress has expressly stated is to encourage reorganization over liquidation because the former is economically more efficient. *See In re Madison Hotel Assocs.*, 749 F.2d 410, 421 (7th Cir. 1984). According to Congress:

> Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

Id. at 420 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 220, reprinted in 1978 USCCAN 5963, 6179). Moreover, because the bulk of the Debtors' assets serves as collateral securing their obligations under the First Lien Indenture, the mechanics and timing of the Sale Transaction will create various events of default under the First Lien Indenture that cannot be cured.

36. Indeed, the First Lien Indenture includes various provisions and covenants that will immediately be breached, or be at risk of being breached, upon the close of the Sale Transaction, including among others:[15]

a. **Minimum Liquidity**. Cobalt and its affiliated Debtors are required to maintain aggregate cash balances of at least $200 million at all times. First Lien Indenture, § 4.20.

[15] In addition to the defaults related to the Sale Transaction, as previously discussed, the Debtors will need to cure the ongoing default under section 6.02(d) of the First Lien Indenture, which prohibits Cobalt from relying on section 1124(2) of the Bankruptcy Code to prevent the First Lien Noteholders from collecting the Applicable Premium.

b. **Change of Control**. Upon the occurrence of a Change of Control,[16] Cobalt shall make a tender offer to repurchase all of the First Lien Notes at the Change of Control Payment Price (comprised of outstanding principal and the Applicable Premium, if prior to Dec. 1, 2018). Unless the First Lien Notes have been redeemed pursuant to Sections 3.03 and 3.07 of the Indenture, the tender offer must be mailed within 15 days. *Id.*, at § 4.15.

c. **Notice of Redemption**. Subject to Section 3.09, the Company shall mail or deliver by electronic transmission in accordance with the applicable procedures of the Depositary, or cause to be mailed (or delivered by electronic transmission in accordance with the applicable procedures of the Depositary) notices of redemption of Notes not less than 30 days but not more than 60 days before the redemption date to each Holder whose Notes are to be redeemed pursuant to this Article at such Holder's registered address or otherwise in accordance with the applicable procedures of the Depositary, except that redemption notices may be mailed more than 60 days prior to a redemption date if the notice is issued in connection with Articles 8 or 12. Except as set forth in Section 3.07(d), notices of redemption may not be conditional. *Id.*, at § 3.07.

d. **Optional Redemption**. At any time prior to December 1, 2018, Cobalt may on any one or more occasions redeem the First Lien Notes, at its option, in whole or in part, upon notice pursuant to Section 3.03 at a redemption price as calculated by the Company equal to 100% of the outstanding principal amount of such Notes, plus the Applicable Premium plus accrued and unpaid interest to, but excluding, the redemption date (subject to the right of Holders of record on the relevant Record Date to receive interest due on the relevant redemption date). Promptly after the determination thereof, the Company shall give the Trustee notice of the redemption price provided for in this Section 3.07(a), and the Trustee shall not be responsible for such calculation. *Id.*, at § 3.07(a).

e. **Consolidation, Merger, Amalgamation or Sale of All or Substantially All Assets**. The Debtors may not sell, convey, transfer, dispose of or lease all or substantially all of their assets to, any Person, unless it satisfies certain requirements. *Id.*, at § 5.01(a). Such requirements include, among others:

   (i) Purchaser expressly assumes all obligations under the First Lien Indenture (*Id.*, at § 5.01(a)(1));

   (ii) No Default or Event of Default will have occurred and be continuing immediately before or after such sale (*Id.*, at § 5.01(a)(2));

[16] Under the First Lien Indenture, a "Change of Control" will result from, among other things, (i) the sale of all or substantially assets to any Person, (ii) the adoption of a plan relating to the liquidation or dissolution of the Debtors, or (iii) the acquisition by any Person or group (as defined in the Exchange Act) of more than 50% of the total voting power of the voting stock of Cobalt.

(iii) Purchaser shall take reasonable steps to cause collateral to be subject to liens (*Id.*, at § 5.01(a)(4)); and

(iv) Purchaser will have delivered an Officer's Certificate and Opinion of Counsel to the First Lien Agent that the sale and related documents comply with the requirements of the First Lien Indenture (*Id.*, at § 5.01(a)(5)).

f. **Corporate Existence**. Subject to Article 5 of the First Lien Indenture, Cobalt shall preserve and keep in full force and effect (1) its corporate existence and the corporate, partnership, limited liability company or other existence of each of its affiliated Debtors, in accordance with the respective organizational documents of each of the Debtors and (2) the rights (charter and statutory), licenses and franchises of the Debtors. *Id.*, at § 4.05.

37. Any cure required by section 1124(2) must occur no later than the Effective Date of the Plan. *See In re Jones*, 32 B.R. 951, 958 (Bankr. D. Utah 1983) ("Section 1124(2) should be construed to require completion of cure and compensation by the effective date of the plan."); *In re Holthoff,* 58 B.R. 216, 219 (Bankr. E.D. Ark. 1985) (explaining plan must provide for cure of defaults by effective date of plan (because creditor remains impaired until all defaults are cured) and it must state date when cure will occur). It is impossible for the Debtors to comply with all of the above-referenced provisions in the First Lien Indenture following the close of the Sale Transaction in order to satisfy the requirements of section 1124(2) by the Effective Date of the Plan.

38. In addition, pursuant to section 1124(2)(E), the First Lien Noteholders will only be unimpaired if the Plan "does not otherwise alter the legal, equitable, or contractual rights" under the First Lien Indenture. Accordingly, even the existence of potential events of default after the Effective Date would result in impairment because the Plan enjoins the First Lien Noteholders "from taking any actions to interfere with the implementation or Consummation of the Plan." Plan, § VIII.F. The First Lien Noteholders will be impaired if they are forced to preemptively relinquish their rights to exercise remedies if a default should occur

under the First Lien Indenture after the Effective Date. *See In re Moody*, 426 B.R. at 671 (explaining that a holder of a claim would be impaired if such holder "were forced to forego declaring a default (and again accelerating the note) during the period prior to completion of the cure"). Based on the foregoing, the Court should deny approval of the Disclosure Statement Motion.

RESERVATION OF RIGHTS

39. In addition to the objections and relief requested herein, the Ad Hoc First Lien Group expressly reserves all of its rights to assert additional objections to the Disclosure Statement and Disclosure Statement Motion at any hearing to consider such pleadings, and expressly reserves all rights to object separately to the Plan on any basis.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Ad Hoc First Lien Group respectfully requests the Court deny the Disclosure Statement Motion and grant such other relief as the Court may deem appropriate.

Dated: March 5, 2018
Houston, Texas

Respectfully submitted,

WEIL, GOTSHAL & MANGES LLP

/s/ Alfredo R. Pérez

Alfredo R. Pérez
Christopher M. López
Weil, Gotshal & Manges LLP
700 Louisiana Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511
Email: alfredo.perez@weil.com
Email: chris.lopez@weil.com

- and -

Matt Barr (admitted *pro hac vice*)
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Email: matt.barr@weil.com

Counsel to Ad Hoc First Lien Group

Certificate of Service

I hereby certify that on March 5, 2018, a true and correct copy of the foregoing document was served by e-mail on the parties who receive electronic notice in this case pursuant to the Court's ECF filing system.

/s/ Rene Olvera
Rene Olvera